This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

THE NEW YORK PUBLIC LIBRARY
Astor, Lenox and Tilden Foundations

WILLIAM JAY GAYNOR

MEMORIAL COLLECTION

Michie

SER

MUNICIPAL CORPORATION CASES

ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING MUNICIPAL CORPORATIONS
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

VOLUME VII.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VIRGINIA.
1902.

790859

PUBLICATIONS
of
THE MICHIE COMPANY,
Charlottesville, Va.
Virginia Reports, Annotated.
American and English Railroad Cases, N. S.
American and English Corporation Cases, N. S.
Municipal Corporation Cases.
Banking Cases.

Copyright, 1902,
by
The Michie Company.

TABLE OF CASES.

Adair, Chambers *et al. v.* (Ky.) ... 871
Adams *v.* City of Waterville (Me.) ... 392
Adams, State Revenue Agent, Jackson Electric Ry. & Power Co. *v.* (Miss.) ... 862
Ahlrichs *v.* City of Cullman (Ala.) ... 904
Allman, Belser *v.* (Cal.) ... 928
Alter *et al. v.* State *ex rel.* Kountze *et al.* (Neb.) ... 861
American Lighting Co. of Baltimore City *v.* McCuen, Superintendent, *et al.* (Md.) ... 191
Ames, City Treasurer, *et al.*, Gladwin *v.* (Wash.) ... 884
Ames, City Treasurer, *et al.*, Hull *v.* (Wash.) ... 884
Anthony *et al. v.* Granger, City Treasurer, (R. I.) ... 893
Archer *et al. v.* Town of Johnson City (Tenn.) ... 958
Attorney General *ex rel.* Trustees of Mathewson St. M. E. Church *et al. v.* Shepard *et al.* (R. I.) ... 932
Auditor General *v.* Hoffman (Mich.) ... 672
Ayres *v.* Goss (N. H.) ... 899
Bailey *v.* Commonwealth (Ky.) ... 187
Ball, City of San Antonio *v.* (Tex.) ... 594
Barber *et al.*, Grant *et al. v.* (Cal.) ... 913
Barker *v.* Boston Electric Light Co. (Mass.) ... 143
Bartholomew *et al.*, City of Austin *v.* (C. C. A.) ... 370
Barto *v.* Board of Sup'rs of City and County of San Francisco *et al.* (Cal.) ... 700
Bates *et al.*, San Francisco Paving Co. *v.* (Cal.) ... 915
Bay Rock Co. *v.* Bell *et al.* (Cal.) ... 932
Beattie *v.* City of Detroit (Mich.) ... 767
Belding Land & Improvement Co. *v.* City of Belding *et al.* (Mich.) ... 232
Bell *et al.*, Bay Rock Co. *v.* (Cal.) ... 932
Bell, James M., City of Lampasas, Plff. in Err., *v.* (U. S.) ... 859
Belser *v.* Allman (Cal.) ... 928
Bennett, Bogue *et al. v.* (Ind.) ... 802
Berendes *et al.*, De Haven *v.* (Cal.) ... 914
Berry *et al. v.* City of Chicago (Ill.) ... 920
Berry *et al. v.* City of Des Moines (Iowa) ... 922
Bidwell *v.* City of Tacoma (Wash.) ... 901
Binns *et al.*, People *ex rel.* Glenn *et al. v.* (Ill.) ... 836
Bishoff *v.* State *ex rel.* Tampa Waterworks Co. (Fla.) ... 815
Blackman *v.* City of Hot Springs (S. Dak.) ... 883
Blain *v.* Staab (N. Mex.) ... 938
Blake, City Treasurer, Hazeltine *v.* (Wash.) ... 867
Blake, City Treasurer, State *ex rel.* Strahorn *v.* (Wash.) ... 868
Blanchard *v.* Ladd (Cal.) ... 912
Blaylock *v.* Incorporated Town of Muscogee (Ind. Ter.) ... 941
Board of Chosen Freeholders of Passaic County, Wentink *v.* (N. J.) ... 387
Board of Church Extension of United Presbyterian Church, City of Indianapolis *et al. v.* (Ind.) ... 553
Board of Com'rs of Park County, Town of Fairplay *v.* (Colo.) ... 898
Board of Education of Hawesville *et al. v.* Louisville, H. & St. L. Ry. Co. (Ky.) ... 872
Board of Mayor, etc., of Town of Pontotoc *v.* Fulton *et al.* (Miss.) ... 634
Board of Park Com'rs of Louisville *v.* Du Pont *et al.* (Ky.) ... 892
Board of Police Pension Fund Com'rs, Kavanagh *v.* (Cal.) ... 863
Board of Public Works of City of Denver *et al. v.* Denver Tel. Co. (Colo.) ... 15
Board of School Directors for Buncombe County *v.* City of Asheville (N. Car.) ... 863

Board of Sup'rs of City and County of San Francisco *et al.*, Barto *v.* (Cal.) ... 700
Board of Trustees of House of Reform *v.* City of Lexington (Ky.) .. 865
Board of Water Com'rs of City of Detroit *v.* Commissioners of Parks and Boulevards (Mich.) ... 314
Bogue *et al. v.* Bennett (Ind.) ... 802
Bolger, Oren, Attorney General, *ex rel.* Maybury, Mayor, *et al. v.* (Mich.) ... 538
Borough of Bristol, Peck *v.* (Conn.) ... 763
Borough of Stafford Springs, Wood *v.* (Conn.) ... 573
Borzone *et ux.*, Young *v.* (Wash.) ... 924
Boston Asylum & Farm School for Indigent Boys *v.* Charles *et al.* (Mass.) ... 746
Boston Electric Light Co., Barker *v.* (Mass.) ... 143
Brabender, City of Philadelphia *v.* (Pa.) ... 661
Brady, Building Com'r, People *ex rel.* Kennedy *v.* (N. Y.) ... 95
Bray *v.* City Council of Florence (S. Car.) ... 879
Bridges, Land Com'r, State *ex rel.* Lehman *v.* (Wash.) ... 891
Briggs, City of St. Paul *v.* (Minn.) ... 501
Bristol & W. Waterworks, Town of Bristol *v.* (R. I.) ... 336
Brown, City of Galveston *v.* (Tex.) ... 674
Brown *v.* City of Owosso (Mich.) ... 379
Brown *v.* City of Webster City (Iowa) ... 559
Brownstown Tp., Coan *v.* (Mich.) ... 796
Bruhn *et ux. v.* Norris (Wash.) ... 938
Buckley, Gast *v.* (Ky.) ... 905
Buser *v.* City of Cedar Rapids (Iowa) ... 940
Butman *v.* City of Newton (Mass.) ... 775
Bybee *et al. v.* Smith (Ky.) ... 838
Byington *v.* City of Merrill (Wis.) ... 956
Cavett, State *ex rel.* Graves, Dist. Atty., *v.* (Miss.) ... 848
Center *et al.*, City and County of San Francisco *v.* (Cal.) ... 939
Chambers *et al. v.* Adair (Ky.) ... 871
Chambers *et al.*, Harris *v.* (Colo.) ... 843
Chappuis, City of New Orleans *v.* (La.) ... 181
Chappuis, City of New Orleans *v.* (La.) ... 184
Charles *et al.*, Boston Asylum & Farm School for Indigent Boys *v.* (Mass.) ... 746
Cheney, City of Rome *v.* (Ga.) ... 140
Chesapeake & P. Tel. Co. *et al.*, Mayor, etc., of City of Baltimore *et al. v.* (Md.) ... 7
Chicago & A. Ry. Co. *v.* People *ex rel.* Raymond, County Treasurer, (Ill.) ... 896
Chicago Bridge & Iron Co. *v.* City of West Bay City (Mich.) ... 888
Chicago, B. & Q. R. Co., People *ex rel.* Freise, County Collector, *v.* (Ill.) ... 897
City Council of Abbeville, Hill *et al. v.* (S. Car.) ... 475
City Council of Florence, Bray *v.* (S. Car.) ... 879
City and County of San Francisco *v.* Center *et al.* (Cal.) ... 939
City and County of San Francisco *et al.*, Fritz *v.* (Cal.) ... 870
City of Alameda *v.* Cohen (Cal.) ... 893
City of Altoona *et al.*, Gable *et al. v.* (Pa.) ... 871
City of Anaconda, May *v.* (Mont.) ... 949
City of Anaconda, Snook *v.* (Mont.) ... 950
City of Ann Arbor *et al.*, Gregory *v.* (Mich.) ... 923
City of Appleton, Davis *v.* (Wis.) ... 937
City of Asheville, Board of School Directors for Buncombe County *v.* (N. Car.) ... 863
City of Atlanta, Reeves *v.* (Ga.) ... 669
City of Atlanta, Roughton *v.* (Ga.) ... 945
City of Atlantic City *v.* Turner (N. J.) ... 673
City of Austin *v.* Bartholomew *et al.* (C. C. A.) ... 370
City of Austin, Nalle *v.* (C. C. A.) ... 370
City of Ballard, Dow *et ux. v.* (Wash.) ... 761
City of Barnesville, Town of Humboldt *v.* (Minn.) ... 868

City of Bay City, Michigan Cent. R. Co. *v.* (Mich.) 549
City of Belding *et al.*, Belding Land & Improvement Co. *v.* (Mich.).. 232
City of Camden, State (Harned, Prosecutor) *v.* (N. J.) 903
City of Cedar Rapids, Buser *v.* (Iowa) 940
City of Cedar Rapids, Coe College *v.* (Iowa) 941
City of Charleston *et al.*, Duncan *et al. v.* (S. Car.) 343
City of Charleston *et al.*, Peiper *v.* (S. Car.) 343
City of Chicago, Berry *et al. v.* (Ill.) 920
City of Chicago, Fay *et al. v.* (Ill.) 911
City of Chicago *v.* Holden *et al.* (Ill.) 912
City of Chicago, Houston *v.* (Ill) 921
City of Chicago, Kohlhof *v.* (Ill.) 960
City of Chicago *v.* Luthardt (Ill.) 110
City of Chicago *v.* Nichols *et al.* (Ill.) 920
City of Chicago, Nichols *et al. v.* (Ill.) 919
City of Chicago *et al.*, W. N. Eisendrath & Co. *v.* (Ill.) 939
City of Chicago, Yaggy *et al. v.* (Ill.) 919
City of Cleveland, Tenn., *et al. v.* United States (C. C. A.) 222
City of Covington *v.* Huber *et al.* (Ky.) 587
City of Cullman, Ahlrichs *v.* (Ala.) 904
City of Dallas *v.* Kruegel (Tex.) 900
City of Des Moines, Berry *et al. v.* (Iowa) 922
City of Denver *et al.*, Dumars *et al. v.* (Colo.) 123
City of Des Moines, Fink *v.* (Iowa) 596
City of Detroit, Beattie *v.* (Mich.) 767
City of Detroit, John C. Goodrich *et al.*, Plffs. in Err., *v.* (U. S.).... 748
City of Detroit, Nicholson *v.* (Mich.) 613
City of Detroit, Tattan *v.* (Mich.) 382
City of Detroit and Thomas M. Lucking, Receiver of Taxes of Said City of Detroit, Edward W. Voigt, Plff. in Err., *v.* (U. S.) 755
City of Dubuque, Thoeni *v.* (Iowa) 656
City of Duluth *v.* Duluth Tel. Co. (Minn.) 67
City of Duluth *et al.*, Le Tourneau *v.* (Minn.) 627
City of Eau Claire *v.* Payson *et al.* (C. C. A.) 210
City of Eau Claire *v.* Payson *et al.* (C. C. A.) 217
City of Elizabeth, State (McCulley, Prosecutor) *v.* (N. J.) 837
City of Everett, Green *et al. v.* (Mass.) 892
City of Fall River, St. Germain *v.* (Mass.) 947
City of Fargo, Gagnier *v.* (N. Dak.) 567
City of Fargo *et al.*, Pickton *v.* (N. Dak.) 930
City of Fitchburg, Miller *v.* (Mass.) 307
City of Flint, Wilton *v.* (Mich.) 384
City of Fond du Lac *et al.*, Devine *v.* (Wis.) 577
City of Fond du Lac, O'Connor *v.* (Wis.) 526
City of Ft. Smith, Wills *v.* (Ark.) 665
City of Galveston *v.* Brown (Tex.) 674
City of Glasgow *v.* Gillenwaters (Ky.) 786
City of Gloucester, Gloucester Water-Supply Co. *v.* (Mass.) 325
City of Grand Rapids *v.* Lake Shore & M. S. Ry. Co. (Mich.) 741
City of Greencastle, Rowland *v.* (Ind.) 647
City of Hammond, Ellis *v.* (Ind.) 960
City of Harrodsburg *v.* Harrodsburg Water Co. (Ky.) 236
City of Hartford, Mauch *v.* (Wis.) 959
City of Hot Springs, Blackman *v.* (S. Dak.) 883
City of Independence *v.* Cleveland (Mo.) 694
City of Indianapolis *et al. v.* Board of Church Extension of United Presbyterian Church (Ind.) 553
City of Jackson, Millsaps *et al. v.* (Miss.) 900
City of Kansas City *et al.*, McGrew *v.* (Kan.) 508
City of Kansas City, Wood *v.* (Mo.) 841
City of Lake Charles, Lake Charles Ice, Light & Waterworks Co. *v.* (La.) 277
City of Lampasas, Plff. in Err., *v.* James M. Bell (U. S.) 859
City of Lancaster *et al.*, Mullins *v.* (Ky.) 188
City of Lansing *v.* Detroit, L. & N. R. Co. *et al.* (Mich.) 584

City of Lexington, Board of Trustees of House of Reform *v.* (Ky.).. 865
City of Lexington *v.* Home Const. Co. *et al.* (Ky.)..... 856
City of Louisville *v.* Gosnell *et al.* (Ky.)..... 886
City of Louisville *v.* Gosnell *et al.* (Ky.)..... 906
City of Louisville *v.* Louisville Ry. Co. (Ky.)..... 677
City of Louisville *v.* Mehler (Ky.)..... 927
City of Louisville, Reed *et al. v.* (Ky.)..... 898
City of Louisville *v.* Tyler (Ky.)..... 915
City of Louisville *v.* Young, Treasurer, *et al.* (Ky.)..... 852
City of Lowell *et al.*, Goddard *et al. v.* (Mass.)..... 888
City of Lowell, Muldoon *v.* (Mass.)..... 839
City of Lynchburg, Woodall *v.* (Va.)..... 697
City of Madison, Ogden *v.* (Wis.)..... 161
City of Merrill, Byington *v.* (Wis.)..... 956
City of Monroe, Monroe Waterworks Co. *v.* (Wis.)..... 360
City of Montpelier, Fuller *v.* (Vt.)..... 899
City of Morgantown *et al.*, Mayor, etc., of Town of South Morgantown *v.* (W. Va.)..... 834
City of Mt. Sterling *et al.*, West *v.* (Ky.)..... 687
City of Newburyport, Newburyport Water Co. *v.* (Mass.)..... 734
City of New Orleans *v.* Chappuis (La.)..... 181
City of New Orleans *v.* Chappuis (La.)..... 184
City of New Orleans *v.* Vidalat (La.)..... 446
City of Newport, Warren *v.* (Ky.)..... 867
City of Newton, Butman *v.* (Mass.)..... 775
City of New Whatcom, Porter *v.* (Wash.)..... 883
City of New York, McNulty *v.* (N. Y.)..... 861
City of Noblesville, State *ex rel.* Barnett *v.* (Ind.)..... 99
City of Noblesville *et al.*, State *ex rel.* Barnett *v.* (Ind.)..... 837
City of Norfolk, Core *v.* (Va.)..... 394
City of Norfolk *et al.*, Painter *v.* (Neb.)..... 238
City of Northport *v.* Northport Town Site Co. (Wash.)..... 736
City of Omaha, Kountze *et al. v.* (Neb.)..... 858
City of Oshkosh, Oshkosh Waterworks Co. *v.* (Wis.)..... 263
City of Owensboro *et al.*, Delker *et al. v.* (Ky.)..... 909
City of Owosso, Brown *v.* (Mich.)..... 379
City of Paris *v.* Lilleston (Ky.)..... 887
City of Philadelphia *v.* Brabender (Pa.)..... 661
City of Philadelphia, McManus *v.* (Pa.)..... 727
City of Philadelphia, McManus *v.* (Pa.)..... 730
City of Philadelphia *v.* Stewart *et al.* (Pa.)..... 931
City of Pierre *v.* Dunscomb *et al.* (C. C. A.)..... 874
City of Pittsburg, McIntosh *v.* (Pa.)..... 911
City of Port Angeles *et al. v.* Lauridsen *et al.* (Wash.)..... 923
City of Port Huron, Lee *v.* (Mich.)..... 301
City of Portland *v.* Gaston (Ore.)..... 892
City of Portland *et al.*, Oregon Real Estate Co. *v.* (Ore.)..... 921
City of Portland *et al.*, Thomas *et al. v.* (Ore.)..... 923
City of Portland, Wagner *v.* (Ore.)..... 598
City of Rapid City, Overpeck *et al. v.* (S. Dak.)..... 946
City of Rochester, Donnelly *v.* (N. Y.)..... 955
City of Rock Island *v.* Starkey (Ill.)..... 954
City of Rome *v.* Cheney (Ga.)..... 140
City of St. Louis, Hafner *et al. v.* (Mo.)..... 889
City of St. Louis, State *ex rel.* Belt *v.* (Mo.)..... 402
City of St. Louis, Van Cleave *v.* (Mo.)..... 946
City of St. Paul *v.* Briggs (Minn.)..... 501
City of St. Paul, St. Paul Gaslight Company, Plff. in Err., *v.* (U. S.).. 154
City of Salem *v.* Webster (Ill.)..... 951
City of Salisbury, Phelps *v.* (Mo.)..... 954
City of San Antonio *v.* Ball (Tex.)..... 594
City of Seattle *et al.*, Smith *v.* (Wash.)..... 910
City of Sioux City, Johnson *v.* (Iowa)..... 772
City of Spokane, Dickerson *v.* (Wash.)..... 889

City of Spokane *et al.*, State *ex rel.* Spokane & B. C. Telephone & Telegraph Co. *v.* (Wash.) ... 20
City of Superior, Jorgenson *et al. v.* (Wis.) ... 944
City of Superior, Nelson *v.* (Wis.) ... 848
City of Tacoma, Bidwell *v.* (Wash.) ... 901
City of Tacoma, Gove *v.* (Wash.) ... 902
City of Tacoma *et al.*, Quaker City Nat. Bank of Philadelphia *v.* (Wash.) ... 623
City of Titusville, L. S. Clark, Plff. in Err., *v.* (U. S.) ... 690
City of Toledo *et al. v.* Western Union Tel. Co. (C. C. A.) ... 1
City of Topeka, Root *v.* (Kan.) ... 886
City of Waterbury, Colwell *v.* (Conn.) ... 780
City of Waterbury, Makepeace *et ux. v.* (Conn.) ... 589
City of Water Valley, Harris *et al. v.* (Miss.) ... 425
City of Waterville, Adams *v.* (Me.) ... 392
City of Webster City, Brown *v.* (Iowa) ... 559
City of Webster City, Millard *v.* (Iowa) ... 934
City of West Bay City, Chicago Bridge & Iron Co. *v.* (Mich.) ... 888
City of Worcester, Como *v.* (Mass.) ... 933
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio) ... 26
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio) ... 30
Clark, L. S., Plff. in Err., *v.* City of Titusville (U. S.) ... 690
Clark *et al.*, Rider *v.* (Cal.) ... 956
Cleveland, City of Independence *v.* (Mo.) ... 694
Coan *v.* Brownstown Tp. (Mich.) ... 796
Coe College *v.* City of Cedar Rapids (Iowa) ... 941
Cohen, City of Alameda *v.* (Cal.) ... 893
Cohn, West Chicago Masonic Ass'n *v.* (Ill.) ... 808
Coler, City Comptroller, Stutzbach *v.* (N. Y.) ... 72
Cole, State Auditor, Kelly *et al. v.* (Kan.) ... 875
Coles *v.* Revere (Mass.) ... 789
Colwell *v.* City of Waterbury (Conn.) ... 780
Commissioners of Parks and Boulevards, Board of Water Com'rs of City of Detroit *v.* (Mich.) ... 314
Common Council of City of Detroit *et al.*, Ruoff *et al. v.* (Mich.) ... 515
Common Council of City of Detroit *et al. v.* Schmid, City Clerk, *et al.* (Mich.) ... 515
Commonwealth, Bailey *v.* (Ky.) ... 187
Commonwealth *ex rel.* O'Rouke *v.* Davis *et al.* (Pa.) ... 843
Como *v.* City of Worcester (Mass.) ... 933
Compton *v.* Holmes (Tex.) ... 850
Connelly, City Clerk, State *ex rel.* Boorum *v.* (N. J.) ... 855
Consolidated Ice Co. *v.* Mayor, etc., of City of New York (N. Y.) ... 890
Coquard *v.* Village of Oquawka (Ill.) ... 880
Core *v.* City of Norfolk (Va.) ... 394
Cotton *et al. v.* Watson *et al.* (Cal.) ... 917
Crawford *v.* Ross (Mich.) ... 935
Crowley *v.* Freud *et al.* (Cal.) ... 840
Cumberland Telephone & Telegraph Co., Louisville Tel. Co. *v.* (C. C. A.) ... 43
Davis *v.* City of Appleton (Wis.) ... 937
Davis *et al.*, Commonwealth *ex rel.* O'Rouke *v.* (Pa.) ... 843
Davis *et al. v.* Town of Rogersville *et al.* (Tenn.) ... 881
De Butts *et al.*, Ray *v.* (Mass.) ... 839
Decker *v.* McSorley (Wis.) ... 284
De Frees, Leeds *v.* (Ind.) ... 917
De Haven *v.* Berendes *et al.* (Cal.) ... 914
Delker *et al. v.* City of Owensboro *et al.* (Ky.) ... 909
Denver Tel. Co., Board of Public Works of City of Denver *et al. v.* (Colo.) ... 15
Detroit, L. & N. R. Co. *et al.*, City of Lansing *v.* (Mich.) ... 584
Devine *v.* City of Fond du Lac *et al.* (Wis.) ... 577
Dickerson *v.* City of Spokane (Wash.) ... 889
Donnelly *v.* City of Rochester (N. Y.) ... 955
Dow *et ux. v.* City of Ballard (Wash.) ... 761

Drolesbaugh *v.* Hill *et al.* (Ohio) 842
Duluth Tel. Co., City of Duluth *v.* (Minn.) 67
Dumars *et al. v.* City of Denver *et al.* (Colo.) 123
Duncan *et al. v.* City of Charleston *et al.* (S. Car.) 343
Dunscomb *et al.*, City of Pierre *v.* (C. C. A.) 874
Du Pont *et al.*, Board of Park Com'rs of Louisville *v.* (Ky.) 892
Eisendrath, W. N., & Co. *v.* City of Chicago *et al.* (Ill.) 939
Ellis *v.* City of Hammond (Ind.) 960
Ellis *et al. v.* Witmer *et al.* (Cal.) 878
Ex parte Ogden (Tex.) 670
Falls City Artificial Stone Co. *et al.*, Joyce *v.* (Ky.) 910
Fargo Tp., Sage *et al. v.* (C. C. A.) 869
Fay *et al. v.* City of Chicago (Ill.) 911
Fink *v.* City of Des Moines (Iowa) 596
Freud *et al.*, Crowley *v.* (Cal.) 840
Fritz *v.* City and County of San Francisco *et al.* (Cal.) 870
Fuller *v.* City of Montpelier (Vt.) 899
Fulton *et al.*, Board of Mayor, etc., of Town of Pontotoc *v.* (Miss.) 634
Gable *et al. v.* City of Altoona *et al.* (Pa.) 871
Gagnier *v.* City of Fargo (N. Dak.) 567
Gast *v.* Buckley (Ky.) 905
Gaston, City of Portland *v.* (Ore.) 892
Gillenwaters, City of Glasgow *v.* (Ky.) 786
Gillon, McDonnell *v.* (Cal.) 917
Givens *v.* People *ex rel.* Raymond, County Treasurer, (Ill.) 929
Gladwin *v.* Ames, City Treasurer, *et al.* (Wash.) 884
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.) 325
Goddard *et al. v.* City of Lowell *et al.* (Mass.) 888
Gooch *v.* Town of Exeter (N. H.) 544
Goodrich, John C., *et al.*, Plffs. in Err., *v.* City of Detroit (U. S.) 748
Gordon *v.* Moores *et al.* (Neb.) 841
Gorman *et al. v.* State *ex rel.* Koester (Ind.) 907
Gosnell *et al.*, City of Louisville *v.* (Ky.) 886
Gosnell *et al.*, City of Louisville *v.* (Ky.) 906
Goss, Ayres *v.* (N. H.) 899
Gove *v.* City of Tacoma (Wash.) 902
Grace *v.* Walker *et al.* (Tex.) 942
Granger, City Treasurer, Anthony *et al. v.* (R. I.) 893
Grant *et al. v.* Barber *et al.* (Cal.) 913
Graves County Water Co. *v.* Ligon *et al.* (Ky.) 653
Green *et al. v.* City of Everett (Mass.) 892
Gregory *v.* City of Ann Arbor *et al.* (Mich.) 923
Hafner *et al. v.* City of St. Louis (Mo.) 889
Ham, Com'r, People *ex rel.* Dunn *v.* (N. Y.) 846
Hamilton *v.* People *ex rel.* Raymond, County Treasurer, (Ill.) 929
Hamilton *et al. v.* Village of Detroit *et al.* (Minn.) 311
Harris *v.* Chambers *et al.* (Colo.) 843
Harris *et al. v.* City of Water Valley (Miss.) 425
Harrison, Mayor, *et al.*, People *ex rel.* Krause *v.* (Ill.) 187
Harrodsburg Water Co., City of Harrodsburg *v.* (Ky.) 236
Hazeltine *v.* Blake, City Treasurer, (Wash.) 867
Hegan *et al. v.* Pendennis Club *et al.* (Ky.) 943
Hill *et al. v.* City Council of Abbeville (S. Car.) 475
Hill *et al.*, Drolesbaugh *v.* (Ohio) 842
Hill, Mayor, *et al.*, Townsend Gas & Electric Co. *v.* (Wash.) 197
Hirsch *et al. v.* Mayor, etc., of City of Brunswick (Ga.) 793
Hoard *et al.*, State *ex rel.* Perrin *v.* (Tex.) 834
Hoffman, Auditor General *v.* (Mich.) 672
Holden *et al.*, City of Chicago *v.* (Ill.) 912
Holmes, Compton *v.* (Tex.) 850
Home Const. Co. *et al.*, City of Lexington *v.* (Ky.) 856
Horne *et al.* Mehler *v.* (Ky.) 927
Horne *et al. v.* Mehler (Ky.) 927
Houston *v.* City of Chicago (Ill.) 921
Hubbell *v.* Town of Custer City (S. Dak.) 884

Huber, City of Covington *v.* (Ky.) 587
Hull *v.* Ames, City Treasurer, *et al.* (Wash.) 884
Incorporated Town of Muscogee, Blaylock *v.* (Ind. Ter.) 941
Incorporated Town of Spirit Lake, Yeager *v.* (Iowa) 563
In re City of Seattle (Wash.) 938
In re Kinsel (Kan.) 643
Jackson Electric Ry. & Power Co. *v.* Adams, State Revenue Agent, (Miss.) 862
Johnson *v.* City of Sioux City (Iowa) 772
Johnson *v.* Mayor, etc., of City of Macon (Ga.) 905
Jones, Edward C., *v.* Town of Guttenburg *et al.* (N. J.) 869
Jorgenson *et al. v.* City of Superior (Wis.) 944
Joyce *v.* Falls City Artificial Stone Co. *et al.* (Ky.) 910
Judge of Criminal District Court, Parish of Orleans, State *ex rel.* Cotonio *v.* (La.) 635
Kavanagh *v.* Board of Police Pension Fund Com'rs (Cal.) 863
Keating, Highway Com'r, People *ex rel.* Pumpyansky *v.* (N. Y.) 945
Kelly *et al. v.* Cole, State Auditor, (Kan.) 875
Keyser *et al. v.* Upshur *et al.*, Police Com'rs, (Md.) 845
Kirwin *et al. v.* Nevin (Ky.) 916
Klotz, Mayor, etc., of City of Hagerstown *v.* (Md.) 303
Knox *et al.*, People *ex rel.* Leary *v.* (N. Y.) 847
Knoxville Water Co. *et al.*, Mayor, etc., of City of Knoxville *v.* (Tenn.) 238
Kohlhof *v.* City of Chicago (Ill.) 960
Kountz *et al. v.* City of Omaha (Neb.) 858
Krakel, Neumeyer, Auditor, *v.* (Ky.) 853
Kruegel, City of Dallas *v.* (Tex.) 900
Ladd, Blanchard *v.* (Cal.) 912
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.) 277
Lake Shore, etc., R. Co., City of Grand Rapids *v.* (Mich.) 741
Lammers *et al.*, State *ex rel.* Town of Holland *et al. v.* (Wis.) 115
Lauridsen *et al.*, City of Port Angeles *et al. v.* (Wash.) 923
Lee *v.* City of Port Huron (Mich.) 301
Leeds *v.* De Frees (Ind.) 917
Le Tourneau *v.* City of Duluth *et al.* (Minn.) 627
Ligon *et al.*, Graves County Water Co. *v.* (Ky.) 653
Lilleston, City of Paris *v.* (Ky.) 887
Lincoln County *et al.*, Somo Lumber Co. *v.* (Wis.) 895
Louisville Home Tel. Co. *v.* Cumberland Telephone & Telegraph Co. (C. C. A.) 43
Louisville, H. & St. L. Ry. Co., Board of Education of Hawesville *et al. v.* (Ky.) 872
Louisville & N. R. Co., Tyler *v.* (Ky.) 915
Louisville Ry. Co., City of Louisville *v.* (Ky.) 677
Louisville Steam Forge Co. *v.* Mehler *et al.* (Ky.) 906
Love *v.* Phalen, Judge of Recorder's Court, (Mich.) 858
Lowrey *v.* Mayor, etc., of Central Falls (R. I.) 103
Lussem *v.* Sanitary Dist. of Chicago (Ill.) 881
Luthardt, City of Chicago *v.* (Ill.) 110
McArdle *et al. v.* Mayor, etc., of City of Jersey City (N. J.) 850
McCuen, Superintendent, *et al.*, American Lighting Co. of Baltimore City *v.* (Md.) 191
McDonnell *v.* Gillon (Cal.) 917
McDougald *v.* Town of Lumberton (N. Car.) 137
McFarlain *v.* Town of Jennings (La.) 856
McGrew *v.* City of Kansas City *et al.* (Kan.) 508
McIntosh *v.* City of Pittsburg (Pa.) 911
McLauchlan, Chief of Police, Wygant *v.* (Ore.) 420
McManus *v.* City of Philadelphia (Pa.) 727
McManus *v.* City of Philadelphia (Pa.) 730
McNabb *et al.*, Trustees of Hazelgreen *et al. v.* (Ky.) 953
McNulty *v.* City of New York (N. Y.) 861
McSorley, Decker *v.* (Wis.) 284

Makepeace *et ux. v.* City of Waterbury (Conn.) 589
Marquiss *et al.*, People *ex rel.* Bondurant *v.* (Ill.) 835
Mason *v.* Mayor, etc., of City of Cumberland (Md.) 447
Matteson, Village of Osmond *v.* (Neb.) 836
Mauch *v.* City of Hartford (Wis.) 959
May *v.* City of Anaconda (Mont.) 949
Mayor and Aldermen of the City of Savannah and Robert J. Wade, City Marshal, David Wells *et al.*, Plffs. in Err., *v.* (U. S.) 462
Mayor, etc., of Baltimore *et al.*, Sindall *v.* (Md.) 453
Mayor, etc., of Borough of Carlstadt *et al.*, State (Outwater, Prosecutor) *v.* (N. J.) 885
Mayor, etc., of Central Falls, Lowrey *v.* (R. I.) 103
Mayor, etc., of City of Baltimore *et al. v.* Chesapeake & P. Tel. Co. *et al.* (Md.) 7
Mayor, etc., of City of Baltimore, Robinson *v.* (Md.) 857
Mayor, etc., of City of Brunswick, Hirsch *et al. v.* (Ga.) 793
Mayor, etc., of City of Chattanooga *et al.*, Patten *et al. v.* (Tenn.) ... 50
Mayor, etc., of City of Cumberland, Mason *v.* (Md.) 447
Mayor, etc., of City of Dublin *et al.*, Smith *et al. v.* (Ga.) 876
Mayor, etc., of City of Hagerstown *v.* Klotz (Md.) 303
Mayor, etc., of City of Hagerstown *et al.*, Mealey *et al. v.* (Md.) 200
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. *et al.* (Tenn.) 238
Mayor, etc., of City of Macon, Johnson *v.* (Ga.) 905
Mayor, etc., of City of New York, Consolidated Ice Co. *v.* (N. Y.) .. 890
Mayor, etc., of City of New York, Pine *et al. v.* (C. C. A.) 894
Mayor, etc., of City of Wilmington, Weldin *et ux. v.* (Del.) 866
Mayor, etc., of Hagerstown *v.* Startzman (Md.) 908
Mayor, etc., of Jersey City, McArdle *et al. v.* (N. J.) 850
Mayor, etc., of Town of South Morgantown *v.* City of Morgantown *et al.* (W. Va.) 834
Mealey *et al. v.* Mayor, etc., of City of Hagerstown *et al.* (Md.) 200
Mehler, City of Louisville *v.* (Ky.) 927
Mehler, Horne *et al. v.* (Ky.) 927
Mehler *v.* Horne *et al.* (Ky.) 927
Mehler *et al.*, Louisville Steam Forge Co. *v.* (Ky.) 906
Meyer, Village of Fairmont *v.* (Minn.) 189
Michigan Cent. R. Co. *v.* City of Bay City (Mich.) 549
Millard *v.* City of Webster City (Iowa) 934
Miller *v.* City of Fitchburg (Mass.) 307
Miller *v.* Williams *et al.* (Cal.) 903
Millerton, Page *v.* (Iowa) 855
Mills, Robinson *v.* (Mont.) 948
Millsaps *et al. v.* City of Jackson (Miss.) 900
Monroe Waterworks Co. *v.* City of Monroe (Wis.) 360
Moores *et al.*, Gordon *v.* (Neb.) 841
Moores, Mayor *et al.*, Poppleton *v.* (Neb.) 865
Mott, State *ex rel.* Nelson *v.* (Wis.) 849
Muldoon *v.* City of Lowell (Mass.) 839
Mullins *v.* City of Lancaster *et al.* (Ky.) 188
Nalle *v.* City of Austin (C. C. A.) 370
Nelson *v.* City of Superior (Wis.) 848
Neumeyer, Auditor, *v.* Krakel (Ky.) 853
Nevin, Kirwin *et al. v.* (Ky.) 916
Newburyport Water Co. *v.* City of Newburyport (Mass.) 734
Newport, L. & A. Turnpike Co., South Covington & C. St. Ry. Co. *v.* (Ky.) 935
Nicholes *et al.*, City of Chicago *v* (Ill.) 920
Nichols *et al. v.* City of Chicago *et al.* (Ill.) 919
Nicholson *v.* City of Detroit (Mich.) 613
Norris, Bruhn *et ux. v.* (Wash.) 938
Northport Town Site Co., City of Northport *v.* (Wash.) 736
O'Connor *v.* City of Fond du Lac (Wis.) 526
Ogden *v.* City of Madison (Wis.) 161
Oregon Real Estate Co. *v.* City of Portland *et al.* (Ore.) 921

Oren, Attorney General, *ex rel.* Maybury, Mayor, *et al. v.* Bolger (Mich.) ... 538
Oshkosh Waterworks Co. *v.* City of Oshkosh (Wis.) ... 263
Overpeck *et al. v.* City of Rapid City (S. Dak.) ... 946
Pacific Sheet Metal Works *v.* Roeder, County Treasurer, *et al.* (Wash.) ... 901
Padgett *et al. v.* Post (C. C. A.) ... 873
Page *v.* Millerton (Iowa) ... 855
Painter *v.* City of Norfolk *et al.* (Neb.) ... 238
Patten *et al. v.* Mayor, etc., of City of Chattanooga *et al.* (Tenn.) ... 50
Payson *et al.*, City of Eau Claire *v.* (C. C. A.) ... 210
Payson *et al.*, City of Eau Claire *v.* (C. C. A.) ... 217
Peck *v.* Borough of Bristol (Conn.) ... 763
Peiper *v.* City of Charleston *et al.* (S. Car.) ... 343
Pendennis Club *et al.*, Hegan *et al. v.* (Ky.) ... 943
People *ex rel.* Bondurant *v.* Marquiss *et al.* (Ill.) ... 835
People *ex rel.* Dunn *v.* Ham, Com'r, (N. Y.) ... 846
People *ex rel.* Freise, County Collector, *v.* Chicago, B. & Q. R. Co. (Ill.) ... 897
People *ex rel.* Glenn *et al. v.* Binns *et al.* (Ill.) ... 836
People *ex rel.* Kennedy *v.* Brady, Building Com'r, (N. Y.) ... 95
People *ex rel.* Krause *v.* Harrison, Mayor, *et al.* (Ill.) ... 187
People *ex rel.* Leary *v.* Knox *et al.* (N. Y.) ... 847
People *ex rel.* Pumpyansky *v.* Keating, Highway Com'r, (N. Y.) ... 945
People *ex rel.* Raymond, County Treasurer, Chicago & A. Ry. Co. *v.* (Ill.) ... 896
People *ex rel.* Raymond, County Treasurer, Givens *v.* (Ill.) ... 929
People *ex rel.* Raymond, County Treasurer, Hamilton *v.* (Ill.) ... 929
People *ex rel.* Raymond, County Treasurer, *v.* Whidden *et al.* (Ill.) ... 909
People *ex rel.* Village of Brockport *v.* Sutphin *et al.* (N. Y.) ... 859
People *ex rel.* Ward *v.* Scheu (N. Y.) ... 844
Phalen, Judge of Recorder's Court, Love *v.* (Mich.) ... 858
Phelps *v.* City of Salisbury (Mo.) ... 954
Pickton *v.* City of Fargo *et al.* (N. Dak.) ... 930
Pine *et al. v.* Mayor, etc., of City of New York (C. C. A.) ... 894
Pollasky *v.* Schmid, City Clerk, (Mich.) ... 839
Poppleton *v.* Moores, Mayor, *et al.* (Neb.) ... 865
Porter *v.* City of New Whatcom (Wash.) ... 883
Post, Padgett *et al. v.* (C. C. A.) ... 873
Pratt, Town of Kent *v.* (Conn.) ... 936
Pritchard *et al.*, Town of Gosport *v.* (Ind.) ... 149
Quaker City Nat. Bank of Philadelphia *v.* City of Tacoma *et al.* (Wash.) ... 623
Rackliffe, State *ex inf.* Mylton, Pros. Atty., *v.* (Mo.) ... 843
Ray *v.* DeButts *et al.* (Mass.) ... 839
Reed *et al. v.* City of Louisville (Ky.) ... 898
Reeves *v.* City of Atlanta (Ga.) ... 669
Reid *et al. v.* Trowbridge *et al.* (Miss.) ... 319
Revere, Coles *v.* (Mass.) ... 789
Richards, State *v.* (Conn.) ... 952
Rider *v.* Clark *et al.* (Cal.) ... 956
Roberts & Co. *v.* Taft *et al.* (C. C. A.) ... 876
Robinson *v.* Mayor, etc., of City of Baltimore (Md.) ... 857
Robinson *v.* Mills (Mont.) ... 948
Roeder, County Treasurer, *et al.*, Pacific Sheet Metal Works *v.* (Wash.) ... 901
Root *v.* City of Topeka (Kan.) ... 886
Ross, Crawford *v.* (Mich.) ... 935
Roughton *v.* City of Atlanta (Ga.) ... 945
Rowland *v.* City of Greencastle (Ind.) ... 647
Runyan, Mayor, *et al.*, Spitzer *et al. v.* (Iowa) ... 864
Ruoff *et al. v.* Common Council of City of Detroit *et al.* (Mich.) ... 515
St. Germain *v.* City of Fall River (Mass.) ... 947
St. Paul Gaslight Company, Plff. in Err., *v.* City of St. Paul (U. S.) ... 154
Sage *et al. v.* Fargo Tp. (C. C. A.) ... 869

San Francisco Paving Co. *v.* Bates *et al.* (Cal.) 915
Sanitary Dist. of Chicago, Lussem *v.* (Ill.) 881
Scheu, People *ex rel.* Ward *v.* (N. Y.) 844
Schmid, City Clerk, *et al.*, Common Council of City of Detroit *et al. v.* (Mich.) 515
Schmid, City Clerk, Pollasky *v.* (Mich.) 839
Schmulbach *et al. v.* Speidel *et al.* (W. Va.) 851
School Dist. of City of Grand Island, Hall County, School Dist. No. 30 of Hall County *v.* (Neb.) 862
School Dist. No. 30 of Hall Co. *v.* School Dist. of City of Grand Island, Hall County, (Neb.) 862
Scott *et al.*, City Council *v.* State *ex rel.* Grothe (Fla.) 853
Shank *et al. v.* Smith *et al.* (Ind.) 926
Shea, Southworth *v.* (Ala.) 611
Shepard *et al.*, Attorney General *ex rel.* Trustees of Mathewson St. M. E. Church *et al. v.* (R. I.) 932
Sindall *v.* Mayor, etc., of Baltimore *et al.* (Md.) 453
Smathers, Village of Osmond *v.* (Neb.) 835
Smith, Bybee *et al. v.* (Ky.) 838
Smith *v.* City of Seattle *et al.* (Wash.) 910
Smith *et al. v.* Mayor, etc., of City of Dublin *et al.* (Ga.) 876
Smith, Mayor, *et al. v.* State *ex rel.* Godard, Atty. Gen., *et al.* (Kan.) 724
Smith *et al.*, Shank *et al. v.* (Ind.) 926
Snead, Thomas *v.* (Va.) 906
Snook *v.* City of Anaconda (Mont.) 950
Somerville *v.* Wood *et al.* (Ala.) 842
Somo Lumber Co. *v.* Lincoln County *et al.* (Wis.) 895
South Covington & C. St. Ry. Co. *v.* Newport, L. & A. Turnpike Co. (Ky.) 935
Southworth *v.* Shea (Ala.) 611
Spaugh *et al.*, State *v.* (N. Car.) 512
Speidel *et al.*, Schmulbach *et al. v.* (W. Va.) 851
Spitzer *et al. v.* Runyan, Mayor, *et al.* (Iowa) 864
Springer *et al.*, State *ex rel.* Cooper *v.* (N. J.) 389
Staab, Blain *v.* (N. Mex.) 938
Starkey, City of Rock Island *v.* (Ill.) 954
Startzman, Mayor, etc. of Hagerstown *v.* (Md.) 908
State (Harned, Prosecutor) *v.* City of Camden (N. J.) 903
State (McCulley, Prosecutor) *v.* City of Elizabeth (N. J.) 837
State (Outwater, Prosecutor) *v.* Mayor, etc., of Borough of Carlstadt *et al.* (N. J.) 885
State *ex inf.* Mylton, Pros. Atty., *v.* Rackliffe (Mo.) 843
State *ex rel.* Barnett *v.* City of Noblesville (Ind.) 99
State *ex rel.* Barnett *v.* City of Noblesville *et al.* (Ind.) 837
State *ex rel.* Beckham *v.* Taylor (Tenn.) 396
State *ex rel.* Belt *v.* City of St. Louis (Mo.) 402
State *ex rel.* Boorum *v.* Connelly, City Clerk, (N. J.) 855
State *ex rel.* Cooper *v.* Springer *et al.* (N. J.) 389
State *ex rel.* Cotonio *v.* Judge of Criminal District Court, Parish of Orleans, (La.) 635
State *ex rel.* Godard, Atty. Gen., *et al.*, Smith, Mayor, *et al. v.* (Kan.) 724
State *ex rel.* Graves, Dist. Atty., *v.* Cavett (Miss.) 848
State *ex rel.* Grothe, Scott *et al.*, City Council *v.* (Fla.) 853
State *ex rel.* Koester, Gorman *et al. v.* (Ind.) 907
State *ex rel.* Kountze *et al.*, Alter *et al. v.* (Neb.) 861
State *ex rel.* Lehman *v.* Bridges, Land Com'r, (Wash.) 891
State *ex rel.* Nelson *v.* Mott (Wis.) 849
State *ex rel.* Perrin *v.* Hoard *et al.* (Tex.) 834
State *ex rel.* Spokane & B. C. Telephone & Telegraph Co. *v.* City of Spokane *et al.* (Wash.) 20
State *ex rel.* Strahorn *v.* Blake, City Treasurer, (Wash.) 868
State *ex rel.* Tampa Waterworks Co., Bishoff *v.* (Fla.) 815
State *ex rel.* Town of Holland *et al. v.* Lammers *et al.* (Wis.) 115

State *v.* Richards (Conn.) 952
State *v.* Spaugh *et al.* (N. Car.) 512
State *v.* Tyrrell (Conn.) 426
Stauffacher *v.* Town of Sylvester (Wis.) 799
Sternberg, City Treasurer, Tacoma Bituminous Pav. Co. *v.* (Wash.) .. 925
Stewart *et al.*, City of Philadelphia *v.* (Pa.) 931
Stutzbach *v.* Coler, City Comptroller, (N. Y.) 72
Sutphin *et al.*, People *ex rel.* Village of Brockport *v.* (N. Y.) 859
Tacoma Bituminous Pav. Co. *v.* Sternberg, City Treasurer, (Wash.) .. 925
Taft *et al.* Roberts & Co. *v.* (C. C. A.) 876
Tattan *v.* City of Detroit (Mich.) 382
Taylor, State *ex rel.* Beckham *v.* (Tenn.) 396
Territory *ex rel.* Attorney General *v.* Town of Jerome (Ariz.) 833
Thoeni *v.* City of Dubuque (Iowa) 956
Thomas *et al. v.* City of Portland *et al.* (Ore.) 923
Thomas *v.* Snead (Va.) 906
Thompson *v.* Troup *et al.* (Conn.) 107
Thompson *et al. v.* Village of Mecosta (Mich.) 877
Town of Bristol *v.* Bristol & W. Waterworks (R. I.) 336
Town of Custer City, Hubbell *v.* (S. Dak.) 884
Town of Exeter, Gooch *v.* (N. H.) 544
Town of Fairplay *v.* Board of Com'rs of Park County (Colo.) 898
Town of Fairview *et al.*, Yancy *et al. v.* (Ky.) 658
Town of Gosport *v.* Pritchard *et al.* (Ind.) 149
Town of Guttenburg *et al.*, Edward C. Jones Co. *v.* (N. J.) 869
Town of Humboldt *v.* City of Barnesville (Minn.) 868
Town of Jennings, McFarlain *v.* (La.) 856
Town of Jerome, Territory *ex rel.* Attorney General *v.* (Ariz.) 833
Town of Johnson City, Archer *et al. v.* (Tenn.) 958
Town of Kent *v.* Pratt (Conn.) 936
Town of Lumberton, McDougald *v.* (N. Car.) 137
Town of Rogersville *et al.*, Davis *et al. v.* (Tenn.) 881
Town of Sylvester, Stauffacher *v.* (Wis.) 799
Townsend Gas & Electric Co. *v.* Hill, Mayor, *et al.* (Wash.) 197
Trah *v.* Village of Grant Park (Ill.) 918
Troup *et al.*, Thompson *v.* (Conn.) 107
Trowbridge *et al.*, Reid *et al. v.* (Miss.) 319
Trustees of Hazelgreen *et al. v.* McNabb *et al.* (Ky.) 953
Turner, City of Atlantic City *v.* (N. J.) 673
Tyler, City of Louisville *v.* (Ky.) 915
Tyler *v.* Louisville & N. R. Co. (Ky.) 915
Tyrrell, State *v.* (Conn.) 426
United States, City of Cleveland, Tenn., *et al. v.* (C. C. A.) 222
Upshur *et al.*, Police Com'rs, Keyser *et al. v.* (Md.) 845
Van Cleave *v.* City of St. Louis (Mo.) 946
Vidalat, City of New Orleans *v.* (La.) 446
Village of Detroit *et al.*, Hamilton *et al. v.* (Minn.) 311
Village of Fairmont *v.* Meyer (Minn.) 189
Village of Grant Park, Trah *v.* (Ill.) 918
Village of Mecosta, Thompson *et al. v.* (Mich.) 877
Village of Oquawka, Coquard *v.* (Ill.) 880
Village of Osmond *v.* Matteson *et al.* (Neb.) 836
Village of Osmond *v.* Smathers (Neb.) 835
Voight, Edward W., Plff. in Err., *v.* City of Detroit and Thomas M. Lucking, Receiver of Taxes of Said City of Detroit, (U. S.) 755
Wagner *v.* City of Portland (Ore.) 598
Walker *et al.*, Grace *v.* (Tex.) 942
Warren *v.* City of Newport (Ky.) 867
Watson *et al.*, Cotton *et al. v.* (Cal.) 917
Webster, City of Salem *v.* (Ill.) 951
Weldin *et ux. v.* Mayor, etc., of City of Wilmington (Del.) 866
Wells, David, *et al.*, Plffs. in Err., *v.* Mayor and Aldermen of the City of Savannah and Robert J. Wade, City Marshal, (U. S.) 462
Wentink *v.* Board of Chosen Freeholders of Passaic County (N. J.) .. 387
West Chicago Masonic Ass'n *v.* Cohn (Ill.) 808

West *v.* City of Mt. Sterling *et al.* (Ky) 687
Western Union Tel. Co., City of Toledo *et al. v.* (C. C. A.) 1
Whidden *et al.*, People *ex rel.* Raymond, County Treasurer, *v.* (Ill.) .. 909
Wills *v.* City of Ft. Smith (Ark.) 665
Williams *et al.*, Miller *v.* (Cal.) 903
Wilton *v.* City of Flint (Mich.) 384
Witmer *et al.*, Ellis *et al. v.* (Cal.) 878
Wood *v.* Borough of Stafford Springs (Conn.) 573
Wood *v.* City of Kansas City (Mo.) 841
Wood *et al.*, Somerville *v.* (Ala.) 842
Woodall *v.* City of Lynchburg (Va.) 697
Wygant *v.* McLauchlan, Chief of Police, (Ore.) 420
Yaggy *et al. v.* City of Chicago (Ill.) 919
Yancy *et al. v.* Town of Fairview *et al.* (Ky.) 658
Yeager *v.* Incorporated Town of Spirit Lake (Iowa) 563
Young *v.* Borzone *et ux.* (Wash.) 924
Young, Treasurer, *et al.*, City of Louisville *v.* (Ky.) 852
Zanesville Telephone & Telegraph Co., City of Zanesville *v.* (Ohio) 26
Zanesville Telephone & Telegraph Co., City of Zanesville *v.* (Ohio) . 30

MUNICIPAL CORPORATION CASES.

VOLUME VII.

CITY OF TOLEDO *et al. v.* WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Sixth Circuit, March 5, 1901.)

[107 Fed. Rep. 10.]

Telegraphs and Telephones—Maintenance of Line—Post Roads—City Streets—Control by City.*

Act Cong. July 24, 1866 (Rev. St. §§ 5263–5268), provides that any telegraph company organized under the laws of any state may construct and maintain telegraph lines over any portion of the public domain, and over and along any military or post road of the United States, provided that such lines shall be so constructed and maintained as not to interfere with travel. Act Cong. June 8, 1872 (Rev. St. § 3964), declares that all letter-carrier routes established in any city or town shall be post roads: *held*, that an interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines, and without procuring a permit therefor from the city.

Same—District Telegraph System.

Such act was strictly limited to the business of telegraph companies as such, and hence did not authorize a telegraph company accepting the act to use the streets of a city for the installation of a district telegraph system for the purpose of the collection and delivery of telegraph messages, and the maintenance of a messenger system, fitted with call boxes for watchman, fire, burglar, and police signals, and for the employment of messenger boys to carry messages and packages, run miscellaneous errands, distribute posters, etc., within the city.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

The Western Union Telegraph Company, complainant, a corporation under the laws of the state of New York, authorized to do a general telegraphic business throughout the United States, on June 17, 1867, accepted the terms of the act of congress of July 24, 1866 (Rev. St. U. S. §§ 5263–5268), the first section of which provides: "That any telegraph company now organized or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph, through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may

*Rights of telegraph and telephone companies to use of streets, see note to Southern Bell Telephone & Telegraph Co. *v.* City of Richmond, 44 C. C. A. 155; cross-reference note to State ex rel. Wis. Tel. Co. *v.* City of Sheboygan, 6 Mun. Corp. Cas. 685.

hereafter be declared such by act of congress, and over, under or across the navigable streams or waters of the United States: provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other." Subsequently, by an act approved June 8, 1872 (Rev. St. U. S. § 3964), all letter-carrier routes established in any city or town for the collection and delivering of mail matter by carriers were declared by congress to be post roads. Soon after its acceptance of the terms of the act of congress of 1866, the complainant constructed its lines of telegraph in the city of Toledo, and has since, with full acquiescence of the city, occupied its streets and alleys with its poles and wires. It has conformed to the regulations of the city from time to time by putting its wires underground where required, and removing its poles from one district to another. For several years the Western Union Telegraph Company had its messages delivered and gathered by a local company, with which it failed to make a contract to continue such service, and at some time before the commencement of this suit several persons had agreed to form another such company, to be known as the "National District Telegraph Company," with which, when formed, the Western Union Telegraph Company had agreed to make a contract for the gathering and delivering of its messages in the city of Toledo. This company was never formed, and never acquired any rights in the streets of Toledo, although the persons who contemplated forming it had call boxes made and placed in some of the offices and buildings, and advertised for business under the representation that this company was connected with the Western Union Telegraph Company. Without obtaining a franchise, the persons contemplating forming the National District Telegraph Company applied to the complainant to be allowed to install its system on the poles and in the conduits of the complainant, which, on advice of counsel, was refused. The project of forming the National District Telegraph Company was then abandoned, and the complainant purchased the boxes which bore the name and advertisement of the National District Telegraph Company, and purposed completing the system by stringing wires on its poles and in its conduits, and carrying on the business of a district tele-

graph company for its own service and for the general public. For this purpose, without disclosing it, the complainant applied to the superintendent of fire-alarm telegraph and city civil engineer of defendant city for permits to set poles as required by the ordinance with which it had always complied. These permits were granted under the belief that the work was for the regular and accustomed business of the complainant; but when it was found that complainant was connecting wires with the call boxes which had been put in, and installing a complete district telegraph system, the defendant, under the impression that complainant was clandestinely doing this for the National District Telegraph Company, revoked the permits, and the complainant was notified that, if it desired to do any more new work, a separate permit should be applied for, stating exactly what was required. The common council of the city then passed a resolution stating that parties styling themselves the National District Telegraph Company had, without right or authority, erected poles and fixtures, and had strung wires in and over the streets, alleys, and public places in the city, which were a hindrance to the fire department, and a menace to the safety of the lives and property of citizens, and directing the chief of police, city civil engineer, and superintendent of fire-alarm telegraph to remove all such wires, fixtures, and poles erected or constructed by the National District Telegraph Company, or by any other individual, company, or corporation, without having first complied with the laws, ordinances, and regulations governing this class of work in the city of Toledo. Thereupon this bill was filed against the city and its officers, stating in the most general terms that the defendant city threatened to cut the wires, destroy the lines, and remove the poles of the complainant, and interrupt the working of its lines, ruin its business, and incapacitate it from discharging its duties to the general public and its agency to the federal government. An order to show cause why a preliminary injunction should not be granted was made, and a preliminary restraining order was issued. On the hearing, the defendant disclaiming every intention of interfering with the lines and property of the complainant used in its usual and ordinary business, and avowing that its purpose was only to arrest the installation of the plant of the National District Telegraph Company, the preliminary injunction was denied, and the temporary restraining order vacated. W. U. Tel. Co. v. City of Toledo, 103 Fed. 746. The complainant then filed a petition setting out frankly its purpose of installing a district telegraph system in the city of Toledo in connection with its business as now conducted, and stating for that purpose it had purchased the boxes with the National District Telegraph Company's name and advertisement imprinted upon them, and intended to connect the boxes already placed and others to be placed in complainant's office by the wires and con-

struction which the defendant threatened to destroy; that the defendant had, since an order for a preliminary injunction had been denied, and the temporary restraining order set aside, cut the wires belonging to the complainant, and it again asked for a preliminary injunction against the defendant. After a hearing, an order was made reciting that the complainant proposed to establish and operate a local district telegraph system in the city of Toledo, through its own wires and apparatus, and restraining the defendant, until the further order of the court, from obstructing complainant in installing the system on its poles and through its conduits, and from interfering with the complainant in carrying on and conducting a district telegraph system within the city of Toledo. From that order the defendant has appealed to this court.

C. K. Friedman, for appellant.

H. D. Eastbrook and John W. Warrington, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

We assume for the purposes of this appeal that the complainant was rightfully occupying the streets, alleys, and conduits in the city of Toledo for the conduct of its ordinary and usual business. We also assume that the defendant had no intention of interfering with the complainant in such use, and that the resolution of the common council was directed against the installation of the district telegraph plant which was being put in, "whether," in the words of the resolution, "it belonged to the National District Telegraph Company or any other individual, company, or corporation, without having first complied with the laws, ordinances, and regulations governing this class of work in the city of Toledo." The broad claim is made by the complainant that by accepting the terms of the act of congress of 1866 it became an agency of the federal government, and as such has the right to occupy with its wires and poles the post road of the United States, which include the streets and alleys of the city of Toledo, subject only to the limitation of not interfering with ordinary travel; that, as it was not necessary originally to obtain the consent of the municipality to occupy its streets, it is under no obligation to obtain permits to put in new construction and do the work under the direction of the city civil engineer and superintendent of fire-alarm telegraph. We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant was subject to the control of the municipality, and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance. It is necessary for its fire protection, and a proper knowledge of the obstructions in its streets, and the use to which its public places are being subjected, for

the city to know, before any construction is put in, what is contemplated, and to have the work done under the supervision of its officers; and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city. The complainant recognized its obligation to obtain permits in all of its conduit work and in its outside construction until the municipal authorities attempted to prevent the installation of a district telegraph plant, and it then for the first time claimed that it was an agency of the federal government, and was subject to no such restrictions. We think in taking that position it was mistaken, as there was no intention on the part of the federal government in permitting the complainant to use its post roads to dispossess the state and municipalities of the control of them, but the permission was given like any other franchise granted to a corporation, to be exercised in subordination to both public and private rights.

The claim that the acceptance of the terms of the act of congress of 1866 made the complainant an agency of the federal government, and exempt from state and municipal control, has been made by the complainant whenever state or municipal authorities have tried to subject it to the same burdens borne by other corporations doing business within the state or municipality, but without avail. When the state of Massachusetts passed an act taxing the Western Union Telegraph Company on account of the property owned and used by it within that state, it set up its acceptance of the terms of the act of 1866 making it an agency of the federal government, and claimed that it was, therefore, exempt from such taxation; that to tax it was equivalent to taxing a government bank, or any other government agency, and therefore beyond the power of the state. But it was held that the act of 1866 was only a permissive statute, and nothing in it implied an exemption from the ordinary burdens of taxation. W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. When the city of St. Louis, in the state of Missouri, imposed an annual charge for each pole erected in its streets by the complainant, the same claim was again made. In announcing the judgment of the supreme court of the United States, Justice Brewer used the following language, which is not inappropriate here, in view of the claim made in this case:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is, like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one *would* suppose that a fran-

chise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control are in the state; and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways. They are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can, by its legislation, deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." City of St. Louis v. W. U. Tel. Co., 148 U. S. 100–102, 13 Sup. Ct. 488, 489, 37 L. Ed. 384.

We think the complainant should have made the usual applications for permits to string its wires, stating exactly what was required, in accordance with the regulations of the city, with which it had been accustomed to comply, and it had no right to construct its work in defiance of those requirements.

We are also of the opinion that the Western Union Telegraph Company had no right, under the privileges granted to it by the act of 1866, to install a district telegraph system in the city of Toledo, as that act only extended its privileges to

the business of telegraph companies. A district telegraph business, as disclosed by this record, consists in securing the attendance of messenger boys to carry telegraph messages, run miscellaneous errands, carry packages, distribute posters, invoices, invitations, etc. The business also includes night watchman signals, fire and burglar alarms, and police calls. If the act of 1866 is construed to embrace a company formed for such service because it uses wires and appliances in use by a telegraph company, then it would not have been necessary for the proposed National District Telegraph Company to ask permission of complainant to install its proposed plant on its poles and in its conduits, because, by accepting the terms of the act of congress, it would itself have been entitled to all the privileges that the complainant derives from that act. It was conceded on the argument that such a corporation would not be entitled to the privileges conferred by the act, but complainant insists that the installation of the call boxes is necessary for gathering messages to be transmitted in order to meet modern competition, and that they are a necessary incident to its business, and therefore come within the privileges granted to it. It is claimed that the test is, are the boxes and wires put in for telegraphing? If they are, no matter in what business they are used, they come within the privileges granted. If this contention is correct, the complainant may, with the consent of the owner, run its wire into every store, shop, office, manufactory, and residence in the city. Instead of the limited number of wires used for the business of interstate commerce, the number would be limitless. Instead of the complainant being limited to transmitting messages by telegraph, it could become engaged in every known business. We do not assent to this view. We think the business of a district telegraph company does not come within the privileges granted by the act, and it cannot, as an incident in procuring messages to be sent, be privileged more than a telephone service, for the same purpose, to which it has been held by the supreme court the act has no application. City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. It follows that the order for a preliminary injunction was improvidently made, and must be reversed.

MAYOR, ETC., OF CITY OF BALTIMORE *et al.* *v* CHESAPEAKE & P. TEL. CO. *et al.*

(Court of Appeals of Maryland, Jan. 20, 1901.)

[48 Atl. Rep. 465.]

Control of Streets—Ordinance Granting Exceptional Privileges to Be Construed Strictly.

A city ordinance granting exceptional privileges which interfere with the city's authority to control its streets must be construed

strictly; and, if there are words in it capable of various meanings, that interpretation should be adopted which will best conserve public interests.

Enjoyment of Franchises Granted by City—Equitable Intervention.

A company asking the intervention of a court of equity to enable it to enjoy franchises granted by a city ordinance must show that it has performed the obligations imposed thereby.

Telephone Companies—Underground Conduits—Poles and Wires in Streets*—Romoval of.

Baltimore City Ordinances of 1889, No. 41, authorizing telephone companies to lay wires in underground conduits, and to make necessary house connections, in such manner as may be best adapted to location, by means of wires from the cables laid, provides that the companies shall construct at least three miles of conduits within two years from the passage of the ordinance, and after said two years, and as rapidly as said conduits may be constructed and cables laid therein, all poles on any street along where such conduit is constructed, and cable laid, shall be removed, and shall not be replaced, except in so far as such poles are necessary for the purpose of making distribution of wires forming part of any cable: *held*, that the companies are not required to construct underground conduits in every street along which they desire to furnish telephone service, but they must remove all poles where a conduit is constructed and cable laid, except such poles as are necessary for distribution.

Same—Compelling Use of Underground Conduits.

As a new system of distribution, not calling for the use of poles, has been devised, and such system is feasible, as to cost and mechanical construction, it must be used in lieu of poles in the congested parts of the city; and until such new system is so introduced, the courts will not interfere to secure to telephone companies the right to make further extensions under the ordinance.

Appeal from the circuit court of Baltimore city.

Action by the Chesapeake & Potomac Telephone Company and others against the mayor and city council of Baltimore and others for an injunction. From a decree for complainants, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, PAGE, SCHMUCKER, and JONES, JJ.

Wm. Pinkney Whyte and Olin Bryan, for appellants.

Arthur W. Machen, Bernard Carter & Sons, and Wm. S. Bryan, Jr., for appellees.

PAGE, J. These parties have been twice before this court,—once in 89 Md. 689, 43 Atl. 784, 44 Atl. 1033, and again in 90 Md. 642, 45 Atl. 446. It is unnecessary for the consideration of the questions involved in this appeal to refer to these cases, further than to say that by the first it was held that Ordinance No. 41 created a valid and subsisting grant, which having been sanctioned by the legislature of the state, the mayor and city council are powerless to destroy or change; and that by the second, the telephone companies, having complied with the terms and provisions of Ordinance No. 41,

*See cross references to State ex rel. Wis. Tel. Co. *v.* City of Sheboygan, 6 Mun. Corp. Cas. 685.

were entitled, upon the case as then presented, to an injunction against the interference by the city with the construction of their conduits,—subject, however, to the right and power of the city to adopt reasonable regulations, etc. After the cause was remanded for the second time, the city, through its counsel, filed a supplemental answer, and it is conceded the only questions now before us are those which arise upon the issues it tenders. The substance of the supplemental answer may be thus briefly summarized. The defendants allege: (1) That Ordinance No. 41, if accepted as a contract, "was based primarily upon the consideration that the telephone companies, for the privileges granted," were to remove, within the period of two years from the date of the approval of the ordinance, "as rapidly as conduits were constructed and cables laid therein," all poles under their control standing upon any street along which any conduits are constructed and cables laid, and that said poles should not be replaced, except in so far as such poles "are necessary" for the purpose of making distribution of and connection with the wires "forming part or parts of any such cables." (2) That the complaining companies "have not removed any of the poles," but, to the contrary, "they have to-day, in fact, more poles in the city, along the same streets and alleys where their conduits have been laid, than they had at the time of the passage of the ordinance." (3) That the primary consideration upon which the privileges set out in the ordinance were granted was to obtain the removal of the overhead wires, yet the complainants have not performed their part of the contract, by failing to remove such poles; it being "now well settled" that no poles or overhead wires are necessary for distribution or for house to house connection where conduits are laid. And that (4) the complainants, having thus failed to perform their contractual obligations, and in fact having violated the contract in letter and in spirit, cannot now undertake to ask the interference of the court to protect them against the action of the city authorities in refusing to permit them to lay further conduits. It is proper to state that it appears, by the map filed among the proceedings, that all of the conduits referred to in the bill, and mentioned in the petition to the city commissioner, lie beyond the central part of the city, and are not within those districts which were called by the counsel at the argument the "congested parts of the city." The counsel for the city at the argument stated, also, that the city did not insist that the companies should, under the terms of the contract, be required to remove all the poles in streets devoted to residences, and where many wires were not required, but only in the central or business parts of the city, where many telephones are used, and therefore many wires required; that the requirements of the contract, as well as of public interest, demand that the companies should remove all poles in the congested parts of the city, it being proved that the distribution from the con-

location, "will necessarily require, if the overhead system is wholly continued," a large and increasing number of overhead wires along the length of the streets and other public ways leading to said building, and such a concentration at a point so central as the location of said building is not desirable, and it would be to the public advantage that such wires should be laid in cable underground, etc. Now, even rigidly construed, this seems to be that these companies being about to locate their new buildings in a central position in the city, where doubtless there were already many other overhead wires, it would be desirable to have such wires as were to be concentrated in the new building in cables underground. Such a disposition would not dispose of all overhead wires, but would inaugurate a system by which finally all wires would be taken off the street. The word "wholly," upon which the appellees' counsel laid so much stress, refers, it would seem, not to the wires of the telephone company only, but to any other wires that might then be on those streets, or might thereafter be placed there by other persons. It was not, therefore, expected that the arrangement with the companies would remove all the wires on the street, but it would at least inaugurate a system which would eventually result in the removal of all overhead wires. Now, what were the character and limitations of the privileges granted by the ordinance? The companies were authorized to lay in suitable conduits underground such wires as were to be used in connection with the new telephone exchange, and "to make necessary house connections in localities where the same may be required, in such manner as may be best adapted to the location, by means of any wire or wires from such cable or cables." By the second section the companies are required to construct at least three miles of conduit within two years from the passage of the ordinance, and "after said two years and as rapidly as said conduits may be constructed, and said cables are laid therein, all poles belonging to, or under the control of, either of said companies, standing upon any street or thoroughfare in this city, along which any such conduit is constructed and cable laid, shall be removed, and shall not be replaced, except in so far as such existing pole or poles now standing, or hereafter to be maintained or erected by such companies or company, are necessary to be maintained or erected by them, or it, for the purpose of making distribution of and forming connections with any wire or wires, forming part or parts of any such cable so laid in a conduit, with the building or buildings or place or places intended to be connected with such wire or wires from such cable." There is nothing in this section or in any others that deprives the companies of any right theretofore belonging to them to extend their system by means of overhead wires; nor does the ordinance impose upon them the obligation to remove their poles anywhere, except those upon streets, alleys, and thoroughfares along which their

conduits are constructed and the cables laid. The language employed is imperative in imposing upon the companies the obligation to build at least three miles of underground conduits within two years from the date of its approval; and thereafter they are to remove as rapidly as possible, and not to replace, all poles on the streets upon which the conduits are constructed. This duty to remove poles is, however, subject to the exception by which they are not required to remove such of their poles then standing, or hereafter erected by them, as are "necessary" "for the purpose of making distribution and forming connections" with the wires constituting parts of the cable in the conduit. It is clear by this clause that the companies are not bound to remove such poles as "are necessary" for distribution; that is, for making house to house connection along the street where the conduit is laid, and also for making connection with wires on poles located on other streets.

The counsel for the companies admit that the poles thus to be permitted to remain are those only that are "reasonably required" for distribution. The words of the exception are, such as "are necessary to be maintained or erected by them or it, for the purpose of making distribution of and forming connections with," etc. It is insisted that inasmuch as the mode of distribution by poles not only to subscribers on, but to subscribers off, the line of the street was the method in use in 1889, when the ordinance was passed, that it was contemplated, and the contract must be understood to mean, that the companies are bound only to make distribution by poles. But to this contention we cannot agree. The word "necessary," in the connection in which it is used, we agree with the appellees' counsel, must be understood as authorizing such poles as are "reasonably required" for the purpose of distribution. But how must this be understood? The word "necessary" must be construed in the connection in which it is used. It is a word susceptible of various meanings. It may import absolute physical necessity, or that which is only "convenient or useful or essential." McCulloch v. State, 4 Wheat. 413, 4 L. Ed. 579. In the case just cited Chief Justice Marshall said the word "has not a fixed character peculiar to itself. It admits of all degrees of comparison." In the present case the object of the ordinance was to get rid, as far as possible, of the overhead system. To secure that end as far as was then practicable, the companies are authorized to lay conduits and place cables in them. At that date the only method in use for distribution from wires laid in cables—indeed, the only method, and therefore the only method that could then "reasonably be required"—was a distribution of poles. But the ordinance did not contemplate that the use of poles, as to numbers and locations, should be only such as would suit the convenience or profit of the companies. They were limited to the use of such only as were necessary or

"reasonably" necessary for that purpose. Nor could the intent have been that the distribution by poles should always be employed, no matter what the improvements of advancing science may have brought about. If such had been the intention, it would have been easy to have so stated. Instead of that, however, the clause in question grants the right to maintain poles on the street where the conduit is laid, upon the condition of reasonable necessity, and when no such necessity exists they must remove the poles. It would be doing violence to the clear intent of the act to hold that the companies might retain obsolete plans, when such plans would go far to defeat the purpose for which the ordinance was passed. If this were true, the whole purpose for accomplishing the extinction of the overhead system would prove a dismal failure. The cost of the new system is undoubtedly to be considered, as matter of fact, in determining whether it is reasonable that the companies should adopt it; but in itself it affords no argument in the construction of the ordinance. In Fenwick v. Railway Co., supra, the court said: "The company may buy mortar anywhere, but it may be cheaper and more convenient to them to make the mortar at this place. * * * But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interferred with." The purpose of the ordinance was not to save the companies expense, but to accomplish a public end; and, while exact justice must be done, we should not permit the consideration of cost to the companies to be of such weight as to force such a construction of the contract as will seriously and injuriously affect the public interest. Lewis v. Board, 40 Ch. Div. 55; Sanderson v. Railway Co., 11 Beav. 497; Moran v. Commissioners, 2 Black, 722, 17 L. Ed. 342; Lessee v. Lessee, 826 App. 105. As long, therefore, as the only feasible plan of distribution was by poles, the companies were authorized, under this contract, to use that system. But when a system which does not involve the retention of poles along the streets in which conduits are laid was devised, by which the old method of distribution was not necessary, and such new plan is feasible, and such as in all respects can reasonably be required of the companies, then, under their contract, they cannot adhere to the old system, but must adopt the new, so that the objects and purposes of the ordinance shall be carried out.

Without prolonging this opinion, we may say that the evidence in the case convinces us that poles on the streets where the conduits are laid are no longer necessary to make connection with houses on the line of that street, nor with overhead wires on the adjoining streets. As to the latter, connection may be made by underground methods, to poles standing elsewhere than on the street where the conduits are laid. In New York, Chicago, and St. Louis the distribution, at least

in the "congested" portion of the city, is made without the use of poles. The expert witnesses who were examined agree that in the construction and maintenance of such a system there is no mechanical difficulty. It is objected by the companies that the cost would be so great as to render the system impracticable. But we do not think the testimony sustains this. There are great differences in the calculations made by the officers and agents of the companies and those made by other persons who have testified. But there is little division of opinion as to the entire feasibility of underground distribution in the congested parts of the city, either as to cost, construction, or physical difficulties of every kind actually existing. As the proof shows that the companies still retain poles in the congested parts of the city (that is, those parts where the houses are close and many telephones in use), we will not pursue the question of cost further.

Our conclusions are (1) that Ordinance No. 41 does not impose upon the companies any obligation to construct underground conduits in every or any street along which it desires to furnish telephone service; (2) that they are bound to remove all poles along the streets where the conduit is constructed and the cable laid, (3) except such poles as are necessary for distribution; (4) that there is a new system of distribution, not calling for the use of poles, feasible as to cost and mechanical construction, where many telephones are in use; (5) that in the congested parts of Baltimore city the new system is practicable and reasonable, and all poles therein along the streets containing the conduit should be removed, before the court will interfere to secure the right to the companies to make further extensions of their privileges under the ordinance. Decree reversed, with costs, and cause remanded.

BOARD OF PUBLIC WORKS OF CITY OF DENVER *et al.* *v.* DENVER TEL. CO.

(*Supreme Court of Colorado, April 8, 1901.*)

[65 Pac. Rep. 35.]

Telephone Companies—Franchise*—Mandamus by Assignee to Compel Permission to Lay Conduits—Objections—Appeal—Jurisdiction of Supreme Court.

Where a city council granted the right to construct and operate a telegraph and telephone system in the streets, on mandamus by an assignee of the company several years after the grant to compel the board of public works to grant a permit to excavate in an alley to lay conduits, objections that the council could not confer such privileges by resolution, and nonassignability thereof, the exclusive power of the board to grant or withhold the same without having their determination reviewed by the courts, that petitioner was unable to carry

*Use of streets by telephone companies, see cross-reference note to State ex rel. Wisconsin Tel. Co. *v.* City of Sheboygan et al., 6 Mun. Corp. Cas. 685.

out the enterprise, that the rights originally existing had been abandoned, and that the petitioner did not make the application in good faith, present no constitutional questions giving the supreme court jurisdiction of an appeal from an order granting the writ.

Same—Same—Right of Board of Public Works to Attack Validity of Resolution Authorizing Use of Streets.

Where a city council conferred on certain individuals the right to use the public streets and alleys for the purpose of constructing and operating a telegraph and telephone system, the board of public works, having no power in the matter of granting the rights or privileges granted to plaintiff, but acting merely in a ministerial or administrative capacity, cannot raise the question that a franchise is involved, and a constitutional question presented as to the resolution, so as to give the supreme court jurisdiction of an appeal from an order granting the writ of mandamus to compel the board to grant a permit to excavate in an alley to lay a conduit.

Same—Same—Unauthorized Appeal by Board of Public Works—Jurisdiction of Supreme Court.

Where a board of public works had no power to question the constitutionality of a resolution of the city council so as to give the supreme court jurisdiction of an appeal from a writ of mandamus directing the board to issue a permit to exercise a right granted by the resolution, the fact that the attorney appearing for the board was the city attorney does not change the character of the action, or make the city a party in its municipal capacity, so as to give the supreme court jurisdiction to decide the question of the constitutionality of such resolution, though the city may desire such a decision, since it would not bind either the city or the owner of the franchise.

On Rehearing.

Remanding—Estoppel of Counsel to Request the Court to Withdraw Its Reasons for.

Where appellants procured the removal of an appeal from the court of appeals to the supreme court on the ground that a franchise and a constitutional question were involved, they cannot be heard on rehearing in their request for the withdrawal of the court's reasons for remanding the case to the court of appeals because such reasons are inimical to their interests in a further prosecution of the case.

Appeal from district court, Arapahoe county.

Mandamus by the Denver Telephone Company against the board of public works of the city of Denver, Edward Monash, and others. From a judgment in favor of plaintiff, defendants appealed to the court of appeals, from which the appeal was removed to the supreme court. Remanded.

J. M. Ellis and H. M. Orahood, for appellants.

Stuart & Murray, for appellee.

PER CURIAM. The Denver Telephone Company, a domestic corporation, is the remote assignee of a right or privilege which the city council of the city of Denver by resolution, in 1884, granted to eight of its citizens to occupy its public streets and alleys for the purpose of constructing and operating a telegraph and telephone system. In January, 1897, the company made a written application, as the charter ordinance of the city prescribes, to the board of public works of the city of Denver, for a permit to excavate a trench in one of the public alleys in which conduits for laying telephone

wires were to be placed, the same being a part of the proposed system. This application was denied. Thereupon this proceeding in mandamus was brought to compel the respondent board to issue to petitioner company the permit theretofore refused. In the petition reasons are given for the apparent delay in completing the system, and there is also set forth a history of petitioner's enterprise from its inception, with the details of which we are not concerned at this time. To the alternative writ to show cause why the petition should not be granted the board made answer, and upon these two pleadings trial was had, which resulted in a judgment awarding the permanent writ. From that judgment respondent board and the individuals composing it appealed to the court of appeals. After all the briefs were filed, and the cause was on the eve of submission, the present city attorney of the city of Denver entered his appearance as attorney for appellants, and asked that the cause be removed to this court upon the ground that a franchise and a constitutional question were involved. No formal application to remand has been made by the appellee, but in argument the suggestion is made that, though its counsel are willing to submit the cause on its merits, this court has not jurisdiction of the appeal. But, as has often been said, consent does not confer appellate jurisdiction; and it is clear that the court of appeals act, which is at once the source and measure of our power in the matter of appeals, has not given it. Of the nine separate grounds interposed by the respondent at the trial and upon this review as reasons why the court should withhold the writ, and as constituting its reasons for refusing the permit, only one presents features which, in any circumstances, properly invoke the jurisdiction of this court. That is that the alleged privilege claimed by petitioner is invalid, because, by resolution by the city council, there is an attempt to make an irrevocable grant of a special privilege or franchise, which is forbidden by section 11 of article 2 of our constitution. This contention by the board is said to introduce into the case not only the element of a franchise, but also the unconstitutionality of the resolution of the council purporting to confer it. The other grounds of objection go to the right of the council by resolution to confer such privileges; the nonassignability thereof; the exclusive power of the board to grant or withhold the same without having their determination reviewed by the courts; that the bond filed was insufficient; that petitioner was unable to carry out the enterprise; that rights, if any, which originally existed, have been abandoned; and that the petitioner did not make the application in good faith. It will be seen that none of these presents a question that gives this court jurisdiction. If it be conceded that in an appropriate action, where the city of Denver and the telephone company were parties, and where the issues were the same as those attempted to be raised here, a franchise would be involved, and a constitutional question

presented, that must be determined, it does not necessarily follow that such questions may be raised in this action by the board of public works, unless, under the statutes and ordinances of the city, it represents the municipality in its legislative capacity, or has power co-extensive with the city council in the subject-matter of the action. By the city charter the legislative power of the city of Denver is vested exclusively in the city council. The board of public works, in the matter of granting rights or privileges, such as those claimed by petitioner, has no power whatever. In so far as it has anything to do in aiding the city or the grantee in giving effect to a right or franchise previously granted by the lawmaking power, the board acts in a ministerial or administrative capacity. It therefore does not lie with the board to pass upon the constitutionality of the ordinance or resolution by which such rights are given, or to decide for itself whether or not the privilege claimed results from the act of the city council purporting to create it. If the city council has not revoked, or canceled, or otherwise called in question the validity of the resolution under which petitioner claims, or the right thereby granted, it is not within the province of a merely administrative body like the board of public works to constitute itself a tribunal for passing upon such questions; and, so long as the privilege remains unrevoked by the city council,—as appears to be the case here,—such administrative officers or tribunal should not be permitted to question it. Only persons who are injuriously affected by the alleged unconstitutionality of a statute or ordinance may be heard to object to it on that ground. Neither individually, nor collectively as a board, are the members of this body affected by this resolution. Their interest in it is only that of other citizens of the city. The question was settled by this court in Tramway Co. v. Londoner, 20 Colo. 150, 37 Pac. 723, and the same principle is enunciated in People v. Ames, 24 Colo. 422, 51 Pac. 426; Ames v. People, 26 Colo. 83, 56 Pac. 656; Rhodes v. Board, 10 Colo. App. 99, 49 Pac. 430; and in a late case, which is strictly in point to the one at bar,—Ghee v. Gas Co., 158 N. Y. 510, 53 N. E. 692. If the final judgment in this case commands the board to issue the permit, the judgment would not, as to the city, be res adjudicata of a future controversy between it and petitioner respecting the rights of the latter under this resolution; and, if the writ should be withheld, this would not estop petitioner to assert its rights as against the city. It may be true that the same reasons which preclude the appellants on this review from raising a constitutional question and that of a franchise will control in the court of appeals as to their right to be heard upon the other assignments of error to which we have above referred. It may also be true that, while refusing to decide the case on its merits because of a lack of jurisdiction of the appeal, in effect we resolve all of appellants' contentions against them when we hold that they are not in a

position to raise the questions which alone give us jurisdiction. But that anomaly, if such it be, we are not responsible for. It is due to the system prevailing in this state by which exclusive appellate jurisdiction in certain cases is conferred upon one appellate tribunal, and, in other cases, concurrent jurisdiction upon the two. Hence, if our decision that the board cannot raise the question of the franchise or constitutional question, even if such questions would be involved were the action appropriate and the necessary parties present, is virtually a determination of the entire controversy, because the principle herein announced is decisive of all the objections urged by appellants, that is no reason why we should not refrain from usurping a jurisdiction we do not possess, and announcing the reasons which compel the decision. The fact that the attorney who appears for appellants in this case happens to be the same person who is the city attorney of the city of Denver does not change the character of this action, or make it one in which the city, in its municipal capacity, is a party. However desirous the city may be for the court in this action to determine the validity of the alleged privilege or franchise of the petitioner, we must decline to depart from the established practice and plain letter of the statute, and cannot allow the city thus to get a decision that would bind neither it nor the owner of the rights claimed. If the city really desires to have this question tested, there ought not to be any difficulty in properly presenting the matter in an appropriate way, where the judgment pronounced would be conclusive of the rights, not only of petitioner, but of the city itself. The case will be remanded to the court of appeals, and it is so ordered. Remanded.

On Petition for Rehearing.

In his petition for a rehearing learned counsel for appellants is disposed to concede, what we have already decided, that appellants may not question the validity of an ordinance passed by the city council, but still maintains his former position that, since permits to excavate in the alleys and streets of the city must be had from the board of public works, that body may for itself determine whether upon the applicant therefor has been conferred by the city council a special or general right thereto. We are satisfied with our conclusion upon both those propositions. The principle which applies to the one is equally pertinent to the other contention. The principal object of counsel's petition, however, is to secure a modification of the opinion. To determine whether the board of public works may be heard upon the only two propositions relied upon for a reversal, which, in any contingency, invoke the appellate jurisdiction of this court, it became necessary first to ascertain the power of the board under the city charter in the matter of granting permits of the character in question. We said that, whatever the power of the board might be in regard to other things, *with respect to the* granting of this

permit it acted in a ministerial or administrative capacity only; for, not possessing the legislative power of the city council, it was not competent for the board to raise the question of a franchise, or attack the constitutionality of the resolution upon which the rights of the telephone company, if any, were based. Jurisdiction of the appeal, therefore, was not assumed. Perceiving, however, that the same reasons which were assigned for not taking jurisdiction might apply to all the objections interposed by the board to the granting of the writ, and in answer to a suggestion that it would be inconsistent for the court, while declining jurisdiction, in effect to determine all the questions which appellants sought to raise, we felt it to be our duty to show that the anomaly of our course, if such it be, was due to the system existing in this state whereby appellate jurisdiction is conferred upon two tribunals. We have no desire, in a cause not within our jurisdiction, to prejudge the merits of the controversy; nor have we sought to tie the hands of the court of appeals. Yet further reflection serves to strengthen the conviction that we were right in inserting in the opinion the remark to which appellants have excepted. We appreciate the desire of appellants to return to the court of appeals with their record uninfluenced by "predictions or unnecessary suggestions" on the part of this court. Appellants, however, had this cause transferred from the court of appeals, and invoked the jurisdiction of this court. In accordance with the established practice, we gave, and very properly, our reasons for remanding it. If these reasons are inimical to the interests of appellants, their act is responsible for that result, and they should not now be heard in the request for their withdrawal. We consider it quite appropriate that reasons for a court's conclusion be given. The petition for rehearing is denied.

STATE *ex rel.* SPOKANE & B. C. TELEPHONE & TELEGRAPH CO. *v.* CITY OF SPOKANE *et al.*

(*Supreme Court of Washington, Feb. 18, 1901.*)

[63 Pac. Rep. 1116.]

Telephone Companies—Constitutional Prohibition of Exclusive Franchises—Power of City to Refuse Use of Streets to a Second Company Where Franchise of First Company Is Not, in Terms, Exclusive.

Const. art. 1, § 12, provides that no law shall be passed, granting privileges or immunities to any other than a municipal corporation, which on the same terms shall not equally belong to all corporations. Ballinger's Ann. Codes & St. § 739, par. 7, vests in cities of the first class the power to authorize or prohibit the use of electricity on their streets, and to prescribe the conditions on which electricity may be used. The streets of a city of the first class were in use by a telephone company, but the franchise did not provide for their exclusive use. The city council refused a second telephone company the privilege of using its streets for erection of wires, and it applied for

mandamus to compel such consent, and contended that the city's refusal was equivalent to granting the first company an exclusive privilege, in violation of the constitution: *held*, that the question of the city's power to grant exclusive privileges was not involved, as the city had not attempted to grant such a privilege, and had the right, under the statute, to refuse the use of its streets to relator.

Same—Constitutional Provision Conferring the Right to Use Streets and Highways Not Self-Operative.

Const. art. 12, § 19, providing that any corporation shall have the right to construct telephone lines within the state, and that all such companies are common carriers and shall have the right of eminent domain, and that the legislature shall provide reasonable regulations to give effect to the section, is not self-operative, and hence, in the absence of legislative regulation, does not confer on telephone companies the right to use the streets of a city.

Same—Right of City to Deny the Use of Streets under Statute Authorizing Telephone Companies to Use Streets and Highways.*

Ballinger's Ann. Codes & St. § 4369, authorizes the construction of all necessary telephone lines for public service along and on any public street or highway, but provides that, where the right of way is within the corporate limits of a city, the consent of the city council shall be obtained before the line can be erected: *held*, that a city has power to refuse to allow a telephone company to use its streets, and that its authority is not limited to a reasonable regulation of the method of using streets for such purposes; the power to refuse being correlative to the power to consent.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Mandamus by the state, on relation of the Spokane & British Columbia Telephone & Telegraph Company, against the city of Spokane and others, to compel the respondents to consent to the use of the streets of the city of Spokane by relator for the erection of telephone lines. From a judgment quashing the writ and dismissing the case, relator appeals. Affirmed.

Stoll & Macdonald, Henley, Kellam & Lindsley, and W. S. Dawson, for appellant.

Fred M. Dudley, for respondents.

REAVIS, C. J. The appellant (plaintiff) is a corporation created under the laws of the state for the purpose of constructing and operating a telephone line and system within this state between the Canadian boundary on the north and the city of Spokane on the south. It made application to the city of Spokane for the city's consent to erect its telephone poles and construct its wires through the streets of the city. In its application it offered to submit to such reasonable rules and regulations as might be imposed by the city. Upon consideration of the application by the city council, such consent was refused. Appellant thereafter instituted proceedings in the nature of mandamus to compel the city to give its consent to the construction and operation of appellant's telephone system, and that the city be required to prescribe reasonable

*See cross-reference note to State ex rel. Wis. Tel. Co. *v.* City of Sheboygan et al., 6 Mun. Corp. *Cas.* 685.

rules and regulations therefor. The affidavit upon which the application was based states that appellant was willing to abide by and conform to any reasonable rules and regulations imposed by the city; that it had built and was operating and maintaining a system of telephones between the town of Northport and the city of Spokane, a branch line from the town of Meyers Falls to the town of Republic, and another line from Bossburg to the boundary line between the United States and Canada, connecting with towns in the province of British Columbia; that it was under contractual relations with another company owning and operating telephones in the province of British Columbia by which it was required to deliver the messages of the foreign company within this state, and especially within the city of Spokane; that in 1896 it had entered into a contract with the Inland Telephone & Telegraph Exchange, in the city of Spokane, owning and operating lines of telephone in Idaho, Oregon, California, and elsewhere in this state; that under the terms of such contract the wires of appellant were connected with the central office of the Inland Telephone & Telegraph Company in the city of Spokane, and, as occasion required, were connected with the system of the Inland Telephone Company and the telephones of its numerous subscribers in the city of Spokane; that, by reason of such contract, appellant had procured a large and lucrative business, which produced an income of many thousand dollars per month, and was rapidly increasing; that in June, 1899, the Inland Telephone Company terminated its contract with appellant and severed its lines from its office, rendering impossible any communication from appellant's lines to those of the Inland Company, and making communication impossible between the customers and patrons of appellant and persons having telephones in offices or residences in the city of Spokane; and that, to enable appellant to properly transact its business and give proper service to the public as a common carrier, it became necessary for appellant to establish an exchange at the city of Spokane. An alternative writ of mandamus was issued from the superior court. The respondent city appeared and demurred to the writ, and moved that the same be quashed. The demurrer was sustained.

Pertinent to the issues involved in the controversy are the following provisions of the constitution of Washington: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Article 1, § 12. "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers

and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." Article 12, § 19. Paragraph 7, § 739, Ballinger's Ann. Codes & St., vests cities of the first class, of which respondent is one, with power "to lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof." Section 4369, Id., provides: "Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires and any other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters; provided, that when the right of way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, any county, city or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law: provided further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

1. The issue involved is succinctly stated by counsel for appellant: "Has the city council the power to refuse the use of its streets to a corporation competent and qualified to erect a telephone exchange within the city?" Counsel have first addressed themselves to constitutional rights, and maintain that section 12, art. 1, of the constitution, supra, inhibits municipalities from granting exclusive franchises, and that, as such franchise has been granted to one telephone company by

the city, the refusal to grant another to appellant in fact constitutes the first grant an exclusive one; and well-considered authority is cited to sustain the principle that neither the city nor the legislature may grant exclusive privileges. Among them are Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 18; Attorney General v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262. The argument against the power to grant an exclusive privilege is sound, and is fully sustained in the rule announced by this court in North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773. But the question of the power to grant an exclusive privilege cannot arise here. If the city had attempted to grant such privileges to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. The city cannot by ordinance or contract disable itself to consent to the erection of telephone lines upon its streets. The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be devested without the sanction of the legislature. The legislature, within constitutional limitations, has sovereign control of the streets and highways of the state and the cities. The primary purpose for which highways and streets are established and maintained is for the convenience of public travel. The use of such highways and streets for water mains, gas pipes, telephone and telegraph lines is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of such ways. Cincinnati Inclined-Plane Ry. Co. v. City & Suburban Tel. Ass'n (Ohio) 27 N. E. 890; Hudson River Tel. Co. v. Watervliet Turnpike & R. Co. (N. Y.) 32 N. E. 148; Halsey v. Railway Co. (N. J. Ch.) 20 Atl. 859. It would seem that, within the fundamental limitations mentioned, the legislative control of ways and streets for the secondary use is absolute, and that the legislative discretion in this regard is not subject to judicial intervention. That the legislature may delegate to municipalities such powers and act through their instrumentality is unquestioned. 2 Dill. Mun. Corp. (3d Ed.) §§ 705, 724; Pacific R. Co. v. City of Leavenworth, 18 Fed. Cas. 953 (No. 10,649). The city streets are limited in dimension. It is apparent that the secondary uses of the streets are physically restricted. When such limit is approached or reached must be determined by some competent authority. The inconvenience, too, of the obstruction of the streets for any secondary uses, and also the breaking up of the solid surface, which is frequently of stone and other expensive material, all suggest the propriety of the control of such uses in the discretion of the municipality. It is further urged that section 19, art. 12, of the constitution declares the right of any corporation or individual to construct and maintain lines

of telegraph and telephone within the state, and that such lines are declared to be common carriers, and the right of eminent domain was extended to them. It may be observed that, in the absence of such constitutional provision, telegraph and telephone companies could derive such rights from the legislature, and it may also be seen that the same section imposes the duty on the legislature to provide by general law reasonable regulations to give effect to the section. The important feature of the section seems to be the duty imposed on the right of way of railroad corporations. The section of the constitution, however, is not self-operative, but requires the action of the legislature to give it effect. There is no prescription of rights referable to the roads, highways, and streets of the state. The obvious construction of this provision is that all such rights were left to the discretion of the legislature. The only right absolutely declared is to maintain lines of telegraph and telephone within the state.

2. It may be observed, then, that section 4369, Ballinger's Ann. Codes & St., is pursuant to the constitutional declaration upon the subject of telegraphs and telephones. The statute authorizes the construction and maintenance of all necessary lines of telegraph and telephone for public service along and upon any public road, street, or highway. But when the right of way has not been acquired by grant or donation from the United States or the state, or any county, city, or town, the right must be secured by the exercise of eminent domain; and it is further declared "that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon." The contention of counsel for appellant that the statute limits the authority of the city council to reasonable and proper regulations, and to prescribing the method in which telegraph and telephone companies shall construct and operate their lines, cannot be conceded. As has been seen, by another statute, the authority to regulate and of complete control of such lines has been given. The power to refuse is correlative with the power to consent, and such power is plainly authorized by the statute. The first clause of the section grants the easement along any public road, street, or highway, and across the right of way of any railroad corporation, in such manner as not to incommode the public use of the railway or highway. This provision reserves the necessary power of police regulation everywhere in the state, and it has been seen that the same power to regulate and control the use of the street was in apt terms conferred upon cities of the first class. The authorities cited by appellant in Inhabitants of Summit Tp. v. New York & N. J. Tel. Co. (N. J. Ch.) 41 Atl. 146, and Atlantic City Waterworks v. Consumers' Water Co. (N. J. Ch.) 15 Atl. 583, construe different grants of power and upon different states of fact from those

appearing in the case at bar and under our statute. In addition to the reasons suggested heretofore for imposing the powers and duties upon municipalities to control the streets, it is pertinent to refer to the long usage in this country for vesting such authority in municipalities. Such usage is historical, and is expressed in many statutes in the different states and in the mother country. The people of a municipality, who incur and pay the expenses for the construction and maintenance of their streets, and who largely use them, are usually most capable of exercising discretion in the secondary and subordinate purposes for which their streets shall be used. A recent case from the circuit court of appeals of the Fourth circuit court (Southern Bell Telephone & Telegraph Co. v. City of Richmond, 103 Fed. 31), in which the statute of the state of Virginia, upon the particular controversy involved is substantially the same as our statute, is very much in point here. Under the Virginia statute the power of the city council to withhold consent or attach any conditions thereto was fully sustained. The judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

CITY OF ZANESVILLE *v.* ZANESVILLE TELEPHONE & TELEGRAPH CO.*

(*Supreme Court of Ohio, Oct. 16, 1900.*)

[59 N. E. Rep. 109.]

Constitutional Law—Distribution of Powers of Government.

The distribution of the powers of government into three co-ordinate branches—executive, legislative, and judicial—is an essential feature of our system of constitutional government, and prohibits the confusion of these powers by conferring upon one branch powers that belong to another, unless necessarily incidental to the powers conferred by the constitution.

Same—Same—When Probate Courts May Exercise Administrative Functions.

The probate courts of the several counties of the state belong to its judicial department, and cannot be authorized to exercise powers that are legislative or administrative in character, except as the same may be incident to their judicial powers.

Same—Same—Unconstitutional Statute Requiring Court to Regulate Use of Street by Telephone Company.

Section 3461, Rev. St., requiring probate courts to direct the mode in which a telegraph or telephone company may use the streets and alleys of a city or village, when the municipal authorities and the company are unable to agree, is legislative, and not judicial, in character, and is therefore unconstitutional.

(Syllabus by the Court.)

Error to circuit court, Muskingum county.

Proceedings by the Zanesville Telephone & Telegraph Company against the city of Zanesville. A judgment of dis-

*For opinion on rehearing, see next case.

missal in the probate court was affirmed by the court of common pleas, which judgment was reversed by the circuit court, and defendant brings error. Judgment of circuit court reversed.

Charles G. Griffiths, City Sol., and Durban & McDermott, for plaintiff in error.

S. M. Winn and A. J. Andrews, for defendant in error.

MINSHALL, J. The question presented in this case concerns the constitutional validity of section 3461, Rev. St. The section reads as follows: "When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." The section as enacted related to telegraph companies, but was subsequently made applicable to telephone companies. Under favor of the section just quoted, the Zanesville Telephone & Telegraph Company commenced a proceeding in the probate court of the county, averring its corporate capacity and right to use the streets and alleys of the city in locating its line therein, and averring that the city had unreasonably failed to agree with it in regard to the use of its streets and alleys, and asking the court to take action under this section, and to fix the mode of use of all streets, etc., to be appropriated to the use of the company, subject to its easement therein. The matter was heard, but the court finally dismissed the petition on the ground that the power sought to be conferred on the court by this section is not judicial. The matter was taken on error to the court of common pleas, and the judgment was affirmed. It was then taken on error to the circuit court, where the judgment of the common pleas was reversed, and the cause remanded to the probate court for further proceedings. Error is prosecuted here to reverse the judgment of the latter court.

If the power conferred on the probate court by section 3461 is legislative or administrative, and not judicial, in character, it cannot be maintained that the section is a valid one. The distribution of the powers of government—legislative, executive, and judicial—among three co-ordinate branches, separate and independent of each other, is a fundamental feature of our

system of constitutional government. In the preservation of these distinctions is seen, by many able jurists, the preservation of all the rights, civil and political, of the individual, secured by our free form of government; and it is held that any encroachment by one upon the other is a step in the direction of arbitrary power. In Dash v. Van Kleeck, 7 Johns. 477, it is said by Kent, C. J.: "It is a well-settled axiom that the union of these two powers [the legislative and judicial] is tyranny. Theorists and practical statesmen concur in this opinion." See, further, 1 Bl. Comm. 269; Spirit of Laws, bk. 11, c. 6; Kilbourn v. Thompson, 103 U. S. 191, 26 L. Ed. 377. And the very fact that the powers of government are so distributed by the constitution is regarded as of itself a prohibition against the power of one department being conferred on another, though such express language is not found in the instrument. The probate court belongs to the judicial department of our state government, so that the question at once arises, what is the nature of the power conferred by this section on the probate courts of the several counties of the state? Is it judicial power? If not, the section cannot be supported as a valid one. The power conferred is invoked where any lands authorized to be appropriated to the use of a company are subject to the easement of a street, etc., within the limits of a city or village, and the mode of use cannot be agreed upon by the municipal authorities and the company, or the former unreasonably delay to enter into an agreement. In such case the probate court, in a proceeding instituted for the purpose, is required to direct in what mode such telegraph (or telephone) line shall be constructed in the streets, etc., of the city. It must be manifest that this section does not confer the right upon a company to use the streets of the city. It recognizes the fact that the streets and alleys belong to the city and are primarily within its control, and provides a mode by which the company may acquire the right to use the same,—first, by agreement with the city; and, if this cannot be obtained, then the probate court is empowered, in a proceeding commenced by the company, to direct the mode in which the streets may be used by the company.. We fail to perceive that any judicial power is here conferred on the court. It is either legislative or administrative,—most probably the former, in so far as it prescribes the mode of use; but neither of these powers is judicial in character. It is true that courts do exercise certain administrative powers. They may appoint receivers and master commissioners and some of their other officers, but these powers are only such as are properly incidental to their powers as a court. They have also at times been authorized to make appointments in other departments, and when they act their appointments have in some instances been sustained; but it has never been held that they could be compelled to make such appointments, for the reason that such appointments are not judicial in character. In this case the court is not required to hear and

determine a disputed right upon issues joined between the parties, and to apply the law to the facts as they are found. This is the essential and distinctive feature of judicial power. We quote in this connection the appropriate language of Judge Cooley: "That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is, in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of future cases falling under its provisions." Cooley, Const. Lim. 108. Further on he says: "An ordinance regulating a street is a legislative act beyond the control of the judicial power of the state." The supreme court of Connecticut, in Norwalk St. Ry. Co.'s Appeal, 69 Conn. 576, 38 Atl. 708, has recently passed on the question presented in this case. A statute of the state gave to a street-railway company the right to appeal to the superior court of the state when the municipal authorities failed for a limited time to exercise their powers to regulate the location and construction of street railways within their limits. The court held, in an elaborate and well-reasoned opinion, that "the power of regulating the location and operation of street railways given to the local municipal authorities by a statute of the state clearly falls without the limits of the judicial department. Nor can the exercise of such power become a judicial function merely because a statute of the state gives to the railway company a right of appeal to the superior court or any judge thereof when the municipal authorities fail to exercise their power within a limited time. Such appeal is not a process to invoke judicial power, but is merely an application to the court or judge, acting in the place or stead of the municipal authorities, to exercise a legislative function." See, also, the following cases: Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436; U. S. v. Ferreira, 13 How. 40, 14 L. Ed. 42; In re Application of Senate, 10 Minn. 78 (Gil. 56).

In the case before us the company presented an ordinance embodying a mode of use as it desired it; the city presented one on the same subject, but differing in its terms from that of the company; and, not being able to agree, the company filed its petition in the probate court. Consequently all the court could do would be to prescribe an ordinance for the city, regulating the mode in which the company might use its streets. It seems, then, too clear for argument that the power invoked is none other than the power, by ordinance, to regulate the use of the city's streets and alleys by the company,—a power primarily in the city, legislative in character, but lost to it and conferred on the probate court by its failure to act in a reasonable time. The judgment of the circuit court will be reversed, and that of the common pleas and probate courts will be affirmed, except that the judgment for costs in the latter court will be reversed. Norton v. McLeary, 8 Ohio St. 205. Judgment accordingly.

CITY OF ZANESVILLE *v.* ZANESVILLE TELEPHONE & TELEGRAPH CO.*

(Supreme Court of Ohio, Jan. 22, 1901.)

[59 N. E. Rep. 781.]

Constitutional Law—Distribution of Powers of Government.

The distribution of the powers of the state, by the constitution, to the legislative, executive, and judicial departments, operates, by implication, as an inhibition against the imposition upon either of those powers which distinctively belong to one of the other departments.

Same—Same—Effect of Statute Fixing Character of Powers as Judicial.

The fact that a power is conferred by statute on a court of justice, to be exercised by it in the first instance in a proceeding instituted therein, is, itself, of controlling importance as fixing the judicial character of the power, and is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department.

Due Process—Institution and Prosecution of Proceeding in Court—What Constitutes.

The institution and prosecution of a proceeding in a court comprehends the filing of a proper complaint, process for bringing in the proper parties, and a judicial inquiry according to established rules and practice.

Exercise of Judicial Function—What Constitutes.

Where the law confers a right, and authorizes an application to a court of justice for the enforcement of that right, the proceeding upon such application is the exercise of a judicial function, though the order or judgment authorized be of such a nature that it can only be performed, or its execution enforced, progressively during a future period.

Public Streets—Telephone Line in Streets—Right of City Holding Title to Streets to Recover for Additional Burden.

A municipal corporation, though holding the title to its streets, has no private proprietary interest in them which entitles it to compensation when they are subjected to an authorized additional public burden by the construction of a telephone line therein; but, being charged with the duty of keeping the streets under its control in repair, it may be allowed compensation to an amount sufficient to make the repairs rendered necessary by such additional use. It is not essential that provision be made for the assessment of such compensation by a jury.

Telephone Companies—Right of Companies Operating under General Statute to Construct Lines in City Streets.†

Telephone companies, organized under the laws of this state, have the right, by virtue of sections 3454, 3461-1, and 3471 of the Revised Statutes, to construct their lines along the streets and public ways of municipal corporations, in accordance with the order of the probate court made in pursuance of section 3461, directing in what mode the lines shall be so constructed, when the municipal authorities and the company fail to agree, or the former unreasonably delay to enter into an agreement with the company.

Constitutional Law—Distribution of Powers of Government.

The power to make such order, as provided in section 3461, is not inappropriately conferred on the probate court, and that court has complete jurisdiction of a proceeding instituted therein in conformity with that section. The provision is not obnoxious to the constitution

---

*For former opinion, see preceding case.

†See cross-reference note to State ex rel. Wisconsin Tel. Co. *v.* City of Sheboygan et al., 6 Mun. Corp. Cas. 685.

of the state, on the ground that the power it confers is distinctively legislative or administrative, but is constitutional and valid.

Shauck, C. J., and Minshall, J., dissenting.

(Syllabus by the Court.)

On rehearing. Judgment of reversal set aside, and judgment affirmed.

For former opinion, see 59 N. E. 109.

The Zanesville Telephone & Telegraph Company is a corporation organized under the Ohio statutes, and authorized, in the construction, operation, and maintenance of its lines, to use the public roads, streets, and ways within the state, and to appropriate such private property as may be necessary for its purposes. Desiring to construct and operate telephone lines in the city of Zanesville, the company made application to the city council in order that an agreement might be arrived at in regard to the mode of constructing its lines in the streets and alleys of the city. The application was accompanied with a proposed ordinance, the adoption of which was requested, providing that the location of the company's poles and wires should be under the control of the council's committee on streets and alleys, and be so placed as not to interfere with the public travel, and it contained provisions for protecting the city against damages arising from the construction and maintenance of the telephone lines. The council declined to accept the proposed agreement, and adopted an ordinance imposing different and more onerous conditions, among others one requiring the company's wires to be placed under ground. The provisions of this ordinance were not satisfactory to the company; and, the negotiations having resulted in a disagreement, the company made its application, in the form of a petition, amendment thereto, and supplemental petition, to the probate court of Muskingum county for an order, under section 3461 of the Revised Statutes, directing in what mode the company's line should be constructed along the streets and public ways of the city. The city was made a party, was served with process, and filed an answer alleging that the company "never offered nor tendered to the said city, or to the said city council, any lawful ordinance or agreement in relation to the matter set out in the petition, or offered or attempted to enter into any lawful agreement in relation thereto." The case was heard on the pleadings and evidence, on the 9th day of August, 1899, and at the conclusion of the trial, as the record shows, the court held that section 3461, under favor of which the proceeding was had, was unconstitutional, and on that ground dismissed the proceeding at the cost of the company. That judgment, and its affirmance by the court of common pleas, were reversed by the circuit court, and the cause remanded for further proceedings. The case is here to obtain the reversal of the circuit court.

Charles G. Griffith, City Sol., and Durbin & McDermott, for plaintiff in error.

J. W. Warrington, W. M. Ampt, and Ellis G. Kinkead also filed briefs, and argued against the constitutionality of the statute.

S. M. Winn and A. J. Andrews, for defendant in error.

Foraker, Outcalt, Granger & Prior also filed a brief, and argued in favor of the constitutionality of the statute.

WILLIAMS, J. The judgment of reversal announced after the first hearing of this case was not the unanimous decision of the court, although no dissent appeared. The case, having been more fully argued on the rehearing, and further considered by the court, is now for disposition as upon the original submission. The only question that has engaged the attention of counsel and the court on each of the hearings is whether that provision of section 3461 of the Revised Statutes which confers jurisdiction on the probate court to direct the mode of constructing a telegraph or telephone line in the streets of a municipality when its authorities and the company are unable to agree, is repugnant to the constitution of the state, and the sole ground of the attack upon the constitutionality of the provision alluded to is that the power it purports to confer on the court is purely legislative in character. It is a sound proposition that the distribution of the powers of the state, by the constitution, to the legislative, executive, and judicial departments, operates, by implication, as an inhibition against the imposition upon either of those powers which strictly belong to one of the other departments. But in classifying those powers, and determining to which class various powers created by statute exclusively or properly belong, difficulties are encountered, and many nice distinctions have been made. If the power here in question is such that it can be conferred on any judicial tribunal, there can be no doubt of the capacity of the probate court to receive and exercise it, by virtue of the constitutional provision which enables that court to take any jurisdiction, in any county, which the legislature may confer upon it. Section 8, art. 4. The statutory provisions which may aid in a determination of the nature of the power involved in this controversy are those contained in sections 3454, 3461–1, 3471, and sections 3456–3459, and 3461 of the Revised Statutes. These sections provide as follows:

"Sec. 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

"Sec. 3461–1. Any person or persons may be and are hereby authorized to construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways, and across any of the waters within the limits of this state, by the erection of the necessary fixtures, including

posts, piers, or abutments for sustaining the cords or wires of such lines: provided, that the same shall not in any instance be so constructed as to incommode the public in the use of said roads or highways, or endanger or injuriously interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this state."

"Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies."

"Sec. 3456. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its lines.

"Sec. 3457. No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or inclosure within which an edifice is situate, nor, in cases not provided for in section three thousand four hundred and sixty-one, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental trees."

"Sec. 3458. When lands sought to be appropriated for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to any other line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with the practical working of such telegraph.

"Sec. 3459. The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those

limits; when the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts showing that it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land; and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places as the court shall direct; but nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling-stock of any railroad company for the purpose of transporting poles, materials, or the employees of such telegraph company, or for any other purpose whatever."

"Sec. 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

It may be observed, at the outset, that the effect of section 3471 is to place telephone companies on the same footing as telegraph companies, so that when the latter kind of company is mentioned in the other sections of the statute the former is also included; and that, under sections 3454 and 3461-1, companies of either kind, when created, obtain from the state franchises to construct and maintain their lines, from point to point, upon and along any public road or highway, and across any of the waters, within the state, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for sustaining the cords or wires for such lines, subject only to the limitation that the lines shall not be so constructed as to incommode the public in the use of the roads and highways, or endanger or injuriously interrupt navigation. In order that such companies may fully enjoy the franchises thus granted them by the state, they are clothed, by section

3456, with the authority to appropriate any lands of individuals or corporations that are deemed necessary by the companies for the erection and maintenance of their poles, piers, abutments, wires, and other appliances, and the right of way over adjacent lands sufficient to enable them to construct and repair their lines. But this right of appropriation of private property for the use of such companies is subject to certain limitations prescribed in the subsequent sections, one of which, contained in section 3457, forbids the appropriation or use by such company, without the owner's consent, of any yard or inclosure within which an edifice is situated, or the erection of any pole or structure so near to any edifice as to occasion injury or risk of injury thereto, or so that it will injure or destroy any fruit or ornamental tree. Another limitation, which is contained in section 3458, restricts the right of the company, in the appropriation of lands held by another corporation, to such use of the same as will not in any material degree interfere with the practical use which the other corporation is authorized by its charter to make of such lands, and it forbids the construction of the company's line in such close proximity to another such line as to interfere, mechanically, with the practical working of the latter. By section 3459, a restriction is imposed on the right of appropriation of property held by railroad companies, to the effect that there shall not be taken for any permanent structure any part of the railroad right of way that lies more than five feet from its outer limits, where it is practicable to construct the telephone or telegraph line within those bounds, and, if it be claimed that is impracticable, the appropriation petition must state the facts showing it to be so. When the petition is controverted, the probate court is required, in all instances, to determine whether the line at the place proposed will, in any material degree, interfere with the practical uses which the railroad company is authorized to make of its right of way, and, if satisfied it will so interfere, the court is empowered to eject the petition, or to require the telephone poles or structures to be erected at such other place or places as the court may direct. It may be well to notice here the nature of the power conferred on the probate court by this provision of the statute; for it is obvious that it is not different in nature from the power conferred by section 3461. It is essential that the rights of the two corporations, each holding separate franchises from the state, with respect to the uses which each are claiming of the same property, should be so adjusted that both may be able to carry out the purposes of their creation, and neither defeated in their objects by the conduct of the other. To accomplish that result, some impartial tribunal must be clothed with the power to hear and determine, at the outset, what mode of use by each company of the same property will enable both companies to carry on their business without obstruction by the other. Where, it

may be asked, could that power be more appropriately lodged than in the tribunal in which the appropriation proceeding is had? And can it be any the less judicial in its nature because exercised by the court in the first instance than it would be if resort were had to a court of equity to settle the dispute, after actual conflict between the two companies had arisen? If it is a judicial function to direct where the poles of a telephone line shall be placed in order to prevent interference with the proper use of a railway, it must be equally so to direct the mode of construction of the line in other respects so as to accomplish the same result, or so as to avoid unnecessary obstruction to the use of a public street. It may be said that the proceeding under this provision of the statute does not involve the exercise of any supervisory or administrative power belonging to municipal authorities. Neither does that under section 3461. That section makes provision for all further appropriation proceedings that are necessary to the complete enjoyment by the companies of their franchises, by authorizing the condemnation of the easement appurtenant to property abutting in the public streets and ways, the owners of which are entitled to compensation for the new burden. And then follows the provision in question, designed, evidently, to furnish a competent tribunal, and provide a method of procedure, for the adjustment of any controversy between the company and the municipal authorities in regard to the mode of constructing the company's lines in the streets, the only remaining step necessary to enable the company to enter upon the full use of its franchises. The provision is that "the mode of use" of the streets "shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." This is practically a provision for an appropriation proceeding against the municipality, and it is the only proceeding of that nature that is necessary against the municipal body in order to enable the company to make the needed uses of its streets. It is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities or of determination by the court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the subject of agreement or

judicial determination. The power of eminent domain residing in the state, it has been held, under our present constitution, is committed to the control of the general assembly by the grant of legislative power, and it may be exercised by that body directly, or by agencies like private corporations, in such manner, under such conditions, and through such tribunals having capacity to receive the jurisdiction, as may be, by legislative enactment, provided; subject, however, to the constitutional requirement that the property taken be for a public use, and to the constitutional guaranty of compensation for private property so taken. A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden of a public nature. Lewis, Em. Dom. § 119. Being charged with a public duty only, with respect to the streets under its control, including that of keeping them in repair, the compensation it is allowed to demand or receive for the use of its streets by a telephone company is expressly limited, by the provision of the statute under consideration, to "what may be necessary to restore the pavement to its former state of usefulness," where it is disturbed it the construction of the company's lines. This compensation, not being for any private property taken, may, without interfering with any constitutional restraint, be assessed by the court without a jury. Nor can there be any doubt that the use of property and of highways for the legitimate purposes of a telephone or telegraph company is a public use, within the purview of the constitution, nor that the occupation of streets for those uses is consistent with their original design. Indeed, such companies have become indispensable business and social agencies, which materially relieve the public highways from use by the ordinary methods of travel, thus contributing to their convenience and safety. The statute contemplates that, if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by bona fide disagreement of the parties, a contingency not unlikely to occur; and hence the necessity for the provision of section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties. Whether that provision be considered as strictly a part of the system established for making appropriations by such companies under the power of eminent domain, or as incidental and auxiliary thereto, it calls for the exercise of judicial functions of the same general nature.

The contention of those who contest the constitutionality of this statutory provision is that the proceeding authorized by it, though not nominally so, is in reality an appeal from the ac-

tion of the municipal council, a purely legislative body, the purpose of which is to invoke the exercise of powers by the court of the same legislative character as those that have been exercised by, and properly pertain to, the council. This is an incorrect view of the statute. The proceeding is not an appeal from the council, either in substance or form. An appeal is the removal of a cause or matter from an inferior jurisdiction after its decision to a superior jurisdiction for retrial on its merits, and a proceeding in a superior jurisdiction cannot, with any propriety, be called an appeal where the cause or matter involved was not before any inferior tribunal or body. No action of the council, nor any matter within its cognizance, is brought before the probate court by the proceeding therein, under the statute, for review or reconsideration. The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of the municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company. The making of such agreement between the parties is not involved in the proceeding instituted in the court, nor is its action in that regard in any way invoked. The jurisdiction conferred on the court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys so as not to incommode the public in the use of the same. The method of calling this jurisdiction into exercise is not by appeal, and could not be so, for the reason already given, but, in the language of statute, is by an original "proceeding instituted for that purpose." The institution and prosecution of a legal proceeding in a court plainly comprehends the filing of a proper complaint, process for bringing the necessary parties into court, and judicial inquiry according to the usual rules and practice of courts. And this fact alone, of conferring on a judicial tribunal in the first instance the power to act in a given matter, is of controlling importance in giving judicial character to the nature of the power, though that is not necessarily a conclusive test, for, if it were, the existence of a statute would establish its validity; but it is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department. This court, in State v. Harmon, 31 Ohio St. 250, 259, approved of that principle, as stated by Selden, J., in Cooper's Case, 22 N. Y. 84, as follows: "The principle * * * obviously is that where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power. The legislature, by conferring any particular power upon a court, virtually declares that it

considers it a power which may .be most appropriately exercised under the modes and forms of judicial proceedings."

In this important feature, our statute is the opposite of the Connecticut statute, which was held unconstitutional by the supreme court of that state in Appeal of Norwalk St. Ry. Co. (decided July 13, 1897) 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, which is cited and chiefly relied on by the plaintiff in error to sustain its position with respect to the invalidity of our statute. The statutory provisions considered in that case are embraced in two sections, one of which was passed in 1893, and the other in 1895. The former (Pub. Acts 1893, c. 169, § 2) provides that when any street-railway company desires to lay its tracks, or any additional tracks, in the streets of any city, town, or borough, it shall make and submit a plan for laying its tracks, etc., to the mayor and common council of the city, the selectmen of the town, or warden or burgesses of the borough, who may adopt the same, or "make such modifications therein as they deem proper," and that "no such company shall construct such railway, or lay additional tracks" in the streets of such city, town, or borough, except in accordance with a plan approved by such local authorities. The section contains the further provision that "the refusal or neglect of any such local authority to notify said company of its decision (on the company's application, within a specified time) shall be deemed to be a refusal to approve and accept said plan as presented by said company." The section adopted in 1895 (Pub. Acts 1895, c. 283, § 1) provides that, when the local authorities named in the former section shall make or render any decision or order with respect to any matter relating to any street railway within their jurisdiction, the company may appeal therefrom to the superior court, or a judge thereof, "and said court or judge shall make such order, in reference to said matter appealed from, as may by it or him be deemed equitable in the premises." Then follows the further provision that, whenever the local authorities named in the act of 1893, above referred to, shall thereunder "be deemed to have refused to approve or accept any plan presented by any street railway company, said street railway company shall have a like right of appeal therefrom to said superior court or any judge thereof; and said court or judge shall have the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had under the provisions of said act, and may make all such orders with reference thereto as may be deemed equitable." Perhaps it may aid somewhat, in arriving at a clearer understanding of the decision in the Connecticut case referred to, to notice here that the act of 1895 provides for appeals in two distinct classes of cases, and that the powers conferred on the court or judge by the respective appeals are somewhat different. It first provides for appeals from any order or decision made or

rendered by the municipal authorities on the railway company's application, and the power conferred on the court or judge in that class of cases is simply to make such order in the matter so appealed from as the court or judge may deem equitable. Then it makes separate provision for appeals from the neglect or refusal of the municipal authorities to act upon the application of the railway company within the required time, and in cases of that kind it is provided that the court or judge "shall have the same powers that the municipal authorities would have had" under the statute of 1893. It is this last provision, and that alone, by which it was attempted to confer on the court or judge all the powers of the municipal council that, in the opinion of the supreme court of Connecticut, made the functions of the appellate court or judge so essentially and distinctively legislative as to render that provision invalid.

The other provisions of the statute, including that providing for appeals in the other class of cases,—that is, from orders and decisions made and rendered by the council, in regard to which, as above shown, the statute does not purport to confer on the appellate court or judge the powers of the council, but limits the jurisdiction to the making of such orders as shall be deemed equitable,—were held valid, and an appeal of that kind sustained, in Central Ry. & Electric Co.'s Appeal, 67 Conn. 197, 35 Atl. 32. This case was not overruled by the later case of Norwalk St. Ry. Co.'s Appeal, supra, but was distinguished. In that part of the opinion in the last case which distinguishes the former one, the provision of the statute for appeals from orders and decisions of the municipal council, and the power thereby conferred on the court or judge, are referred to as follows: "The act of 1895 provided, among other things, that an aggrieved person might appeal from an order made by a municipal council in pursuance of the act of 1893; that such appeal should be by petition to the court, which should specifically state the portion of the order appealed from, and the reasons, and be served on the council; and that such appeal should be tried by the court, and appropriate judgment rendered." Then the learned judge, after giving the reasons for sustaining that provision of the statute and the appeal taken under it in the former case, proceeds to state the difference in the provision in question authorizing appeals when there is a refusal of the council to act, and in the nature of the power it purports to confer on the appellate court or judge, as follows: "But the act of 1895 goes further, and contains an additional provision, which is not fairly susceptible of being construed as merely providing for a process to bring into action the judicial power of the court, and which, without any action by a municipal council other than a failure to act within a limited time, purports to transfer to the court all the powers conferred on municipal councils by the act of 1893. The distinction between the two provisions of the act is vital."

So that the real ground of that decision, holding invalid the statutory provision there in question, is that its purpose was to transfer to the appellate tribunal, to be exercised by it, all the legislative and administrative powers of the municipal council over the subject-matter of the appeal. That principle has no application to our statute; for, as has been heretofore shown, the proceeding authorized by it is in no sense a substitution of the court for the municipal council, nor in the nature of an appeal from that body, nor does it transfer to the court, to be exercised by it, any power primarily conferred on that body, nor purport to do so. And, furthermore, whether the distinction made in the Connecticut case between the different provisions of the statute there considered be substantial or not, it is clear the proceeding under each provision is strictly an "appeal," in the appropriate sense of that term, from a legislative body, on matters originally committed to it, which, of itself, is a feature of controlling influence in fixing the legislative character of the power conferred, and which is wholly lacking in our statute.

The reasonable limits of an opinion, already enlarged, will not permit a review of all the cases cited by counsel for the plaintiff in error. We have carefully examined them all, and find none of them more directly in point than the one just noticed, and none, we believe, is claimed to be so. "It is certainly clear as a general rule," says Selden, J., in Cooper's Case, supra, "that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." It is competent for the state, through its legislative department, to grant to telephone and telegraph companies organized under its authority the right to construct their lines in the streets of municipalities, and in the present instance the grant was so made. The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for that purpose practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 of the Revised Statutes. The administration of that remedy does not involve the exercise of any continuing supervisory powers over the municipal or telephone corporation, nor the adoption or execution of administrative regulations for the government of either, but consists of an order made by the court in the usual manner of legal proceedings, after a hearing of the allegations and evidence of parties who are brought before the court by proper process.

It is necessary, no doubt, to specify in the order, with reasonable certainty, the mode of construction of the company's lines, so that they will not incommode the public in the use of the streets; and it is true that an order of that nature can only be performed, or its execution enforced, in the future. But, while orders of that description may be infrequent, they

are not unknown to the courts. In Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518, 626, 14 L. Ed. 249, the court, after the examination of plans submitted, and the hearing of expert and other evidence, entered its order directing the defendant to so change the construction of its bridge over the Ohio river, according to certain detailed plans and specifications therein set forth, as not to obstruct the navigation of the river. And other instances of like orders and decrees of courts may be found in the books. The case of Canada Northern Ry. v. International Bridge Co. (D. C.) 7 Fed. 653, was a proceeding in a federal court under an act of congress which "authorized the construction and maintenance of a bridge across the Niagara river by the International Bridge Company, and provided that 'all railway companies desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the appurtenances thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the Northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree.' The Canada Southern Railway Company subsequently presented their petition under this act to the district court of the United States for the Northern district of New York, and, alleging that it had never been able to agree with the International Bridge Company upon the amount of compensation which it should pay for the use of such bridge, prayed the court to determine and prescribe the terms and conditions upon which it might use the said bridge, together with the machinery, fixtures, and approaches." The jurisdiction of the court was called in question on the ground that the power which the statute attempted to confer on the court was legislative, and not judicial. But the court held that "a determination by a court, under the authority of a statutory enactment, in a case of disagreement, of the terms and conditions upon which a railway company should be entitled to the use of a bridge and its appurtenances, after hearing the allegations and proofs of the parties, is not an improper exercise of the judicial functions; that it is no less the exercise of a judicial function to prescribe a rule of conduct, or protect the exercise of a right during a future period, than it is to determine whether the right has been invaded in the past; and that when a statute refers the question of the conditions upon which an easement shall be enjoyed to a judicial tribunal for decision, after hearing the proofs and allegations of the parties, the implication is cogent that the decision shall proceed upon settled principles of law and equity, and not upon arbitrary discretion."

The necessity for the existence of some tribunal authorized to hear and determine disagreements between municipalities and telephone companies with respect to the mode of construction of the companies' lines in the public streets is apparent, not

only for the protection of the rights of the respective corporations, but also in the public interest, as conservative of peace and good order, and in securing to the public the full benefit of the service such companies are designed to afford, at those reasonable rates which always attend fair competition, and the best consideration we have been able to give this case has failed to satisfy us that the power conferred on the probate court by the statutory provision in question has been inappropriately bestowed. The argument to the contrary, thorough and able as it has been, at most has served to cast a doubt upon the validity of the provision, but that is not enough to justify the court in holding it unconstitutional. The judgment is therefore affirmed.

BURKET, SPEAR, and DAVIS, JJ., concur.
SHAUCK, C. J., and MINSHALL, J. dissent.

LOUISVILLE HOME TEL. CO. *v.* CUMBERLAND TELEPHONE & TELEGRAPH CO.

(*Circuit Court of Appeals, Sixth Circuit, November 6, 1901.*)

[111 Fed. Rep. 663.]

Appeal—Review—Order Granting Preliminary Injunction.

An order granting or refusing a preliminary injunction will not be reversed on appeal, unless the lower court has manifestly fallen into some mistake of law or fact material to its decision.

Telephones—Rights in Streets*—Priority of Occupation.

While the prior occupancy by a telephone company of space in a street for its poles and wires under a franchise granted for such purpose will entitle it to the continued enjoyment thereof, without substantial impairment, so long as it continues to perform its obligations, its right to such space is not absolutely exclusive, but is subject to the right of another company to enjoy a like privilege therein granted under power reserved by the municipality, provided there is no unreasonable or unnecessary interference with the operation of its own line, and it will suffer no serious injury therefrom.

Same.

A telephone company constructed its line in the streets of a city under a franchise granted therefor which expressly reserved the right to the city to grant similar rights to other companies. Thereafter a franchise was granted to a second company, which was required to construct its line under the directions of the board of public works, and such board required its line on certain streets to be placed on the same side and over the same space occupied by the first company. The poles were planted in line with those of the first company, but were extended 25 feet higher, with the cross arms 20 feet above those of the old line: *held*, that there was no such substantial interference with the rights of the first company, or serious injury threatened to

*Rights of telegraph and telephone companies to use of streets, see note to Southern Bell Telephone & Telegraph Co. *v.* City of Richmond, 44 C. C. A. 155; cross-reference note to State ex rel. Wisconsin Tel. Co. *v.* City of Sheboygan, 6 Mun. Corp. Cas. 685; State ex rel. Spokane & B. C. Telephone & Telegraph Co. *v.* City of Spokane et al., ante, p. 20.

the operation of its line, as entitled it to a preliminary injunction to prevent the placing of wires on the poles of the second company and their use pending the trial of a suit for a permanent injunction.

Same—Power of City to Designate Location.

It is within the power of a city to designate on what part of its streets a telephone company shall construct its line, and the exercise of such power is presumptively valid, and cannot be interfered with by the courts, unless shown to have been arbitrary and unreasonable.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

This is an appeal from an order of the circuit court granting a preliminary injunction in a suit in equity brought by the Cumberland Telephone & Telegraph Company against the Louisville Home Telephone Company for the purpose of restraining the latter company from erecting or maintaining telephone poles and wires along the south side of Park avenue and the north side of Hill street, in the city of Louisville, within the limits of the space occupied by the complainant. 110 Fed. 593. The bill alleged that the complainant (who is here the appellee) was a consolidated company, the constituents of which were the Ohio Valley Telephone Company, a local company at Louisville, and another company bearing the same name as that assumed by the consolidated company. This last-named constituent was doing business in the state at large outside of the city of Louisville. The Ohio Valley Telephone Company was incorporated by an act of the legislature of Kentucky approved April 3, 1886. By the fifth section of the act it was provided that "the said company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the general council of said city; and it may purchase or lease from any corporation created under the laws of this commonwealth, on such terms as may be agreed on, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents or interests therein, equipments, rights of way, easements and servitudes, in the highways, streets and alleys in the city of Louisville, together with all of its properties, and when purchased or leased shall have the power to maintain and operate the same along, over or under the highways, streets and alleys of the city of Louisville: provided, however, that such telephone poles, lines and systems have heretofore been granted the right of way or easements in the highways, streets and alleys in the said city of Louisville by the general council thereof. And the said company may also construct, equip and maintain telephone lines along, over or under the highways, streets and alleys, and across any water course within this commonwealth, so as not to obstruct the same, and said company may connect its lines with those of any other company on such terms as may be agreed on." 1 Acts 1885–86, p. 1175.

On the 17th of August the common council of the city passed an ordinance, which, after reciting the preceding fifth section of the act of the legislature, proceeded as follows: "Therefore be it ordained that the said act, in so far as it refers to constructing, equipping, operating, and maintaining telephone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating, and maintaining conduits and manholes; to laying pipes, cables, conductors, and wires, and operating telephone wires over, along, or under the highways, streets, and alleys in the city of Louisville, is hereby ratified and confirmed, and the right is hereby granted and confirmed to the said the Ohio Valley Telephone Company, its successors and assigns, to construct, equip, operate, and maintain telephone systems, and construct, operate, and maintain conduits and manholes, to lay pipes, cables, conductors, and wires, and operate its telephone lines over, along, or under any street, avenue, alley, or sidewalk in the city of Louisville." The ordinance contained this further provision: "Nothing in this ordinance shall be so construed as to give to the said telephone company, its successors or assigns, any exclusive right to erect poles, or to lay underground conduits, pipes, cables, conductors, or wires, in the streets, avenues, alleys, or sidewalks of the city of Louisville." And by the ninth paragraph of the ordinance it was ordained: "That within thirty days from the passage of this ordinance the said the Ohio Valley Telephone Company, its successors and assigns, shall formally agree, in writing, to accept the terms of the provisions of this ordinance, and file the said written copy of said agreement, and also the aforementioned bond, with the mayor of the city of Louisville, and from and after the date of said acceptance this said accepted ordinance shall take effect and be in force as a contract between the said city of Louisville and the said the Ohio Valley Telephone Company." The provisions of the ordinance were accepted by the company, and it proceeded to construct, and thereafter maintain, a telephone system in the streets of Louisville until June 27, 1900, when it was consolidated under the constitution and laws of Kentucky with the Cumberland Telephone & Telegraph Company, as above stated. Since that time the consolidated company has continued to maintain and operate the telephone system in the city under the power granted to the Ohio Valley Telephone Company and devolved upon the consolidated company by operation of law. Among the sets of lines so constructed and operated was one on the south side of Park avenue, extending from Sixth street to the alley between Fifth and Fourth streets, and another on the north side of Hill street, extending from Sixth street to the alley between Fifth and Fourth streets, upon each of which lines poles and cross arms had been erected and numerous wires were strung.

Some time in 1900 the Louisville Home Telephone Com-

pany was incorporated under the laws of Delaware, and on November 5th of that year the common council of the city of Louisville passed an ordinance, entitled "An ordinance to provide for the sale of the franchise or privilege to construct, establish, maintain, and operate a telephone system in the city of Louisville," and containing the following provisions:

"Section 1. That there shall be sold to the highest and best bidder for a term of twenty years the franchise or privilege to construct, establish, maintain, and to operate a telephone system for public and private use in the city of Louisville, including the necessary conduits, subways, manholes, wires, poles, and other equipments, and also the right of way over, along, under, through, and in the streets, avenues, alleys, lanes, parks, squares, bridges, and other public places in said city, for the purpose of running the subways, manholes, poles, wires, and other equipments necessary to construct, establish, maintain, and operate said telephone system in the city of Louisville in accordance with the conditions, terms, and limitations of this ordinance."

"Sec. 5. That any person, firm, or corporation owning or exercising such franchise or privilege may assign or transfer the same, but it shall not be assigned or transferred directly or indirectly, in whole or in part, or for the benefit of the owner or owners of any competing telephone system operating in the city of Louisville.

"Sec. 6. That the said telephone system shall be located and constructed in the public ways and places in the city of Louisville under the supervision of the board of public works."

"Sec. 14. That the franchise or privilege herein provided for shall not be construed as being in any way exclusive, or as preventing the general council of the city of Louisville from providing for the sale of similar franchises or privileges to other persons, companies, or corporations."

The Home Company became the purchaser at the sale of the franchise for the price of $10,000. Desiring to construct lines, each of several squares in length, along Park avenue and Hill street, upon some portion of which the other company had, as above stated, already constructed its lines, the Home Company made application to the board of public works to locate its line in those streets. By resolutions of the board, duly passed, the Home Company was permitted to construct its pole routes along the north side of Hill street and the south side of Park avenue. That company proceeded to erect its poles accordingly, and in that portion of those streets which was already occupied by the other company, set its poles in the same line with those of the other company and run them up between the wires, 25 feet higher than those of the other company. The reasons which induced the location of the Home Company's poles and lines on the same route with that of the other company on this portion of the streets

appear to have been mainly these: The only feasible place for setting the poles is by the side of the street at the curbstones. On the south side of Hill street that place was already occupied by the poles and wires of an electric light line, which, on account of the greater voltage required in that service, rendered the proximity of telephone wires not only dangerous to the system itself, but to the lives of those employed about them. On the south side of Park avenue there were no residences. The other company was located there, and for a distance of two or three poles there was an electric light line. On the north side of the avenue there were no electric lines, but the territory north of the street was filled with residences, and fine shade trees were standing by the side of the street, which would have to be mutilated if electric wires of any kind were strung there. Other reasons are suggested for the determination of the board of public works, but in the view taken of the case by the court here it is not necessary to detail them. The Home Company having erected its poles and cross arms for the wires, the Cumberland Company filed this bill, alleging that by reason of the prior location of its poles, cross arms, and wires, which covered a width of 8 feet, it was entitled to retain that space free from interruption; that, although the Home Company proposed to carry its poles 25 feet higher than its own, and string its wires some 20 feet or so higher than its own, such construction would be injurious to its rights, for the reasons that by the breakage of wires, which frequently happens, the lines above would fall down upon its wires and disturb its operations; that the poles would abrade its wires and cables and destroy their insulation; that its workmen would be imperiled while making additions or repairs, and that it intended to extend its own lines upward and would require the space above.

Affidavits were filed in support of the averments of the bill, and upon these (the bill and affidavits) the motion for a preliminary injunction was brought on. The Home Company filed affidavits controverting the grounds on which substantial injury would be likely to result to the complainant from the intended construction, offering to provide means for insulating complainant's wires and cables from the structures of the Home Company, and averring that it had tendered the choice of location for the wires, whether above or below, to the complainant, which offer had been rejected. Upon the hearing, the court made the following order, granting the injunction prayed: "In consideration thereof it is now adjudged and decreed that until the further order of court it [defendant] be, and it is, restrained and enjoined from erecting or maintaining any poles or cross arms, or stringing any wires thereon, any of which shall encroach on a space of the breadth of 8½ feet, which space is the line of telephone poles of complainant on the south side of Park avenue between Sixth street and the first alley west of *Fourth street*, and the north

side of Hill street from Sixth street west [east?] to the first alley west of Fourth street." From this order the defendant appeals.

Helm Bruce, for appellant.

David W. Fairleigh, for appellee.

Before DAY and SEVERENS, Circuit Judges, and THOMPSON, District Judge.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

This being an appeal from an interlocutory injunction, we are required, in making our determination, to recognize the rule, which we have announced and applied in several previous cases, that we should not disturb the order unless the lower court has manifestly fallen into some mistake of law or fact material to its decision. Garrett v. T. H. Garrett & Co., 24 C. C. A. 173, 78 Fed. 472; Proctor & Gamble Co. v. Globe Refining Co., 34 C. C. A. 405, 92 Fed. 357; Thomas G. Plant Co. v. May Co., 44 C. C. A. 534, 105 Fed. 375, 379. The circuit court appears to have accepted as correct the contention of the complainant that, by its prior occupation of the space which it occupies by erecting its poles, cross arms, and wires over a width of 8 feet and at the height of 25 feet, it acquired an exclusive right to occupy that width of space from the ground upward without limitation, and this without any intrusion by another party; for the order must be construed by reference to the fact that the intrusion which the defendant was charged with intending to make when the injunction was moved for was that of stringing its wires above and out of contact with the structures of the complainant. In this the court misconceived the nature and extent of the right of the complainant. It may properly be conceded that its prior occupation of space under the franchise granted by the statute and ordinance would entitle it to the continued enjoyment thereof, so long as it continued to perform its obligations, without substantial impairment. But its right is not absolutely exclusive. It is subject to such incidents as result from the exercise of the rights of other parties who have acquired a valid franchise of similar character. It is implied in such grants as were here made to the first company that the grant is subject to such limitations as will enable another company to enjoy a like franchise, and no property right is invaded by the adoption of such measures by the second company as will enable it to exercise its privilege, provided there is no unreasonable and unnecessary invasion of the operations of the first occupant. For the property right of the first is not to a monopoly. It is bound to exercise its privilege in such a way as to give room to another coming in under the power reserved. In the present case the common council of the city expressly reserved the authority to grant to others, if it should deem it for the public interest, the same privileges in

its streets as it granted to the complainant. Its determination that it was expedient to grant the Home Company the same privilege it had granted to the Ohio Valley Company cannot be again said, and the old company is bound to recognize the newcomer and grant all reasonable accommodation. Upon principle it may be doubted whether the first company could block the way in any of the streets so as to prevent the possible exercise of the power reserved to the common council.

It is not intended, of course, to say that the first occupant may be despoiled, or the substance of its right appropriated. But this does not happen from merely giving place to a rival company, whose presence was expressly stipulated for by the contract, nor, probably, if the presence of the new party was the result of the exercise of a power reserved by implication in such a grant of privileges. The distinction between the actual invasion of the property of a former licensee engaged in supplying public utilities and those incidental consequences which result from the authorized exercise of the privileges granted to a subsequent licensee for similar purposes was pointed out in an elaborate opinion by Judge Brown, now a justice of the supreme court, in Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544, where the authorities are collated.

Mere inconvenience will not afford ground for complaint. The injury must be grave and unwarranted by the requirements necessary to such further exercise of the municipal authority in that direction as may be deemed expedient. The evidence in the record leaves no doubt whatever in our minds that the inconveniences likely to be suffered by the Cumberland Company in consequence of the proposed construction by the Home Company are comparatively trivial. The affidavits of experts and practical men show that the practice of constructing a system of lines by one company above the lines of another is very common in many cities which are enumerated, especially where both are telephone systems, and no substantial inconvenience has been found to result. The city at all times has the power of regulation. It may not be arbitrarily exercised, but within reasonable bounds the city authority may rightfully designate in what manner the public interests require public services to be rendered, to the extent, at least, of determining in what part of a street the facilities shall be located, and presumptively this exercise of the police power is valid. Its right to do this was not surrendered by the city when it made the grant of the franchise to the Ohio Valley Company. The power in this instance was delegated to the board of public works, and there is an entire lack of proof that the board acted arbitrarily, or without due regard to the rights acquired by the Cumberland Company. Com. v. City of Boston, 97 Mass. 555; Chicago, St. L. & N. O. R. Co. v. Louisville & N. R. Co. (Ky.) 58 S. W. 799; Gay v.

Telegraph Co., 12 Mo. App. 485; Michigan Tel. Co. v. City of Charlotte (C. C.) 93 Fed. 11, and the authorities there cited. Besides, it follows from the conditions we have noted that there was no grave danger to be apprehended at the time this bill was filed. The poles of the Home Company had been already erected and the cross arms put on. No action appears to have been taken until after this was done. There appears no such impending danger of injury to the complainant from the stringing and maintenance of the wires pending the suit as would justify the interference of the court before the final hearing and anticipating the entire purpose of the bill. Blount v. Societe Anonyme du Filtre, etc., 3 C. C. A. 455, 53 Fed. 98 (per Jackson, J.).

The order granting the preliminary injunction must be reversed, with costs.

PATTEN *et al. v.* MAYOR, ETC., OF CITY OF CHATTANOOGA *et al.*

(*Supreme Court of Tennessee, Nov. 23, 1901.*)

[65 S. W. Rep. 414.]

Telephone Companies*—Bill to Set Aside Ordinance Granting Exclusive Franchise—Necessary Interest of Parties.

Where a bill brought by private citizens to have a city ordinance granting a telegraph, telephone, and electrical exchange franchise decreed void does not show that complainants will suffer any injury not common to the body of the citizens, they have no such interest in the subject-matter as gives them a status to call on the court to determine the validity of the ordinance.

Same—Same—Who May Question Validity of Exclusive Grant.

Where a city ordinance grants an exclusive franchise to construct and operate a telegraph, telephone, and electrical exchange in the city, the validity of such exclusive grant, and authority of the city to grant such exclusive right, can be called in question only by one claiming the right to do something contrary to such exclusive feature.

Same—Validity of Exclusive Franchise Not Affected by Fact That It Imposes Additional Burden on Street.

The validity of an ordinance granting the right to construct and operate telegraph and telephone lines along the streets of a city is not affected by the fact that the exercise of such right may impose an additional burden on the fee of the streets, as, if such burden is imposed, the persons exercising the franchise may be required to pay damages therefor.

Appeal from chancery court, Hamilton county; Walter S. Bearden, Chancellor.

Action by Z. C. Patten and 18 other citizens of Chattanooga, purporting to be for themselves and all other taxpayers, voters, and property owners thereof, against the mayor and aldermen and city of Chattanooga and others, to have an ordinance declared void which granted the right to certain persons to

*Rights of telephone and telegraph companies in streets, see cross references to State ex rel. Wisconsin Tel. Co. *v.* City of Sheboygan et al., 6 Mun. Corp. Cas. 685.

establish and maintain a telephone, telegraph, and electrical exchange in such city. From a decree of the court of chancery appeals affirming the decree of the chancellor holding the ordinance void, defendants appeal. Reversed.

E. S. Daniels, W. T. Murray, Shepherd & Frierson, and G. B. Murray, for appellants.

Cook, Swaney & Cooke, Pritchard & Sizer, Thomas & Thomas, C. R. Evans, and A. W. Gaines, for appellees.

SNODGRASS, C. J. On the 20th of November, 1900, the board of aldermen of the city of Chattanooga passed the following ordinance:

"An ordinance granting T. S. Wilcox and associates the right to establish an electrical plant in the city of Chattanooga; to put up and maintain a telephone, telegraph and electrical exchange; to erect poles, wires, cables and all necessary devices, appliances and constructions, including the privileges of constructing underground conduits and erecting, running and maintaining underground wires; together with all necessary devices and appliances for the conduct of a general telephone, telegraph and electrical plant in the city of Chattanooga.

"Section 1. Be it ordained by the mayor & aldermen of the city of Chattanooga, Tenn., that the right is hereby granted to T. S. Wilcox and his associates, successors and assigns, for the term of twenty-one years, to erect, construct and build an electrical plant in the city of Chattanooga; to put in and maintain a telephone, telegraph and electrical exchange, the right to use the streets, alleys, roads, lanes, ways and courts of Chattanooga; to erect telephone and telegraph poles, wires, cables and all necessary devices, appliances, constructions, including underground conduits, and all necessary things and constructions to operate telephone, telegraph and electrical communications and devices; to establish and maintain telephone, telegraph and electrical exchanges; to carry on, operate and control telegraph, telephone and all manner of electrical communication. And the right is hereby granted them to place their wires above or under ground so as to enable them in the most convenient and suitable manner to conduct their said electrical communications. But it is hereby understood that the right to erect poles, structures, conduits, and other appliances of the said T. S. Wilcox, his associates, successors, and assigns, herein permitted to be constructed in the streets, roads, alleys, lanes, courts, and other highways of the city of Chattanooga, is herein granted upon the distinct understanding that the same are to be so placed and put that no unnecessary and improper obstructions to the streets and ways of said city shall occur therefrom.

"Sec. 2. Be it further ordained that the city of Chattanooga shall have the right to use the poles set in the streets, for fire alarms, free and without compensation; that all poles, sub-

ways and conduits are to be located under the direction of the city engineer, and such poles shall be sufficiently high as to in no way interfere with the business of the streets on which the same are located. The city reserves the right to regulate this privilege from time to time as the city may increase in population or necessity demands.

"Sec. 3. Be it further ordained, that the sole right to construct, provide, build, establish and maintain underground conduits or subways in which to plant, carry or hang electrical wires, and all other appliances, and to conduct pipes for water, oil or gas, is hereby granted to the said T. S. Wilcox and his associates, their successors and assigns, for the term of twenty-one years, with the distinct understanding that the said T. S. Wilcox and his associates, their successors and assigns, shall make such subways or underground conduits, as aforesaid, ample at all times, either by original construction or by subsequent enlargement or extension, at the demand of the municipal authorities, after sufficient notice, to accommodate the wires of all companies that may be required or desired to be put under ground of a like voltage with the wires of the said T. S. Wilcox and associates, and all pipes and other things needed to be so carried, provided, that the same will not interfere with the purposes for which the conduit is intended, and that all owners of such wires, cables and other electrical conductors and transmitting devices within the city of Chattanooga as shall be so required or desired to be conducted over, through and under said highways, or any such apparatus, underground subways or conduits, as aforesaid, shall pay for the use of such subways and other devices belonging to the said T. S. Wilcox and his associates, their successors and assigns, a reasonable rental per annum, the same to be mutually agreed upon by the parties thereto interested; and in case of disagreement as to said rental, an arbitration may be required by either party thereto, and shall be heard by three disinterested persons, one to be chosen by said T. S. Wilcox and associates, their successors and assigns, one by the person or company whose wires are to be placed in said conduits or underground ways, and one by the board of mayor & aldermen of the city of Chattanooga, for and in behalf of the city. The findings of the said board of arbitration shall be final as to all parties.

"Sec. 4. Be it further ordained that in consideration of this franchise, the said T. S. Wilcox and associates, their successors and assigns, will furnish the city of Chattanooga, twelve telephones free, and to the county buildings inside the city limit eight telephones free for the use of such buildings. And the said T. S. Wilcox and associates, their successors and assigns, agree to pay the city 1 per cent. of the gross receipts derived from the business within the city limits of Chattanooga, Tenn., for the first fifteen years after it begins operation, and thereafter 12 per cent. of such gross receipts.

"Sec. 5. Be it further ordained, that this franchise is granted upon the express stipulation and agreement upon the part of the said T. S. Wilcox and associates, their successors and assigns, that the telephone service shall be metallic circuits, and that all instruments used shall be of the long-distance, solid-black type.

"Sec. 6. Be it further ordained, that this franchise is granted to the said T. S. Wilcox and associates, their successors and assigns, with the distinct understanding that it is not in any way to interfere with any franchise heretofore granted or any of the vested rights of any individual or corporation under such franchise.

"Sec. 7. Be it further ordained, that the city of Chattanooga, Tenn., hereby reserves the right at any time to purchase of the said T. S. Wilcox and associates, their successors and assigns, any and all conduits constructed under the provisions, and in consideration of the rights and franchises herein granted, the purchase price to be agreed upon by and between the parties; and in case they fail to agree, the price is to be fixed by arbitration, said T. S. Wilcox and associates, their successors and assigns, are to select one arbitrator, the board of mayor & aldermen to select one, and the two so selected to select the third; the award of the said arbitrators to be final and binding upon the parties. And after the award has been made, the said T. S. Wilcox and associates, their successors and assigns, will in compliance with the award, turn over and deliver to the city such conduits when the city upon its part complies with the award.

"Sec. 8. Be it further ordained that this ordinance take effect from and after its passage, the public welfare requiring it."

Its passage aroused antagonism, and a number of citizens petitioned the mayor to veto it. These petitioners pointed out five objections to the ordinance: (1) Omission of usual provisions fixing maximum rate for telephone service; (2) omission of requirement as to when work on telephone system should begin, and when same should be completed; (3) omission of requirement to restore pavements and streets; (4) omission to prohibit sale to, or consolidation with, old telephone company; (5) that the exclusive feature with respect to the conduit system is unnecessary and dangerous. The mayor thereupon asked the city attorney for an opinion as to what safeguards were necessary to properly protect the city's interests. The latter replied, suggesting provisions covering the very five objections specified in the citizens' petition. The mayor vetoed the ordinance in a lengthy message. He based his veto on the five objections already stated, and assigned the additional reasons: (1) That the ordinance granted more than one franchise, which he deemed unwise; (2) that the plan of arbitration provided was defective, in that it gave the power to the grantees to prevent an *arbitration*. He specified his

objections to the exclusive feature as to conduits as follows: (1) That the ordinance granted the exclusive right to build conduits, lay wires, etc., under the streets, and that therefore no person or company hereafter required or desiring to lay wires or other appliances underground could do so, but such person or company would be forced to use the conduits of Wilcox and associates; (2) that, if the city should desire to build waterworks, it could not use the streets for that purpose, but must deal with Wilcox and associates. On December 4, 1900, the ordinance was passed over the mayor's veto by a vote of 13 to 3. Upon taking the vote, one of the aldermen presented and read the following written explanation, which was signed by 12 of the 13 aldermen voting with him, viz.: "The undersigned aldermen respectfully submit the following explanation of their votes to pass over the mayor's veto an ordinance entitled 'An ordinance granting T. S. Wilcox and associates,' etc., passed by the board November 20, 1900, viz.: We voted for said ordinance because we believed the public welfare would be best served by permitting the organization and operation in Chattanooga of another telephone company, and the building of the underground conduits or subways for wires, pipes, etc. We are still of this opinion, and believe that is also the opinion of a large majority of the people of Chattanooga. But we have become convinced that there should be some further restrictions placed upon the franchises granted by said ordinance. T. S. Wilcox and associates have agreed in writing to accept the franchises subject to these restrictions and limitations, which we believe will fully protect the interests of the city, and make it desirable that the franchise be granted. An ordinance has been prepared carrying this into effect. We will present this ordinance, and ask that it be passed on three readings at the present meeting, under suspension of the rules. Believing that this relieves the franchise granted of any objectionable or unwise feature, we shall vote to pass the ordinance over the mayor's veto. We ask that this paper be spread upon the minutes as a part of the proceedings of this board," which was done. Thereupon the following amendatory ordinance, with its recitation of tender of acceptance by Wilcox and associates, was introduced and passed at same meeting:

"An ordinance to amend Ordinance No. 1133, page 432, Book E, passed Nov. 20, 1900, and passed over the mayor's veto Dec. 4, 1900, and entitled 'An ordinance granting T. S. Wilcox and associates,' etc., and to add to the contract evidenced by said ordinance certain restrictions and limitations, based upon the written stipulation and agreement of the grantees of the privileges granted under said ordinance.

"Whereas, on Nov. 20, 1900, an ordinance was passed by this board entitled 'An ordinance granting to T. S. Wilcox and associates, etc.,' and said ordinance has been on Dec. 4,

1900, passed over the mayor's veto; but whereas, prior to the passage of said ordinance over the mayor's veto, said T. S. Wilcox and associates entered into and signed the following agreement, further fixing the terms and conditions upon which the rights, privileges and franchises granted by said ordinance shall be exercised and enjoyed by them, to-wit: 'Whereas on Nov. 20, 1900, an ordinance was passed by the board of mayor & aldermen of Chattanooga, entitled "An ordinance granting T. S. Wilcox and associates," etc.; and whereas said ordinance has been vetoed by Mayor Joseph Wassman, and is now pending for consideration and passage over said mayor's veto: Now, therefore, we, T. S. Wilcox and associates, for ourselves and for our successors and assigns, in consideration of the rights, privileges and franchises, which will be granted to us, our successors and assigns, in event said ordinance finally passes over said mayor's veto, hereby agree and expressly stipulate as follows: (1) The maximum rate to be charged for telephones shall not exceed $36 per year for business telephones, and shall not exceed $24 per year for residence telephones. (2) The actual work of constructing a new telephone system shall begin within twelve months after the date of the passage of the said ordinance over the mayor's veto, and a new telephone exchange capable of accommodating at least 1,000 subscribers shall be ready for operation within two years after the passage of the said ordinance. A failure to comply with either of these requirements, as to beginning work and putting exchange in operation as aforesaid, within the time stipulated, shall cause all rights granted under said ordinance to cease and terminate. (3) All pavements, streets and sidewalks in any way cut or disturbed by the undersigned, their successors and assigns, shall be restored and put in as good condition as before. A bond in the sum of $20,000 payable to said mayor and aldermen shall be executed to insure the faithful performance of this stipulation by said grantees. (4) The rights and privileges granted under said ordinance shall not be directly or indirectly transferred to any rival or competing company, corporation or individual, or to any person or corporation already owning or controlling a telephone exchange within the city of Chattanooga. (5) In lieu of the stipulations as to arbitration contained in section 7 of said ordinance, the following method or plan of arbitration may be adopted at option of said board of mayor and aldermen, namely: The city shall select one arbitrator, the grantees shall select one, and in the event these two arbitrators agree, their award shall be final and binding on the parties, but if said two arbitrators shall fail to agree, a third arbitrator shall be selected or appointed by the circuit judge of the circuit in which Hamilton county at the time of such arbitration may be included, and the award of any two of the arbitrators shall be final and binding on the parties. (6) It is expressly agreed and understood that in case of such arbitration looking to the

purchase by the city of the conduits and subways which may be constructed by the undersigned, their successors and assigns, only the value of the physical, tangible conduits and subways shall be considered by the arbitrators in making their award. The city shall not be required to pay anything for the value of the franchises connected with said conduits and subways. But the city shall not exercise the right to acquire said conduits and subways as provided in said ordinance until 10 years from Dec. 4, 1900, but may exercise the same any time thereafter. (7) It is expressly agreed and understood that said ordinance shall not be construed to grant a franchise to operate a water plant, a gas plant, an oil plant, an electric light plant, nor any other plant except a telephone or telegraph or general electric plant, together with the right to construct and operate a system of conduits and subways and place therein wires, pipes and other appliances of such companies, firms or individuals as may arrange with the owners of the franchises granted in the said ordinance for the use of such conduits and subways, and the right is reserved to the city to utilize said conduits and subways for the electric fire alarm wires without charge. Nor shall anything in said ordinance be construed to interfere with the city's right to make such use of its alleys, streets and lanes as it may desire for sewerage purposes or other municipal purposes. Nor shall anything in said ordinance be construed as preventing the city from hereafter granting to any individual firm, company or corporation the right to lay underground in the streets, alleys and lanes of the city his or its own wires, pipes or appliances. T. S. Wilcox, for Himself and Associates. This Dec. 1, 1900. Now therefore be it ordained by the board of mayor & aldermen as follows:

"Section 1. Be it ordained that the maximum rate to be charged for telephones under the franchise granted by the aforesaid ordinance and this ordinance, shall not exceed thirty six dollars per year for a business telephone and shall not exceed twenty four dollars per year for a residence telephone.

"Sec. 2. Be it further ordained that the actual work of constructing a new telephone system shall begin within twelve months after Dec. 4, 1900, and a new telephone exchange capable of accommodating at least ten hundred subscribers shall be ready for operation within two years after said date and that a failure to comply with either of these requirements as to beginning work and putting exchange in operation within the time stipulated, shall cause all rights, privileges and franchises granted under the aforesaid ordinance and this ordinance to cease and termininate.

"Sec. 3. Be it further ordained, that all pavements, streets and sidewalks, in any way cut or disturbed by the said T. S. Wilcox and associates, their successors and assigns, in the exercise of any of the rights, privileges and franchises

granted by the aforesaid ordinance and this ordinance shall be by them restored and put in as good condition as before. Before exercising the right to so cut, or disturb any pavement, street or sidewalk, said T. S. Wilcox and associates, their successors and assigns, shall execute a bond in the penalty of ($20,000) twenty thousand dollars, payable to the mayor and aldermen of Chattanooga, to insure the faithful performance of this requirement.

"Sec. 4. Be it further ordained that the rights and privileges and franchises granted by the aforesaid ordinance and this ordinance shall not be directly or indirectly transferred to any rival or competing company, corporation or individual, or to any person or corporation already owning or controlling a telephone exchange within the city of Chattanooga.

"Sec. 5. Be it further ordained, that in lieu of the stipulation as to arbitration contained in section 7 of the aforesaid ordinance, the following plan or method of arbitration may be adopted at the option of the board of mayor and aldermen of Chattanooga, viz.: The board of mayor & aldermen shall select one arbitrator, the owner or owners of the franchise at the time of such arbitration shall select one arbitrator, and in the event the two shall agree their award shall be final and binding on the parties. But if the said two arbitrators shall fail to agree, a third arbitrator shall be selected or appointed by the circuit judge of the circuit in which Hamilton county may then be included, and the award of any two of the arbitrators shall be final and binding upon the parties.

"Sec. 6. Be it further ordained, that in case of an arbitration, under the aforesaid ordinance and this ordinance, looking to the purchase by the city of the conduits and subways which may be construed by said T. S. Wilcox and associates, their successors or assigns, only the value of the physical, tangible conduits and subways, shall be considered by the arbitrators in making their award, and the city shall not be required to pay anything for the value of the rights, privileges, and franchises connected with said conduits and subways.

"Sec. 7. Be it further ordained that the city shall not exercise the right to acquire said conduits and subways as provided in the aforesaid ordinance and this ordinance, until ten years from Dec. 4, 1900, but may exercise the same at any time thereafter.

"Sec. 8. Be it further ordained, that nothing in the aforesaid ordinance or this ordinance..shall be construed to grant a franchise to operate a water plant, a gas plant, an oil plant, an electric light plant, or any other plant except a telephone or general electric plant, together with the right to construct and operate a system of conduits and subways and place therein the wires, pipes, and other appliances of such companies, firms or individuals as may arrange with the owners of the franchises granted for the use of such conduits and subways Nor shall anything in the *aforesaid* ordinance or this

ordinance be construed to interfere with the city's right to make such use of its streets, alleys and lanes as it may desire for sewerage purposes or for other municipal purposes. Nor shall anything in the aforesaid ordinance or this ordinance be construed as preventing the city from hereafter granting to any individual, firm, company or corporation, the right to lay underground in the streets, alleys and lanes, his or its own wires, pipes or other appliances.

"Sec. 9. Be it further ordained that the aforesaid ordinance and this ordinance taken together shall determine the rights, privileges and franchises granted to the said T. S. Wilcox and associates, their successors and assigns, and the terms, conditions and restrictions and limitations under which the same may be exercised and enjoyed.

"Sec. 10. Be it further ordained, that the agreement assigned by T. S. Wilcox for himself and associates, and set out in full in the preamble hereto, shall be delivered to the auditor and preserved as a part of the records of this board.

"Sec. 11. Be it further ordained, that this ordinance take effect from and after its passage, the public welfare requiring it."

The amended ordinance, it will be observed by noting and analyzing the several provisions of both, eliminated four of the five exceptions first suggested, and seems to have attempted to meet the fifth and two others indicated, if it did not entirely do so, by qualifying the exclusive feature of the right to build and maintain a conduit system for the use and rental incident granted with a provision reserving the city's right and power to grant to any other individual, firm, company, or corporation the right to lay underground in the streets, alleys, and lanes of the city his or its own wires, pipes, or appliances. The other objections added by the mayor, that numerous franchises were granted, and that the plan of arbitration was defective, were obviated by providing that the original ordinance shall not be construed to grant the right to operate anything except a telephone or general electric plant, and by means of or together with conduit and subway for necessary wires and appliances, and incidentally with rental privilege for space therein to others. The suggestion that the proposed plan of arbitration was defective is met by providing for a plan, in the event the city desires to take over the property, under which it will be impossible for the grantees to prevent arbitration. This feature is further safeguarded by providing that in such arbitration the city shall pay "only the value of the physical, tangible conduits and subways," and shall not pay anything for the franchise. The provision for arbitration as to rates to be charged customers for space is unchanged, but the objection to this is removed by allowing any person, firm, or corporation to lay his or its own wires and appliances in the street. When these amendments were made to the original ordinance, it, of course, stood as though they

were all incorporated into one, and, being a contractual ordinance, was a mere tender of franchise and privileges, which might or might not be accepted. But, in the amendment made, the grantees' willingness to accept had been recited; and they did accept the grant as finally tendered, and not thereafter disputed or complained of by the city, which is not a complainant, but defendant, to this litigation.

The bill in this case was filed by 19 named resident citizens and taxpayers of Chattanooga, purporting to be on behalf of themselves and all other taxpayers, voters, and property owners of Chattanooga, against the city itself, in its corporate representation of mayor and aldermen, and against the alleged offending aldermen individually, and against Wilcox and his associates, Freeman, Johnson, Erwin, Cummings and Whitehead, to have the ordinance declared void, and, as complainants further pray in the bill, "to have the same canceled and removed as clouds upon the title and rights of complainants, and all other similarly situated citizens, voters, and taxpayers." The defendants all demurred to the bill, presenting every legal defense to it as a whole, and to its several parts in particular. The demurrer was overruled by Chancellor Bearden, sitting by interchange with Chancellor McConnell, who was incompetent by reason of relationship; and leave was given defendants to appeal, which they did, and assigned errors. Without stating the various averments of the bill, it is sufficient to say that it alleged the invalidity of the ordinance upon its face, on numerous grounds, and also that it was void by reason of extraneous facts in the procurement of its passage. Much secrecy, negotiation, contracting, and "conspiring" were alleged between the aldermen and the grantees; but no specific fraud was averred, as the bill must be understood, notwithstanding its abundant characterizations of acts and motives of all concerned; nor is it anywhere charged that the aldermen were, or were to be, in any wise profited by the transaction, nor that they were acting for self-aggrandizement. Before the court of chancery appeals the defendants assigned numerous errors. It is not necessary to quote them here, but it is sufficient to say that they raised all the questions involved, and as later repeated before this court. The court of chancery appeals sustained the decree of the chancellor, holding the ordinance void, and defendants appealed to this court. Here, again, it is proper to say that it is not necessary to go into a recitation or discussion of points there considered, because the questions of law upon which the decision of that court is predicated are not specifically apparent from their opinion; the judge who delivered it having found the ordinance void upon the ground that it was not for a "public use, but for the private use, gain, and emolument of Wilcox and associates, their successors and assigns," while discussing, but not deciding, several other questions; and the majority of that court "concurred in the

result," but not in all the positions taken or reasoning advanced in reaching it. The assignment of errors here to that decree is as follows: "The demurrer should have been sustained, and the bill dismissed, because: (1) Complainants do not show that they will sustain any injury which is not common to all members of the public, or that their tax burdens will be in any way increased. (2) Even if the city had no power to grant an exclusive franchise, complainants cannot attack the ordinance upon that ground. Such attack can only be made by some one claiming a right from the city in conflict with the exclusive feature of this ordinance. (3) The law does not prohibit the granting of more than one franchise to the same individuals. Whether or not it is wise to do this is a legislative question, over which the courts have no jurisdiction. (4) The fact that a member of a legislative body, state or municipal, has, by an ante-election pledge, as a result of a caucus, or by a promise previously made, agreed to vote in a certain way, does not affect the validity of the act for which he votes; and this is all the bill alleges against the manner and method of passing the ordinance. (5) A franchise ordinance becomes a contract. The aldermen are the duly-accredited agents of the city for making such contracts. It is neither unusual, improper, nor illegal, but, on the contrary, it is proper and necessary, for them to confer, consult, and negotiate with parties seeking to enter into such contracts with the city. Nor does the validity of such ordinances depend upon whether or not the aldermen happened to consult with the people who elected them, before voting. (6) The board clearly had the power to grant the franchise. There was no irregularity in the passage of the ordinance. No fraud is charged. It is not charged or even intimated that the aldermen were acting in pursuit of their own self-aggrandizement. (7) To maintain this bill the courts must assume a veto power, and annul an ordinance upon the ground that it is unwise. (8) The bill presents no judicial question for determination. (9) The use for which the ordinance permits the streets to be used is not a private, but a public, work, and the city has ample authority to grant such permission." In the view we take of the case, it is impossible for us to consider but two of these objections,—the two embraced in Nos. 1, 2, and 8, which, put together, make but two assignments. They go to the questions whether complainants have any right to bring this bill, or whether they present for consideration a judicial question; and we are of the opinion that these questions must be answered in the negative. The arguments and the authorities on these propositions are concisely and fully presented in the brief of defendants' counsel, and we include them herein, with only such comment and changes as are necessary to make them conform to an opinion.

By a judicial question, where the validity of acts of a municipal council are involved, is meant one the determina-

tion of which, under our forms of government, is intrusted to the judiciary, as distinguished from the other co-ordinate departments, when, and only when, such question is made by a person who has suffered or is threatened with some special injury, which he seeks to redress or prevent. No such question is made by the bill in this cause. (1) The bill not alleging that complainants will suffer any injury not common to the body of the citizens, complainants have no such interest in the subject-matter as gives them a status to make any of the questions attempted to be made by the bill. (2) The complainants cannot, in any event, make the question that the city has no power to grant an exclusive franchise.

Status of Complainants. The bill is filed by citizens and taxpayers as such. It does not show that they can possibly suffer any injury which is not common to the body of the citizens, and complainants show no special injury or interest, and therefore cannot be heard to question the validity of the ordinance; and there is consequently no judicial question. Anticipating the line of argument in objection, we desire to state distinctly our positions, and avoid the discussion of abstract questions about which there is no disagreement. There is no question as to the jurisdiction of the chancery court to restrain municipal ordinances upon the ground that they are beyond the powers conferred upon the municipality, or that they were not passed regularly or according to the forms of law. There is no question that any one who suffers or will suffer a special injury may maintain a suit to test the validity of an ordinance upon either of these grounds, and that such bill may be maintained by a taxpayer, as such, if the result of the ordinance will be to increase his tax burden. What we decide is that it is essential to the jurisdiction of the court in such a case that there shall be an allegation that the effect of the ordinance claimed to be illegal will be to require of complainant the payment of a tax, to increase his tax burdens, or otherwise inflict an injury not common to the body of the citizens. Courts do not sit to declare abstract propositions of law, or to determine, for any one who may desire to know, whether laws or ordinances are valid. They only determine the law as an incident to granting relief. Hence, before the court can pass on the ordinance, it must appear that complainants seek some redress or assert some right which depends upon the validity or invalidity of the ordinance. Now, what special interest have these complainants in this matter? The bill proceeds upon the theory, and only upon the theory, that the result of the ordinance will be injurious to the city at large,—to the common body of citizens. In all such matters—matters which affect not the private rights of certain citizens, but only those public rights which are common to all, and incident to citizenship itself—the law confers upon the duly-elected representatives of the people the sole right to appeal to the courts for redress. It is only when he can go

further, and show some right which he has aside from those rights which are incident to the mere fact of citizenship, that he may, for himself or in behalf of others similarly situated, invoke the conceded jurisdiction of the courts to restrain an ordinance passed irregularly or without authority. Matters of common interest, both of original action and of redress, are intrusted to duly-chosen public officials, and in such matters the chancery court is not open to confer upon private citizens the right of public guardianship. In short, such a bill as complainants present can be maintained only to protect private, and not public, rights. "The power of courts to declare acts of legislation unconstitutional exists only where they are called on to enforce them, or declare under them some right affecting life, liberty, or property." Ford v. Farmer, 9 Humph. 160. It is a well-settled rule that equity will not interfere by its injunctive process in a case like this unless the complainants show that they will suffer some special injury, and not merely an injury in common with the body of the citizens. This rule is, we believe, without exception. There is a line of Tennessee cases in which taxpayers, as such, may maintain an injunction against public officials. But these are cases involving public revenues, and in which the result of the proposed action will be to increase the burden of taxation. It being proposed to increase the burden of taxation upon each individual taxpayer, he will sustain an injury not common to those citizens who are not taxpayers; and hence, as a taxpayer, on behalf of himself and other taxpayers he has a status in court to contest the legality of the accomplished or proposed action. Lynn v. Polk, 8 Lea, 121; Kennedy v. Montgomery Co., 98 Tenn. 165, 38 S. W. 1075; Colburn v. Railroad Co., 94 Tenn. 43, 28 S. W. 298. But these cases are strictly in line with the rule that complainants must be threatened with an injury not common to the body of the citizens. "As a general rule, taxpayers have no right to contest in an equity suit the validity of a grant of an exclusive privilege or franchise, or to enjoin a city from entering into a contract, unless they can show in both instances that they will sustain special injury by the municipal action." Tied. Mun. Corp. 395. "Although the general doctrine that taxpayers are proper parties to invoke equitable relief against misconduct upon the part of municipal authorities is thus seen to be well established, it is not to be understood that they are entitled to maintain an action in all cases of this nature, regardless of their personal interest or of the degree of injury they may sustain." High, Inj. 301. "Unless a party is liable to sustain some special injury different from that of all other taxpayers, or others in the vicinity, by the vacation of a public street, he cannot maintain a bill to enjoin the vacation." Hesing v. Scott, 107 Ill. 600. "However commendable it may be in an individual to carry on a suit for the whole community, in the result of which he has no inter-

est over any other member of that community, to urge the perpetuation of an injunction for the good of the city, such is not a fit case for equitable interposition." Jones v. City of Little Rock, 25 Ark. 305. "The plaintiff does not show with any reasonable certainty that he would sustain any injury by the contemplated action of the council. Without such showing, we do not think he is entitled to an injunction." Searle v. Abraham, 73 Iowa, 508, 35 N. W. 612.

There are no Tennessee cases establishing any other doctrine than that, where taxpayers show an interest beyond that of other citizens, they may maintain their bill. Counsel have asserted that the foundation in this state for the jurisdiction invoked is Bradley v. Commissioners, 2 Humph. 432, 37 Am. Dec. 563, where the organization of a new county under an unconstitutional act was enjoined at the suit of the taxpayers in the territory of the proposed new county. In this case the necessary interest of complainants was assumed without discussion. But later, in referring to this case, the same judge (Judge Turley) shows that the interest existed because of "a necessary increase of taxation for public buildings and police expenditures." Ford v. Farmer, 9 Humph. 159. In Maury Co. v. Lewis Co. the jurisdiction was maintained upon the ground that commissioners, by not conforming to a legislative act, had taken a part of the territory of Maury county and included it in Lewis county, and that this invasion of the rights of the former county gave it a status in court. 1 Swan, 245, 246. In Bridgenor v. Rodgers, 1 Cold. 260, it was held that any taxpayer could enjoin the unconstitutional taking of a part of his county to form another, and Judge Wright said, "The spoliation of his county must of necessity result in an increase of taxation for public buildings and public expenditures, to his injury and wrong." Colburn v. City of Chattanooga, 2 Tenn. Cas. 22: "Any taxpayer may bring his bill to prevent the corporate authorities of a city from acting ultra vires, where the effect will be to impose upon him an unlawful tax, or to increase his burden of taxation." Morris v. City of Nashville, 6 Lea, 340: Suit to enjoin annexation of territory to city of Nashville by taxpayers of the territory. "The complainants had prima facie such a peculiar interest and such rights in regard to the question of annexation as warranted a resort to a court of chancery for their assertion and protection." It was not deemed necessary in that case to say further that the city burdens thus imposed would add to the taxpayer's existing burdens. Bouldin v. Lockhart, 1 Lea, 200: The relief granted to a taxpayer was to enjoin the "further proceeding to erect the county seat at Tracy City, and to forbid the county court from levying taxes or incurring further expense for this purpose." Lynn v. Polk, 8 Lea, 121: At the suit of taxpayers an act was declared invalid which directed the funding of the public debt, and thereby required the levy and collection of additional taxes,

and not only to avoid this burden, but to prevent its becoming irrevocable. Thus examined, the Tennessee cases show that the court had jurisdiction to pass on questions admittedly of a judicial nature only when such jurisdiction is invoked by those having a special or peculiar interest in the question, and there are none to the contrary.

In view of the uniform authorities on this subject, it is clear that complainants have no status in court. What injury can this ordinance possibly do to them which is not common to all citizens? The ordinance does not deal with the question of taxation, and hence cannot affect their tax burdens. The streets, as streets, are not the property, in any sense, of individual citizens. A taxpayer has no more proprietary interest in them than any other citizen. They are the property of the common public. An abutting lot owner has a special interest in them, but only to the extent of his right of ingress and egress, or somewhat wider, as his deed may or not extend the fee to the center of the street. If this be impaired, he suffers a special injury, and may maintain an action. But complainants make no claim of this kind. The whole theory of their bill is that the right to use the streets as permitted by this ordinance—a right which does not belong to abutting lot owners any more than to other citizens, whether taxpayers or not—is a valuable right, which may in the future be of importance to the public. Complainants can sustain no injury in this respect which is not common to all members of the public.

Much has been said about whether the exercise of the franchises granted would impose an additional burden on the fee of the streets. We deem this question entirely immaterial. If there is no additional burden, the franchise confers a complete right to the use of the street. If, however, there will be an additional burden,—and we are not to be understood as implying that there is not,—the franchise still makes the use of the street lawful, but the persons exercising the franchise may be required to pay damages for the additional burden. But this does not affect in any way the validity of the franchise. Nor does it afford any basis for an injunction now. The grantees may never use any street on which any of complainants own abutting property. Until they are about to use some such street, no one of complainants will be threatened with any injury, or have anything to complain of. If it should happen that, in the exercise of the right granted, the grantees should invade any private right of any one of the complainants, he, but not the other complainants, could maintain a proper action.

On this determination of the first proposition, complainants have no status in court for any purpose, and their bill fails, regardless of the merits of the abstract questions made. Nor are complainants, or any of them, in an attitude to attack the ordinance upon the theory that it attempts to grant an ex-

clusive franchise. They certainly have no status to make that question. We shall enter into no discussion of the power of the city to grant an exclusive franchise. It may be admitted that no such power exists. But this can give no aid to complainants. The want of this power could only make the exclusive feature invalid. The franchise might still be valid, though not exclusive. In this view, the effort to grant an exclusive franchise can furnish no ground for the interference of equity by injunction. It cannot be necessary to have this point adjudicated now, because, if the exclusive feature is ultra vires, it confers no power, and it is well settled that nothing that may be done under the franchise will make it exclusive. State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 263; Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co. (C. C.) 33 Fed. 659. The case last cited is a most learned opinion by Judge Howell E. Jackson. Besides, whatever may be the conflict of authority upon some of the propositions discussed by counsel in this case, there is one proposition upon which, so far as we can find, the authorities are uniform: A taxpayer, as such, cannot test the validity of a franchise merely because it is exclusive. This question can only be made by one claiming the right to do something contrary to the exclusive feature. In a case involving this point, the supreme court of Iowa said: "The ordinance purports to grant an exclusive right. Whether it was competent for the city to grant such right, we need not determine. If we should conclude that it was not, it is manifest that the ordinance would not be void. It would result merely that the right granted was not exclusive, and the plaintiffs, as mere taxpayers, cannot properly raise that question. Such question cannot properly be raised until a conflict arises between the American Construction Company [the grantee of the exclusive franchise] and some person or persons or corporation claiming also a right from the defendant city to construct and operate waterworks." Dodge v. City of Council Bluffs, 57 Iowa, 566, 10 N. W. 886. See, also, Grant v. City of Davenport, 36 Iowa, 496; Tied. Mun. Corp. 395. Of course, as we have substantially stated in the foregoing part of this opinion, we are not deciding that this amended ordinance is exclusive or nonexclusive, nor that it was in this respect valid, whether exclusive or not. But we have discussed the objections to complainants proceeding against it, and held their bill is not maintainable, whether the ordinance is or not exclusive, and is or not valid, because complainants are in no attitude to question it. These holdings are none of them technical. They lie at the very foundation of the orderly conduct of municipal government. If cities could not exercise public powers, even erroneously or unwisely, when lawfully done by their constituted legislative authority, without the concurrence of every citizen or taxpayer, it would

be impossible to have municipal government, and there never could be any certainty or permanence in municipal grants of franchises for public purposes. And if, when granted, they are open to other contest than that and by those indicated, no public work could ever be accomplished, and intolerable confusion and complication would prevail in every city of sufficient importance to have competing or conflicting interests in public grants, or discontented citizens to litigate all public acts not affecting their private interests. Besides, it would delay many, and destroy more, useful public enterprises requiring municipal authority. This case well illustrates the condition described. The ordinance in controversy was passed on the 4th of December, 1900. The franchise granted was to be void if the work of construction of the telephone system did not commence within 12 months. The time fixed for commencing the work lacks but a few days of expiring. This bill sought an injunction, but, it seems, none in fact issued. Yet the application and the questions attempted to be raised as to the validity of the proceeding were doubtless sufficient to delay the work until the right claimed was well-nigh wholly lost, and until it may be seriously impaired in consequence of another provision requiring the completion of the exchange within a fixed short period. Had the litigation continued a few days longer, the claimed right of defendants, possibly a very valuable one,—indeed, alleged in the bill to be of extraordinary importance and value,—would have been wholly lost because of a contest made by parties not specially interested, and therefore not authorized to make the contest. It is therefore of extreme importance that these rules of law we have declared in accord with all the authorities should be strictly observed by the courts in refusing, for want of jurisdiction, to entertain litigations not brought by parties specially injured or conflictingly interested, and thus avoid the ruinous consequences indicated. Cities can protect themselves,—they must be allowed to do so,—unless their ordinances complained of are of the nature specified, in which individual rights or conflicting interests are specially and immediately involved. This is particularly true of injunction litigations in which valuable rights might be lost by lapse of time, where they are not brought by parties whose interests would be such as to save the time lost pending such litigations, which would not be the case in proceedings like the one before us, with or without injunction.

The decree of the court of chancery appeals to the contrary, affirming the decree of the chancellor, is erroneous, and it is reversed, and the bill dismissed, with cost.

CITY OF DULUTH *v.* DULUTH TEL. CO.

(*Supreme Court of Minnesota, Nov. 29, 1901.*)

[87 N. W. Rep. 1127.]

Telephone Companies—Removal of Poles and Wires upon Termination of Franchise*—Case Stated.

The Duluth Telephone Company was organized under title 1, c. 34, Gen. St. 1878, before section 28, c. 34, Gen. St. 1866, was amended by chapter 73, Gen. Laws 1881. By a special act approved March 7, 1881, the exclusive right was conferred upon the company to erect its poles and wires upon the streets of the city for the period of 10 years, which right was extended for the further period of 10 years by a special act approved April 13, 1889. Commencing in 1882 under the authority of both the general and special acts, the company constructed its telephone system within the city, and has since maintained and continued to extend the same therein. The time granted under the special acts having expired, on November 29, 1898, under the provisions of chapter 74, Gen. Laws 1893, the common council offered to sell a franchise to construct a telephone system within the city upon certain conditions; and, defendant having refused to submit a bid, the franchise was granted to another company, which thereupon constructed a telephone system, which it has since maintained and operated. On February 13, 1900, the city council passed a resolution requiring defendant on or before April 1, 1900, to remove its poles and wires from the streets, avenues, and alleys of the city. Upon defendant's refusal to comply with the order, the city commenced an action to enjoin defendant from further extending its system, and to compel the removal of the poles and wires already erected: *held*:

Same—Same—Police Power.

That section 28, Gen. St. 1866, as amended by chapter 73, Gen. St. 1881 (section 2641, Gen. St. 1894), authorized defendant to enter upon the streets and alleys of the city and erect its poles and wires therein, subject only to the police power of the city to control and regulate the same.

Same — Same — Same — Acceptance of Privileges—Impairing Vested Rights.

The company having established its plant in reliance upon the provisions of the general law (section 2641, Gen. St. 1894), such action on its part constituted an acceptance of the right or privilege thus granted, and its occupancy of the streets thus acquired, including the right to extend its system within the city as occasion might require, became fixed, in the nature of vested rights, which cannot be revoked by the city, except within the exercise of its police power. Northwestern Tel. Exch. Co. *v.* City of Minneapolis, 83 N. W. 527, 86 N. W. 69, 81 Minn. 140, 53 L. R. A. 175.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Wm. A. Cant, Judge.

Action by the City of Duluth against the Duluth Telephone Company. Judgment for defendant, and the city appeals. Affirmed.

Oscar Mitchell, for appellant.

Billson, Congdon & Dickinson, for respondent.

LEWIS, J. The plaintiff municipality was organized under a special act of the legislature approved March 2, 1887. The

*Poles and wires in streets, see cross references to State ex rel. Wisconsin Tel. Co. *v.* City of Sheboygan et al., 6 Mun. Corp. Cas. 685.

defendant company was organized under title 1, c. 34, Gen. St. 1878, and its corporate existence began February 15, 1881. By a special act approved March 7, 1881, the exclusive right was conferred upon the municipality, as it then existed, to erect and maintain telephone poles and wires upon and over its streets, avenues, and alleys for a period of 10 years; and by the special act of the legislature approved April 13, 1889, this privilege was extended until the 8th of March, 1899. Commencing in 1882, and continuing down to the present year, the defendant company has, in the customary manner, established its plant, erected its poles, and strung wires thereon, to the extent of some 50 miles, in the streets, avenues, and alleys of the city of Duluth. The charter of 1887, through the common council, conferred upon the city the power "to prevent the encumbering of streets, sidewalks, alleys, lanes, public grounds or wharves with * * * posts * * * or any other materials or substances whatsoever," and "to remove and abate a nuisance, obstruction or encroachment upon the streets, alleys, public grounds and highways of the city." By chapter 74 of the General Laws of 1893, title 1, c. 34, Gen. St. 1866, was amended in part as follows: "But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alley or other highway of any city or village, * * * any improvement of whatsoever kind or nature without first obtaining a franchise therefor from such village or city, according to the terms of its charter, and without first making just compensation therefor as herein provided." There was also a further amendment to the effect that such corporation should be subject to any conditions imposed from time to time by the village or city, which might, at the end of every five years from and after the granting of a franchise for the construction of any improvement whatsoever, have a right, under certain conditions, to purchase the same. After the expiration of the 20-years grant under the special acts of 1881 and 1889, the company continued to occupy the streets and to extend its system. After the amendment of 1893 went into effect the defendant company continued erecting its poles and stringing wires thereon in the streets, avenues, and alleys to the extent of several thousand feet. On November 29, 1898, the common council of Duluth passed an ordinance providing for the sale by the city of a franchise for the establishment and operation of a telephone exchange system, which contained elaborate provisions with reference to bids and their acceptance. The defendant company did not submit a bid in accordance with the ordinance, and thereafter, on March 11, 1899, the city granted a franchise to another company, which was accepted by it, and a telephone plant constructed in conformity to the requirements of the ordinance. Subsequently, on February 13, 1900, the council adopted a resolution requiring defendant on or before the 1st of April, 1900, to remove

its poles and wires from the streets, avenues, alleys, and public grounds of the city of Duluth, and to cease using the same for the purpose of carrying on its telephone business. A copy of this resolution was served upon the defendant company, which refused to comply therewith, whereupon this action was commenced by the city to enjoin the defendant company from further extending its system, and to compel the removal of that part already erected. The defendant justified its action in an answer which set forth the laws under which it claimed to be authorized, and alleged that its possession of the streets, avenues, alleys, and public grounds of the city was in the ordinary and usual manner, and without interference with the safety or convenience of ordinary public travel. The court found as facts that the defendant company constructed its plant and occupied the streets and alleys of the city in reliance upon the special acts above mentioned, and also upon the general law embodied in section 28, c. 34, Gen. St. 1886, as amended by chapter 73 of the General Laws of 1881 (section 2641, Gen. St. 1894); that the resolution requiring defendant to remove its plant from the city was adopted by the common council under the mistake of law that it was erected without right or legal authority; and that such resolution was passed without any intention of expressing the council's judgment as to its power to regulate under its police power. Judgment was entered for the defendant, and the city appealed.

The findings of fact by the trial court are not attacked by appellant, and the propositions which it submits for consideration in this court are embodied under the following heads: (1) That the amendment of 1881 (section 2641, Gen. St. 1894) did not become a part of the charter of the Duluth Telephone Company. (2) That, if such amendment did become a part of defendant's charter, (a) it granted simply a privilege or license, revocable at any time by the state, or, when duly authorized, by the city; (b) that if such amendment became a part of defendant's charter, in the nature of a contract right, then the rights of defendant became vested only to the extent of the expansion of its system at the time of the adoption of the city charter, in 1887, and the amendment of title 1, c. 34, in 1893.

All of these propositions were involved and necessarily decided in the case of Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, and there only remains for us an application of the principles announced in that case to the facts in this controversy. On reargument in that case it was decided that the words "public roads and highways," as used in section 2641, Gen. St. 1894, applied to streets and alleys of cities and villages, and that, under the provisions of that section, appellant had authority to enter upon the streets and alleys of Minneapolis, for

the purpose of erecting its poles and stringing its wires, without first obtaining the consent of the governing body, and subject only to the police power of the city. It was there also decided that the amendment of 1881 (section 2641) was in the nature of an amendment of the company's charter to the same extent as though enacted prior to its organization, and it was impliedly held that the rights and privileges of the company under the general law which authorized its organization were to all intents and purposes of the same force as though organized under a special act, and the particular provisions referred to had been embodied in such special charter. It was also held that the company having entered upon the streets of the city by virtue of its organizing act as amended, and erected its poles and wires in accordance with the direction of the city council, such council was thereafter powerless to arbitrarily and without cause remove the poles and wires from the streets, unless acting within its province to regulate and control under its police power. In the present case counsel makes a distinction between a so-called charter contract and a license or privilege, contending that, by the statute as amended in 1881, defendant, at most, obtained merely a privilege or license, which it was within the state's power to recall at any time. It will not be necessary to enter into a discussion of the technical meaning of a charter contract, or contractual right as expressed in a charter, and a license or privilege. The decisive question is what contract was made, if any,—what was the intention of the state in enacting the law, and of the defendant company in accepting and relying upon it? Section 2641, as it now appears in the General Statutes of 1894, was an amendment to section 42, c. 34, Gen. St. 1878. It was under this chapter that the defendant company was organized, and that chapter, as amended, contained the law which regulated the defendant in its relation to the state and city of Duluth. Whether the amended act expressed a contract right, or but the granting of a privilege, inoperative until accepted, we need not now stop to inquire.

The city contends that the future operations of defendant were not conducted in reliance upon the general law as amended. On the contrary, it claims that the plant was erected under the express authority of the special act of March 7, 1881, which conferred upon the company the exclusive right to erect its system in the streets of the city. For the purposes of this case, we must assume that defendant erected its plant in dependence upon the general as well as the special law. Upon this point appellant is foreclosed by the finding of the trial court, which is not assailed. The court found that defendant relied upon both the general and special law in building and extending its system within the city. It is contended, however, that, conceding the company was operating under the general law, such authority was repealed by the

provisions of the city charter of 1887. Without admitting the state's ability to delegate authority to the city to prevent defendant from continuing the use of its streets for the purposes of its telephone system, it is clear that no such power was attempted by the 1887 charter. The powers there granted are restricted to the prevention of the incumbering of streets, sidewalks, etc., and to the removal and abatement of nuisances upon streets and highways. Such grant of power must be construed consistently with the rights already acquired by defendant under section 2641, and extends only to the reasonable exercise, control, and regulation of its police power. Northwestern Tel. Exch. Co. v. City of Minneapolis, supra. Again, appellant contends that the authority embraced within section 2641 was repealed by chapter 74, Gen. Laws 1893. This amendment of 1893 provided that no corporation organized under section 1, tit. 1, c. 34, Gen. St. 1866, should have any right to construct, maintain, or operate upon or within any street, alley, or other highway of any city or village any improvement, of whatsoever nature or kind, without first making just compensation, and obtaining a franchise therefor from such city or village. In our opinion, this amendment repealed the provisions of section 2641, so far as it applied to the state at large, or to new enterprises undertaken by defendant in other cities or villages. It does not follow that, because section 2641 was repealed by the amendment of 1893, it operated as a repeal of defendant's authority to maintain and extend its system within the city of Duluth. We are asked to decide that the 1893 amendment wiped out defendant's authority not only to extend its system in other streets as the growth of the city might warrant, but also to maintain the plant and system as already built and operated. In the Minneapolis Case we held that, where the company had made substantial improvements upon the strength of authority granted to it by the state, the rights acquired in so doing become vested, and cannot be interfered with by subsequent legislation. The same principle applies to the extension of the telephone system in the city of Duluth. If the state might at any time step in and present the extension of the system, the profit of such an enterprise would indeed be dubious, and offer slight attraction to capital. If the company were prevented from making extensions, its privileges not being exclusive in the streets already occupied, it might in a few years be superseded by competitors who had the entire city at their command. The natural and reasonable construction to be placed upon the relation of the parties hereto is that, the company having in good faith expended large sums of money in the construction of its plant, it constituted an acceptance of the charter rights or privileges, which included the implied right to maintain and extend its system and make it remunerative. The resolution of the city council requiring the

removal of the poles and wires of defendant's system from the streets, alleys, and public grounds of the city of Duluth having been passed, not in the exercise of its police power, but upon the theory that the company had no legal right to maintain the same, it follows that it was void and powerless to affect defendant's interests.

Judgment affirmed.

STUTZBACH *v.* COLER, City Comptroller.

(*Court of Appeals of New York, Nov. 12, 1901.*)

[61 N. E. Rep. 697.]

Municipal Employees—Preference of Veterans*—Statute Regulating Removal—Constitutional Law.

Civil Service Law (Laws 1899, c. 370) §§ 20, 21, provide for preference in appointment and promotion of veterans, without regard to their standing on any list from which such appointment or promotion may be made, and that no veteran holding his position by appointment or employment shall be removed, except for incompetency or misconduct, after a hearing on due notice: *held*, that the comptroller of the city of New York could not remove a veteran from a position in the finance department in which others were employed who were not veterans in order to reduce the expenses, without stated charges made against him and a hearing on due notice.

Same—Same—Same—Same.

Civil Service Law (Laws 1899, c. 370) § 21, providing that no veteran shall be removed from a position by appointment or employment, except for incompetency or misconduct, after hearing on notice, is not unconstitutional, though it limits the right to remove veterans given by Const. art. 5, § 9, providing for a preference of veterans, but not providing that they shall be continued in public service in preference to other employees.

Appeal from supreme court, appellate division, First department.

In the matter of the application of Otto Stutzbach for a writ of mandamus against Bird S. Coler, as comptroller of the city of New York. From an order of the appellate division (70 N. Y. Supp. 901), reversing an order of the special term denying an application for a peremptory writ commanding defendant to reinstate relator as messenger in the auditing department, defendant appeals. Affirmed.

John Whalen, Corp. Counsel (Theodore Connoly and William B. Crowell, of counsel), for appellant.

Benno Loewy, for respondent.

PARKER, C. J. That the comptroller discharged the relator in the performance of what he believed to be a public duty is beyond question. He had submitted to the board of estimate and apportionment in due time an estimate of the salaries for the year 1901. The amount asked for the finance department was the salary list as shown by the monthly pay roll of September, 1900, and the same condition of affairs

*See notes at end of case.

prevailed in the month of December following. The board of estimate and apportionment, however, awarded an amount less by more than $30,000 than that asked for. It thereupon became the comptroller's duty to reduce the expenses of the finance department to the sum awarded, for section 1543 of the charter provides that the "aggregated expense thereof shall not exceed the total amount duly appropriated to the respective departments for such purpose." As the only way to reduce the amount of the pay roll was to discharge men, 14 were selected for immediate dismissal, and on the 3d of January each of them was notified that, because of insufficiency of appropriation, their services were no longer required. This relator was one of the 14, and was selected for dismissal because he was the least efficient man in the bureau in which he was employed. He had, however, served in the Union army during the War of the Rebellion, and was an honorably discharged soldier, of which fact the comptroller was in ignorance; but the relator contends in this proceeding, and rightly as we think, that if, under the law of the state, he was entitled to be continued in employment as against other employees in his bureau who were not veterans, the fact that the comptroller was not advised of his right to preference does not deprive him of the right which the law affords him, for it is the fact of his being an honorably discharged soldier which entitles him to preference in employment, and not knowledge of that fact by the head of the department employing him. Lack of information justified the act of the comptroller in attempting to discharge him; but, if his removal was illegal because he was a veteran, it became the duty of the comptroller, when the fact came to his knowledge, to reinstate the relator, and, as there were other employees in the department not entitled to preference, to discharge one of them, as he would have done in the first instance, had he been aware of the relator's status.

The purpose of this proceeding is to compel reinstatement, which we think the relator is entitled to, provided his removal was not in compliance with the law. Chapter 821 of the Laws of 1896 provided that honorably discharged Union soldiers "shall be preferred for appointment, employment, and promotion," and that no such person "holding a position by appointment or employment in the state of New York or of the several cities * * * shall be removed from such position or employment, except for incompetency or misconduct shown, after a hearing upon due notice, upon the charge made." While this act was repealed by chapter 370 of the Laws of 1899, entitled "An act in relation to the civil service of the state of New York and the cities and civil divisions thereof," its provisions were, with some amendment, incorporated into sections 20 and 21 of that act. Section 20, which relates to "preferences allowed honorably discharged soldiers, sailors, and marines," provides for "preference in appoint-

ment and promotion without regard to their standing on any list from which such appointment or promotion may be made," thus differing from the act of 1896, in that the word "employment," which appeared after the word "appointment" in the earlier act, is omitted in the latter. As the word "employment" is not used in section 9 of article 5 of the state constitution, which relates to civil service appointments and promotions, it may well be that the change in the statute was for the purpose of making it harmonize with the constitution in that respect, or the word "employment' may have been regarded as superfluous; for it seems to have been used in that same section interchangeably with "appointment," as in the paragraph providing for the preparation of a list of eligible persons, in which it is declared in effect that honorably discharged soldiers upon such list "shall be given preference on any list of registered applicants for employment." Section 21, headed "Power of Removal Limited," is practically a re-enactment of so much of the act of 1896 as relates to that subject, and it provides that "no person holding a position by appointment or employment, * * * who is an honorably discharged soldier, * * * shall be removed from such position or employment, except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges and with the right to such employee or appointee to a review by a writ of certiorari." Stated charges were not made against this relator for incompetency or misconduct, and a hearing given to him thereon upon due notice; and hence his removal was, according to the letter of the statute, illegal. The comptroller's return to the writ indicates that he was selected for discharge because he was the least competent man in his bureau, but it is not a sufficient compliance with the statute to discharge a man for incompetency. Before the dismissal takes place, the charge of incompetency must be made, notice given, and the hearing had.

It is now urged that, in so far as the statute extends preference of veterans beyond that accorded to them by the constitution, it is void. The constitution only provides for a preference of veterans in appointments and promotions in the civil service within the state, and does not, in terms or otherwise, provide that they shall be continued in the public service in preference to other appointees; and the contention is that the legislature cannot go further and give a preference beyond that declared in the constitution. The decision of this court in Re Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447, is mistakenly invoked in support of that position. In that case the court had under consideration a portion of chapter 344 of the Laws of 1895, which in effect provides that, as to honorably discharged soldiers and sailors of the late Civil War, competitive examinations for positions in the civil service should not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not

exceed $4 per day; and this was held to contravene section 9 of article 5 of the constitution, which provides that merit and fitness are to be ascertained so far as practicable by examinations, which so far as practicable shall be competitive, thus placing all upon an equality, including soldiers and sailors, in the investigation which may be made in a given case to determine the merit and fitness of applicants for the position sought, whether the examination be competitive or noncompetitive. When a list is made up of persons whose merit and fitness have been ascertained according to law, then such honorably discharged soldiers and sailors of the Civil War as appear thereon are entitled under the constitution to preference in appointment and promotion therefrom; but the legislature cannot dispense with the necessity of ascertaining the merit and fitness of all applicants for employment in the civil service, for the constitution safeguards the public service against all such attempts. That, however, was the aim of the statute in question, for it sought to exempt honorably discharged soldiers and sailors from competitive examinations where the compensation was under $4 a day, and this the court necessarily held violated the constitution, and nothing further was decided in that case. Now, while the legislature cannot enact laws repugnant to this provision of the constitution, it may legislate further in that direction from time to time, if in its judgment it shall seem wise to do so. As it created the civil service system in this state substantially as it now is before there was any constitutional provision on the subject, so it may go on from time to time, strengthening it in what experience may prove to be the weak places, provided, always, that it does not offend against any of the provisions which the people have incorporated into the organic law. And so it was within its power to place a limit upon the removal of persons employed in the public service, as it has done by section 21, in which, in addition to the provisions already mentioned, it is provided that in cities of the first class, if the position held by an honorably discharged soldier shall become unnecessary or be abolished for reasons of economy or otherwise, he shall not be discharged from public service, but shall be transferred to any branch of the city service for such duty in that service as he may be fitted for receiving the same compensation as before. This court had before it a case in which that provision was under consideration in Re Breckenridge, 160 N. Y. 103, 54 N. E. 670. In that case, for reason of economy, the position occupied by relator had been abolished; but it was held that he was not entitled to succeed, as against the defendant, for the reason that it appeared that there was no vacancy in his department to which the relator could be assigned. Had the relator shown the existence of such a vacancy, the result would have been different.

Our conclusion is that, however necessary and proper

the discharge may have seemed to be from the standpoint of the comptroller, it was illegal, because that provision of the statute was not complied with which requires that, before a discharge shall be made, an honorably discharged soldier shall be informed of the charge against him, and a hearing given upon due notice, at which he shall have the right to appear and answer. And hence the order of the appellate division directing his reinstatement should be affirmed, with costs.

BARTLETT, HAIGHT, MARTIN, VANN, and LANDON, JJ., concur. O'BRIEN, J., not voting.

Order affirmed.

NOTES.

PREFERENCE OF VETERANS IN APPOINTMENTS TO PUBLIC SERVICE.

I. Appointment.
   a. Veterans to Be Preferred Only When Equally Qualified with Other Applicants.
   b. Finding of Commissioners Not Reviewable by the Courts.
   c. Applicant Must Make Known the Fact That He Is a Veteran.
   d. Rule Fixing Age Limit Not Applicable to Veterans.
   e. Statute Requring Preference to Be Given Not Applicable to Promotions.
   f. Teams of Veterans to Be Preferred Where Teams Are Employed.
   g. Act Governing Special Appointments Not Superseded by General Statute.
   h. District of Columbia—Police Force.
   i. Members of Health Board.
   j. Officers and Teachers of Free School.
   k. Second Assistant Clerk of District Court.
   l. Street Inspectors.

II. Certification.
   a. Striking Name of Veteran from Eligible List.
   b. Refusal to Certify—Estoppel of Commissioners to Repudiate Their Official Acts.

III. Removal.
   a. Penal Statute Forbidding, to Be Construed Strictly.
   b. Statute Forbidding Removal Not Derogatory from Power of Subsequent Legislature.
   c. Statute Not to Be Construed Retrospectively.
   d. Removal for Incompetency and Misconduct Only.
   e. De Facto Officers.
   f. Statute Applicable Only to Subordinate Positions.
   g. Confidential Positions.
   h. Abolition of Office Held by Veteran.
   i. Veterans Employed by the Day, Job, etc.
   j. Term of Office or Position Not Otherwise Fixed by Law.
   k. Miscellaneous Offices and Employments.
   l. Due Process.
   m. Waiver of Rights by Veteran.
   n. Recovery of Wages by Veteran Wrongfully Removed.

IV. Constitutional Law.
   a. Special Privileges.
   b. Scope of Statute Restricted by Title.
   c. Special Provision in Regard to Certification.
   d. Special Provision Regulating Removal of Public Officers.
   e. Preferring Children of Veterans in Admission to Public Schools.

V. Preference of Children of Veterans in Public Schools.

VI. Remedy.
   a. For Refusal to Give Preference in Appointment.
   b. For Wrongful Removal.

Notes

I. APPOINTMENT.

a. Veterans to Be Preferred Only When Equally Qualified with Other Applicants.

Under many of the statutes, veterans who have passed the required examination, and whose names have been placed upon the list of eligibles, are given preference in appointment notwithstanding there may be other persons, not veterans, on the list who have received higher ratings. But under other statutes it is held that veterans are entitled to preference only when they are "equally qualified" with other applicants. Thus in People *v.* Com'rs of Almshouse of Newburgh, 20 N. Y. S. 21, 65 Hun 169, following People *v.* Trustees of Saratoga, 7 N. Y. S. 125, a veteran seeking appointment to the position of superintendent of the poor of the city and town of Newburgh under the veteran act 1887 (Laws N. Y. 1887, ch. 464, § 1), was held not to be entitled to appointment over another applicant, not a veteran, possessed of superior qualifications, the court saying, in substance: "The office of superintendent of the poor of the city and town of Newburgh is one which calls for the exercise of care, discretion, and business capacity, and a union veteran lacking those qualifications is not entitled to appointment thereto in preference to another applicant possessing the requisite qualifications." And in People *v.* Village of Little Falls, 8 N. Y. S. 512, where the council had determined that an applicant for the office of city attorney was better qualified than an honorably discharged veteran applying for the same position, the appointment of the former was held to be no violation of the statute above mentioned. And see Keim *v.* United States, 177 U. S. 290, 20 Sup. Ct. Rep. 574, 44 L. Ed. 774, affirming 33 Ct. Cl. 174, where it was held that under Act of Congress Aug. 15, 1876, § 3 (19 Stat. at L. 169), and the Civil Service Act of 1883, § 7 (22 Stat. at L. 406), veterans are to be preferred for appointment in the civil service of the United States only when they are "equally qualified," and that the statute is not to be construed as authorizing the appointment or retention of incompetent or inefficient clerks.

b. Finding of Commissioners Not Reviewable by the Courts.

In the absence of a provision in the statute to the contrary, the finding of the commissioners as to a veteran's competency or incompetency to fill any office to which he seeks appointment is not reviewable by the courts. For example, Laws of N. Y. 1899, ch. 370, § 20, give preference in appointment and promotion to honorably discharged veterans, provided their qualifications have been duly ascertained; and further provide that age or physical disability shall not disqualify the persons so preferred, provided they are not thereby rendered incompetent to perform the duties of the position to which they seek appointment; and for refusal to accord such preferences, the statute provides a remedy by mandamus. In a case arising under that act, it was held that a finding by the commissioners that the applicant was not physically capable of performing the duties of the position to which he sought to be promoted would not be reviewed on application for a mandamus to compel the preference provided by the statute. Allaire *v.* Knox, 68 N. Y. S. 889, 33 Misc. Rep. 555, affirmed in 70 N. Y. S. 845. See also, People *v.* Summers, 9 N. Y. S. 700; People *v.* Trustees of Saratoga Springs, 7 N. Y. S. 125; People *v.* Village of Little Falls, 8 N. Y. S. 512.

So under the civil service laws of the United States, the action of the Secretary of the Interior, in dismissing an honorably discharged veteran from a clerkship in the Pension Bureau, upon the recommendation of the Commissioner of Pensions requesting his dismissal because of his rating as "inefficient," is not subject to review by the courts in the absence of any act of congress specially providing therefor. Keim *v.* United States, 177 U. S. 290, 20 Sup. Ct. Rep. 574, 44 L. Ed. 774, affirming 33 Ct. Cl. 174.

Notes

c. Applicant Must Make Known the Fact That He Is a Veteran (Laws of N. Y. 1896, ch. 821).

A veteran claiming to be entitled to preference in appointment under New York Laws 1896, ch. 821, must make known to the appointing body the fact that he is a veteran. People, Goetchious *v.* Follett, 53 N. Y. Supp. 956, 24 Misc. Rep. 510.

d. Rule Fixing Age Limit Not Applicable to Veterans (Laws of N. Y. 1883, ch. 354; 1884, ch. 410).

Laws of New York 1883, chapter 354, and Laws of New York 1884, chapter 410, expressly provide that honorably discharged veterans shall not be disqualified for appointment in the civil service of the state, or of the towns and cities thereof, on account of their age; hence a rule adopted by the mayor of Buffalo fixing the age limit for all appointees to the civil service of that city at from twenty-one to sixty years, except in so far as such restriction may conflict with the general statutes, does not bar a veteran of more than sixty years of age from appointment to such position in the civil service of that city as he is otherwise qualified to fill. People, Kittenger *v.* Buffalo Civil Service Com'rs, 20 Misc. Rep. 217, 45 N. Y. Supp. 46.

e. Statute Requiring Preference to Be Given Not Applicable to Promotions (N. Y. Stats. 1884, 1886).

Acts of New York of 1884 and 1886 requiring that honorably discharged soldiers of the civil war be given preference in appointments under the civil service of the state and various cities in the state, do not apply to promotions in the police department, but only to appointments, as a distinction between promotions and appointments is made by Laws New York 1882, ch. 410, Laws 1883, ch. 354, and Laws 1884, ch. 357, in that promotions are to be made according to meritorious service and superior capacity. McGuire *v.* Byrnes, 2 N. Y. 760.

f. Teams of Veterans to Be Preferred Where Teams Are Employed (Laws N. Y. 1887, ch. 464, § 1).

Laws of New York, 1887, ch. 464, § 1, requiring that preference be given to honorably discharged soldiers of the Civil War in appointments under the civil service, require the employment of men with their teams when teams are necessary and being used. State *v.* Wallace (People *v.* Wallace), 8 N. Y. S. 591, 55 Hun 149.

g. Act Governing Special Appointments Not Superseded by General Statute (Laws N. Y. 1883, ch. 490, § 40).

Laws New York 1883, ch. 490, § 40, relating to the Croton Aqueduct, and providing that "no person shall be appointed by the said aqueduct commissioners as inspector or superintendent, who shall not be certified by at least three members of the commission to be competent and fit for the duties of the position for which he is an applicant, and experienced in the subject matter of the employment,"—being special and local in its character, is not to be deemed to be repealed by the civil service act requiring preference to be given to honorably discharged Union soldiers in civil appointments. Browne *v.* Duane, 14 N. Y. S. 450.

h. District of Columbia—Police Force—Statute Requiring Preference in Appointment Superseded by Later Act (Rev. St. Dist. C. § 334).

Revised Stats. Dist. Columbia, § 334, were superseded by the act of Congress, June 11, 1878; and since July 1, 1878, the commissioners of the District of Columbia have had full power to appoint on the police force persons who have never served in the army or navy of the United States. Hutton *v.* District of Columbia, 19 Wash. Law R. 386.

i. Members of Health Board (Laws of N. Y. 1887, ch. 464; Laws N. Y. 1896, ch. 821, § 1).

Laws of New York 1887, ch. 464, and 1896, ch. 821, § 1, preferring honorably discharged veterans for appointment in all departments of the public service, do not require the preference of veterans in the appointment of members of a village board of health, for the reason

Notes

that the statutes mentioned do not apply to heads of departments; whereas the board of health is itself a department, and the members thereof are not "appointees in the department." People *v.* Board of Trustees of Saratoga Springs, 35 App. Div. 141, 54 N. Y. Supp. 1083, affirmed, without opinion, 159 N. Y. 568, 54 N. E. Rep. 1093. See also, People *v.* City of Yonkers, 14 N. Y. S. 455.

j. Officers and Teachers of Free School (Laws of N. Y. 1896, ch. 821).

So the officers and teachers of a union free school, which is within or coextensive with the limits of a village, are not within the provisions of New York Laws 1896, ch. 821, amending Laws of 1884, ch. 312, preferring honorably discharged veterans for employment in the civil service in every department of the state, counties, cities, and villages, for the reason that such school is not a public department within the meaning of the statute. People, Burlingame *v.* Hayward, 19 App. Div. 46, 46 N. Y. Supp. 1083.

k. Second Assistant Clerk of District Court (Greater New York Charter, § 1373).

A veteran holding a position as second assistant clerk of a justice's court in the city of Brooklyn prior to January 31, 1898, and removable therefrom at the pleasure of the justice, was not entitled to be advanced to the position of assistant clerk upon the removal of that official after the consolidation, for the reason that his clerkship was not an office, and that he did not hold for a fixed term within § 1373 of the charter of the new city, providing that clerks, assistant clerks, etc., of the district courts of the city of New York, and the justice's courts of the city of Brooklyn, who should be in office at the time of the consolidation, should continue until the expiration of their respective terms. People, Joyce *v.* Van Wart, 25 Misc. Rep. 215, 55 N. Y. Supp. 68, affirmed 55 N. Y. Supp. 522, 36 App. Div. 518, 158 N. Y. 720, 53 N. E. Rep. 1130.

l. Street Inspectors (Buffalo City Charter).

Street inspectors, appointed under provision of Buffalo city charter authorizing the street commissioner to make such appointments, and declaring that such appointees shall be deemed city officers, are within the terms of the veteran acts preferring honorably discharged soldiers for appointment in the civil service of the state and city governments. In re Wartman, 2 N. Y. S. 324; People *v.* Summers, 9 N. Y. S. 700.

II. CERTIFICATION.

a. Striking Name of Veteran from Eligible List (Laws N. Y. 1896, ch. 821).

After a veteran has been given preference by the commission in accordance with New York Constitution, art. 5, § 9, and New York Laws 1896, ch. 821, § 1, upon the list of persons eligible for appointment, he cannot afterwards, without notice and an opportunity to be heard, be stricken from such list because of an alleged physical infirmity, although the board omitted giving him a physical examination in the first instance, as they had a right to do. People, Van Petten *v.* Cobb, 13 App. Div. 56, 43 N. Y. Supp. 120.

b. Refusal to Certify—Estoppel of Commissioners to Repudiate Their Official Acts.

While the "Black Law" (Laws N. Y. 1897, ch. 428) was in effect, providing that applicants for appointment in the public service of the towns and cities of the state should be examined by the civil service commission as to merit, and by the common council, who held the power of appointment, as to fitness, each examination to be rated at fifty points, an honorably discharged veteran made application, was examined as to merit, graded at 49.35, and certified on the eligible list to the appointing power. Subsequently, in March 1898, the "Brush Law" (Laws 1898, ch. 186) was enacted authorizing the commission to examine as to both merit and fitness, the examinations to be rated the same for each. Under this law the commission formulated rules whereby all lists of eligibles *existing prior to* July 1, 1898, were

Notes

to be continued, and the ratings for merit only to be multiplied by two to determine the rating for merit and fitness. In pursuance of this rule, the commission so multiplied the applicant's rating, and placed his name upon the eligible list at 98.70, and officially notified him of the same. In February, 1899, however, they refused to certify his name on the list of eligibles to the common council, on the ground that their acts were invalid. On an application for mandamus to compel such certification, it was held that the commission could not repudiate its rules and official actions in such manner, and that the applicant's name was entitled to be placed on the eligible list at the rating as doubled. People *v.* Knauber, 163 N. Y. 23, 57 N. E. Rep. 161.

III. REMOVAL.

a. Penal Statute Forbidding, to Be Construed Strictly (Acts of Mich. 1897, No. 205).

The first section of the Michigan veterans' act (Public Acts 1897, No. 205) prefers honorably discharged veterans for appointment and employment in "every public department, and in all public departments in all municipal corporations, and upon the public works of the state of Michigan." The second section provides that "no veteran holding an office or employment in the public works of any city or town of the state shall be removed," etc. Section 3 provides that any violation of the provisions of the act shall be deemed a misdemeanor, punishable by fine, etc.: *held*, that the statute being penal, must be strictly construed; hence the provisions of section 2, being expressly limited to offices or employment in the public works of any city or town, cannot be extended to include public departments. Ellis *v.* Common Council of Grand Rapids et al. (Mich.), 82 N. W. Rep. 244.

b. Statute Forbidding Removal Not Derogatory from Power of Subsequent Legislature.

The relator, a Union soldier, duly installed in the office of superintendent of the almshouse of the city of Trenton, complained that his office had been intruded into by the respondent. The latter justified the alleged intrusion on the ground that he had been duly appointed to the office in dispute by virtue of an act providing for the creation of a police department in certain cities of the second class, and vesting in such police department certain powers of management and appointment which prior to that time were invested in other departments or offices of said cities. Among other positions placed under the control of the police power so created was that held by the relator. It was held that the statute regulating the removal of Union soldiers from office was applicable only to municipal action, and was not intended as a restraint upon legislation which might result in such removals; and that in the case at bar, the relator was removed by the intrinsic force of the act relied on by the respondent. State, Baker *v.* Delaney (N. J.), 55 N. J. L. 9, 25 Atl. Rep. 936.

c. Statute Not to Be Construed Retrospectively (Laws N. Y. 1899, ch. 370).

New York Laws 1899, ch. 370, prohibiting the removal of honorably discharged soldiers holding municipal positions except for incompetency and after a hearing, does not apply to removals occurring before its passage. People *v.* Drake, 60 N. Y. S. 309, 43 App. Div. 325.

d. Removal for Incompetency and Misconduct Only (Laws N. Y. 1894, ch 716).

Under Laws New York 1894, ch. 716, § 1, providing that veterans shall not be removed from public positions to which they have been appointed except for "incompetency and conduct inconsistent with the position held by them," removals can be made on no other grounds than those specified. People *v.* Wright, 40 N. Y. S. 285, 7 App. Div. 185, affirmed in 150 N. Y. 444, 44 N. E. Rep. 1036; People, Cunliffe *v.* Cram, 34 App. Div. 313, 54 N. Y. Supp. 355.

Notes

e. De Facto Officers (Laws N. Y. 1896, ch. 821).

The provisions of New York civil service act of 1896, that no veteran holding a position by appointment or employment shall be removed except for cause shown and after due notice and a hearing, apply to de jure officers only, so that one whose appointment was illegal because he had failed to pass the required examination was not within the protection of the statute; nor could the validity of his appointment be inquired into under the provision requiring notice. People, Hannan *v.* Troy Board of Health, 153 N. Y. 513, 47 N. E. 785, reversing 15 App. Div. 272, 44 N. Y. Supp. 597.

Same—Veteran Appointed to Succeed Wrongfully Removed Veteran (N. J. Act, March 14, 1895).

Under New Jersey act of March 14, 1895 (3 Gen. St. p. 3702), declaring that no honorably discharged veteran holding a position under the government of any county, the term of which is not otherwise fixed by law, shall be removed except for cause and after a hearing, an honorably discharged soldier appointed janitor of a county courthouse upon the unlawful removal of another veteran from the position, cannot, when he is himself removed and the former incumbent restored, maintain a certiorari proceeding to have the re-appointment of such first incumbent set aside on the ground that it was in violation of the veteran act, since by such contention he admits that his own previous appointment was illegal for the same reason. State, Heaviland *v.* Board of Chosen Freeholders of Burlington County et al. (N. J.), 44 Atl. Rep. 963.

Same—Does Not Protect Deserter Who Afterwards Received Discharge (N. J. Act, March 14, 1895).

Nor does the New Jersey Act of March 14, 1895, protect a soldier who deserted his regiment, but afterwards received his discharge, under an order of the war department authorizing the same to be issued upon his furnishing a substitute, for such a person is not to be deemed an honorably discharged soldier. Francis *v.* City of Newark (N. J.), 33 Atl. Rep. 853.

f. Statute Applicable Only to Subordinate Positions (Laws N. Y. 1894, ch. 716).

New York Laws 1894, ch. 716, relative to the removal of veterans, applies only to subordinate officers and employees, and not to public officers vested with discretion in the performance of their duties, subject to no direction, and empowered to appoint clerks and other subordinates, and fix their compensation. Hence a member of the board of assessors of the old city of New York who was appointed to a like position under the consolidated government of Greater New York, and who has been removed under § 95 of the charter giving the mayor absolute power to remove any of his appointees within six months after the beginning of his term, cannot invoke the protection of the veterans' act against removal. People, Jacobus *v.* Van Wyck, 157 N. Y. 495, 52 N. E. Rep. 559. And so as to a veteran holding the position of commissioner of the New York and Brooklyn bridge. People, Baird *v.* Nixon, 53 N. Y. Supp. 230, 32 App. Div. 513, affirmed in 158 N. Y. 221, 52 N. E. Rep. 1117. See also, People, Speight *v.* Coler, 157 N. Y. 676, 51 N. E. Rep. 1093.

Same (Mass. St. 1896, ch. 517, § 5).

So the Massachusetts statute 1896, chapter 517, § 5, applies only to officers within the scope of the civil service act of 1884 (St. 1884, chapter 320), and a veteran removed by the mayor from the board of assessors without a hearing cannot maintain a petition for a mandamus to compel his recognition as an assessor. Ayers *v.* Hatch, 175 Mass. 489, 56 N. E. Rep. 612.

g. Confidential Positions.

Many of the New York statutes exempt from their provisions forbidding the removal of veterans all those occupying positions in which they sustain confidential relations to their superiors in office;

Notes

for example, private secretaries, confidential clerks, etc. In some instances the positions to be considered as confidential have been left to the determination of the commissioners, as in Laws N. Y. 1894, ch. 716. In such case a veteran cannot compel appointment or restoration to a place which has been entered upon the schedule as "confidential." In re Ostrander, 34 N. Y. S. 295, 12 Misc. Rep. 476. On the other hand, the statute itself may declare certain positions to be confidential; in which case the act of the commissioners in placing them in the competitive list is a mere nullity. Thus in People, Sweet *v.* Lyman, 157 N. Y. 368, 52 N. E. Rep. 132, the relator, an honorably discharged veteran, sought to compel his restoration to the position of "special agent" in the state revenue system, to which he had been appointed for a probationary period of three months by the state commissioner of excise. The statute (N. Y. Laws 1896, ch. 112) conferring authority upon the commissioner to make the appointment expressly declared that the persons appointed should be deemed "confidential agents of the state commissioner." It was held that the act of the civil service commissioners placing such position in the list where competitive examinations were required, afforded the relator no ground of relief.

Same—Secretary of Fire Department.

In other cases the character of the position as confidential or non-confidential seems left to be determined upon the facts as they arise. Thus, the secretary of the fire department of New York City, whose duties require him to open all letters addressed to the commission, and to supervise generally the business and operations of the office, and who is in a position to know all the proposed proceedings by the fire marshal for the enforcement of the laws relating to arson, is within the provision of the veteran act declaring that the section prohibiting the removal of veterans from office, except on charges preferred and after a hearing, shall not apply to the private secretary of a department. People *v.* Scannell, 64 N. Y. S. 593, 51 App. Div. 360.

Same—Subpœna Server.

So under New York Laws, 1896, chapter 821, § 1, forbidding the removal of veterans holding other than strictly confidential positions except for cause shown, a subpœna server appointed by the district attorney of the county of New York holds a strictly confidential position from which he may be removed by the appointing officer at pleasure. People, Flood *v.* Gardiner, 157 N. Y. 520, 52 N. E. Rep. 564, reversing 53 N. Y. Supp. 451, 33 App. Div. 204.

Same—Clerk in Sheriff's Office.

So under the New York statutes of 1890, ch. 67, a veteran holding a position as clerk in a sheriff's office by appointment from the sheriff is removable at pleasure, and in no case can such appointee hold beyond the term of the appointing officer. Sargent *v.* Gorman, 14 N. Y. S. 481, affirmed in 131 N. Y. 191, 29 N. E. Rep. 946.

Same—Water Registrar.

But a veteran holding a position as water registrar in the city of Greater New York does not sustain a confidential relation to either the commissioner or deputy commissioner of water supply within the provisions of chapter 716 of the veteran act of 1894, or chapter 821 of the act of 1896, for the reason that neither alone has the absolute power of appointment to such position, and therefore neither would be liable for any defalcation by such registrar. People, Tate *v.* Dalton, 58 N. Y. Supp. 929, 41 App. Div. 458, affirmed in 160 N. Y. 686, 55 N. E. Rep. 1099.

Same—Deputy Tax Commissioner.

So under the New York act of 1888, ch. 119, amended by act of 1892, ch. 577, it was held that a deputy tax commissioner of New York City was not the deputy of an official department, or a person sustaining a confidential relation to the appointing officer in such sense that he

Notes

might not claim the benefit of the statute relating to the removal of veterans. People, Conway *v.* Barker, 14 Misc. Rep. 360, 70 N. Y. S. 523, 35 N. Y. Supp. 727.

Same—Dock Master.

And the mere fact that a veteran holding the position of dock master is entrusted with the collection of various moneys does not serve to make the position held by him one of trust within the terms of the veteran act. People, Brady *v.* O'Brien, 9 App. Div. 428, 41 N. Y. Supp. 529.

Same—Special Act Superseded by Later and General Enactment.

In People, Speight *v.* Coler, Comptroller, 31 App. Div. 523, 52 N. Y. Supp. 197, it was held that chapter 708, of the Laws of 1887, forbidding the removal, except for cause, of any honorably discharged veteran holding a position in the city of Brooklyn or the county of Kings, and receiving a salary from the city or county treasury, was not affected by the general act of 1896, chap. 821, which excepts from its proviso forbidding the removal of veterans, except upon cause shown, all those holding confidential positions. This was affirmed in 157 N. Y. 676, 51 N. E. Rep. 1093, without opinion, on the ground that it did not appear from the record that the position was a strictly confidential one. But in People, Tate *v.* Dalton, 158 N. Y. 204, 52 N. E. Rep. 119, it was decided that chapter 708 of the local act of 1887 was repealed by chapter 821 of the general act of 1896, thereby making veterans holding confidential positions in the city of Brooklyn and county of Kings removable at the pleasure of the appointing officer.

h. Abolition of Office Held by Veteran.

The cases are unanimous in holding under all the statutes that nothing contained therein shall prevent the removal of a veteran from his office or position by abolishing it in good faith and for reasons of economy and transferring the duties thereof to the incumbent of an existing office. People *v.* Scannell, 163 N. Y. 599, 57 N. E. Rep. 1121, affirming 62 N. Y. S. 930, 48 App. Div. 445; People *v.* City of Brooklyn, 149 N. Y. 215, 43 N. E. Rep. 554, reversing 36 N. Y. S. 172; People *v.* Waring, 62 N. Y. S. 966; State, Beirne *v.* Jersey City Street & Water Com'rs, 60 N. J. L. 109, 36 Atl. Rep. 778; State, Caulfield *v.* Mayor, etc., of Jersey City, 43 Atl. Rep. 433; State, Sutherland *v.* Board of Street and Water Com'rs, 61 N. J. L. 436, 39 Atl. Rep. 710. So in People, Nutall, *v.* Simis, 18 App. Div. 199, 45 N. Y. Supp. 940, it was held that a veteran holding a position as tin smith in the department of charities and corrections was entitled to no redress upon the abolition of his position and the transfer of his duties to the prisoners who did the work for nothing. And where the commissioner of public works of the city of Brooklyn appointed as temporary clerks four persons, only one of whom was an honorably discharged veteran, and upon the return of the regular clerks notified the ex-soldier that his services were no longer needed, but retained the other three who had been assigned to other duties, it was held to be no violation of the statute forbidding the removal of veterans except for cause. People *v.* Adams, 133 N. Y. 203, 30 N. E. Rep. 851, reversing 6 N. Y. S. 128. So section 127 of the charter of Greater New York, which provided that all veterans holding positions under the old city governments from which they could not be removed under the law existing at the time of the consolidation, should be retained in like positions and under the same conditions so far as consistent with economy and the needs of the service, was held not to alter the rule that the city authorities might remove a veteran from his position by abolishing it in good faith and on economic grounds. People, Breckenridge *v.* Scannell, 25 Misc. Rep. 619, 56 N. Y. Supp. 117, 58 N. Y. Supp. 1146, affirmed in 160 N. Y. 103, 54 N. E. Rep. 670; People *v.* Scannell, 62 N. Y. S. 930, 48 App. Div. 445, affirmed in 163 N. Y. 599, 57 N. E. Rep. 1121. Nor does section 127 direct that veterans be retained at like salaries as in their old positions; as

Notes

where one holding a position as street inspector in the city of Brooklyn at the time of the consolidation was appointed to a position as section foreman under the government of the new city, but at a salary of $1,000, in conformity with section 536 of the new charter, instead of $1,200 as in the former position. People, Schumann *v.* Coler, 38 App. Div. 615, 56 N. Y. Supp. 943.

But it is rigorously insisted that the abolition must have been strictly in good faith, and not merely colorable and for the purpose of evading the statute. Thus where the duties of the place were not dispensed with, altered, or merged into any other service, but the only abolition consisted in a mere colorable change of title, the pretended abolition was ordered set aside and the relator restored to his position. State, Womsley, Prosecutor, *v.* Mayor, etc., of Jersey City, 61 N. J. L. 499, 39 Atl. Rep. 710; State, Ingram *v.* Board of Street and Water Com'rs of Jersey City, 43 Atl. Rep. 445.

But the removal of seventeen honorably discharged veterans from their positions as inspectors of fire-hydrants in the city of Brooklyn, for alleged economic reasons, and for the purpose of securing uniformity in the service, is not, per se, evidence of bad faith on the part of the commissioner. People *v.* Scannell, 62 N. Y. S. 930, 48 App. Div. 445, affirmed in 163 N. Y. 599, 57 N. E. Rep. 1121.

Same—Transfers Required.

Owing to the colorable abolitions and other abuses arising under the existing law, the New York Legislature added to the statute (Laws N. Y. 1898, ch. 184, amended, Laws 1899, ch. 370, § 21) a provision to the effect that whenever an office held by a veteran in a city of the first class shall become unnecessary or abolished, he shall be transferred to some other position in the service. Under this act and its amendment it is held that a mandamus will issue to compel the comptroller of the city of New York to reinstate a veteran whom he has discharged on the alleged ground of economy while retaining others, not veterans, performing the same services. People *v.* Coler, 68 N. Y. S. 738, 34 Misc. Rep. 119.

And so where the fire commissioners have abolished an office held by a veteran and discharged him from the service without charges or an opportunity to be heard. People, Shields *v.* Scannell, 59 N. Y. Supp. 480, 27 Misc. Rep. 734.

But this statute does not vest in such veteran the unqualified right to be retained in the service irrespective of the existence of any position which he is qualified to fill. The burden is on him to show the existence of similar positions, and that he is qualified to fill them. When he has done this a mandamus will issue to the proper officer requiring him to assign the relator to duty in some one of the positions, especially if it is shown that some of the positions are vacant. People *v.* Scannell, 62 N. Y. S. 682, 48 App. Div. 69; People *v.* Clausen, 61 N. Y. S. 579, 29 Misc. Rep. 701; People *v.* Scannell, 160 N. Y. 103, 54 N. E. Rep. 670, affirming 58 N. Y. S. 1146, 40 App. Div. 633.

i. Veterans Employed by the Day, Job, etc.

As a rule, the statutes forbidding the removal of veterans do not apply to those employed by the day or job, or to discharge duties which, from the very nature of the case, are of a temporary character; it being generally held that veterans so employed may be discharged when there is a lack of work, or when the special duties upon which they were engaged have been completed. Thus it was held that the N. Y. Act of 1888, ch. 119, did not apply to a day laborer in the department of public works. Meyers *v.* City of New York, 23 N. Y. S. 484, 69 Hun 291. And in Nuttall *v.* Simis, 47 N. Y. Supp. 1097, 22 Misc. Rep. 19, affirmed in 31 App. Div. 503, 52 N. Y. Supp. 308, arising under the same statute, a distinction was made where the employment itself, and not merely the compensation, was by the day, in which latter case the veteran would have been entitled to the protection of the statute. See also, Wagner *v.* Collis, 40 N. Y. S. 171, 7

Notes

App. Div. 203 (exempt fireman detailed as laborer on public works), arising under ch. 577, of the act of 1892; and People, Reynolds *v.* Squier, 10 App. Div. 415, 42 N. Y. Supp. 1, arising under ch. 716 of the act of 1894.

Same—Carpenter Employed by Board of Freeholders.

Under the New Jersey act of March 14, 1895, it was held that a carpenter, an honorably discharged veteran, employed by the board of chosen freeholders to do certain work about the county courthouse, under the direction of the county superintendent, and paid by the day, might be discharged upon the completion of the work for which he was engaged, for the reason that he did not hold an "office" or "position" within the meaning of the statute. State, Kreigh *v.* Hudson County Freeholders, 62 N. J. L. 178, 40 Atl. Rep. 625.

Same—Veteran Signing Contract to Work by the Job.

So under the Mass. act of 1896, ch. 517, § 5, a veteran employed only by the job is not to be deemed discharged or suspended after his special task is done. Under that statute a veteran who signs a contract to do work by the job, thereby waives his rights under the statute; and the fact that he did not know that the contract amounted to a waiver, does not, in the absence of fraud, mistake, or misrepresentation, suffice to invalidate it. Nor can he, in such case, maintain an action against the city for failure to employ him, when there was work to do, in preference to another man, not a veteran. Clark *v.* City of Boston, 60 N. E. Rep. 793, 6 Mun. Corp. Cas. 718.

Same—Veteran Appointed for Probationary Term.

So under Laws N. Y. 1896, ch. 821, prohibiting the removal of veterans except for misconduct or incompetency, a veteran appointed to a position for a probationary term of three months, under the act of 1883, ch. 354, § 2, does not, during such period, hold "a position by appointment" in such sense as to bring him within the terms of the statute first mentioned. People, Sweet *v.* Lyman, 20 Misc. Rep. 80, 44 N. Y. Supp. 1084.

Same—Veteran Employed to Inspect Laying of Gas Mains.

So a veteran appointed by the commissioner of public works of New York City to inspect the laying of the mains of a certain gas company, by which company he was to be paid $100 per month, was employed for a special and particular purpose, and not in the general service of the department of public works; and upon the termination of such special employment, he was not entitled to be continued in the service of the city. The fact that he did other work in the department after the completion of the laying of the mains was immaterial. People *v* Gilroy, 15 N. Y. S. 242.

Same—Painter in Department of Docks.

In People *v.* Cram, 63 N. Y. S. 1027, 30 Misc. Rep. 561, a veteran employed in the department of docks to do painting, for which he was paid by the day, was discharged without a hearing and without any charge as to incompetency or misconduct. Chapter 716 of the Laws of 1894 prohibited the removal of veterans employed in the public service except for incompetency or conduct inconsistent with their positions. Chapter 478 of the Laws of 1894, relating to the department of docks, declared that all work done therein, except repairs not exceeding $500, should be by contract, after advertising. It was held that as the work done by the relator was repairs not exceeding $500, it could be done by one paid by the day; hence the discharge was improper under the statute first mentioned.

Same—Veteran Laborers Not to Be Discharged While Others Are Retained.

An honorably discharged veteran holding a position as foreman of a "repair gang" whose chief duties consist in repairing the city streets, cannot be removed because of a temporary lack of work, while another, not a veteran, is retained as foreman of a "connection gang," the duties of the two gangs being identical. McCloskey *v.* Willis, 15 App. Div. 594, 44 N. Y. *Supp. 682.*

Notes

Same—Same.

So where a veteran employed in the department of public parks was transferred to an "annexed district," the failure of the appropriation for work in that district was no excuse for his discharge when laborers were retained and employed in other sections under the control of the park commissioners. People *v.* Board of Public Parks, 17 N. Y. S. 589.

j. Term of Office or Position Not Otherwise Fixed by Law (N. J. Acts, April 9, 1889; May 16, 1894; March 14, 1895).

Under the New Jersey veteran acts, of which there have been several, a veteran is not entitled to immunity from removal unless: first, he hold an "office" or "position"; second, the term of which is not otherwise fixed by law. As used in the statutes, a position is defined to be a place the duties of which are continuous and permanent, analogous to those of an office, and which pertain to the position as such. State, Lewis *v.* Board of Public Works, 51 N. J. L. 240, 17 Atl. Rep. 112; State, Stewart *v.* Board of Chosen Freeholders of Hudson County, 61 N. J. L. 117, 38 Atl. Rep. 842. Under this definition a bridge keeper employed at a salary of $25 per month, a superintendent of public buildings, a janitor of a county courthouse, a keeper or guard at a county jail, and the deputy warden of an almshouse, have all been held to be entitled to the protection of the statute. State, Lewis *v.* Board of Public Works, 51 N. J. L. 240, 17 Atl. Rep. 112; State, Townsend *v.* Boughner, 55 N. J. L. 380, 26 Atl. Rep. 808; State, Peterson *v.* Board of Chosen Freeholders of Salem County, 42 Atl. Rep. 844; State, Daily *v.* Board of Chosen Freeholders of County of Essex, 33 Atl. Rep. 739; State, Cvanagh, *v.* Essex County Freeholders, 58 N. J. L. (29 Vroom) 531, 33 Atl. Rep. 943.

In State, Bilderback *v.* Board of Freeholders of Salem County, 42 Atl. Rep. 843, the term of office of a trustees of the poor appointed under the provisions of the act of April 10, 1846, Rev. St. p. 893, was held to be fixed by the terms of that act, so that a veteran failing of reappointment thereto was held to be without remedy. And in State, McLaughlin *v.* Board of Public Works, 51 N. J. L. 240, 17 Atl. Rep. 112, a veteran employed as a general workman about the city waterworks was held to be without the protection of the statute, for the reason that he did not hold an office or position within the meaning thereof. See also, State, Kreigh *v.* Hudson County Freeholders, 62 N. J. L. 178, 40 Atl. Rep. 625.

As to the meaning of "not otherwise fixed by law," it is understood that every veteran holding an office or position the term of which is not defined by statute, becomes, by the force of the act, entitled to hold during good behavior, or until the office is abolished in good faith and for economic reasons. State, Stewart *v.* Board of Freeholders of Hudson County, 61 N. J. L. 117, 38 Atl. Rep. 842; State *v.* Boughner, 55 N. J. L. 380, 26 Atl. Rep. 808.

Same (Pa. Act, May 26, 1897—P. L. 107).

In Brower *v.* Schuykill County Com'rs, 21 Pa. Co. Ct. Rep. 311, 7 Pa. Dist. Rep. 702, it was held that the Pa. act of May 26, 1897, relating to the removal of veterans from public office or position, did not apply to the office of county warden, for which the law requires appointment annually. On appeal to the supreme court the act was held to be unconstitutional, in that it contravened § 4 of art. 6, of the constitution, declaring that appointed officers may be removed at pleasure by the power which appointed them. Brower *v.* Kantner et al. Com'rs, 190 Pa. 182, 43 Atl. Rep. 7.

k. Miscellaneous Offices and Employments—Teacher in Public Schools (N. Y. Act 1892, ch. 577).

A teacher in the public schools of a city, paid by the board of education, was held not to be within the protection of Laws of N. Y. 1892, ch. 577, relating to the removal of honorably discharged veterans holding an appointment within, and receiving salary from, a city or county. Ridenour *v.* Brooklyn Board of Education, 15 Misc. Rep. 418, 37 N. Y. Supp. 109, 72 N. Y. S. 155.

Notes

Same—Assistant Bridge Keeper (N. Y. Act, 1892, ch. 577).

The assistant keeper of the Blissville bridge, once under the control of the supervisors of Kings and Queen counties, but subsequently under the control of the board of aldermen of the city of Brooklyn, was held to be within the protection of the New York act of 1892, ch. 577. Re Murray, 17 Misc. Rep. 185, 40 N. Y. Supp. 1041.

Same—Employees of Fire, Water Supply, and Street Cleaning Departments (Laws N. Y. 1888, ch. 119, § 1; Greater New York Charter §§ 537, 1536).

In People *v.* Waring, 37 N. Y. S. 478, 1 App. Div. 594, affirmed in 40 N. Y. S. 35, 7 App. Div. 247, it was held that Laws N. Y. 1892, ch. 269, authorizing the commissioner of street cleaning to dismiss a member of the uniformed force upon satisfactory evidence, being special and local in its operation, was not restricted by the act of 1888, ch. 119, § 1, forbidding the removal of veterans from public position or employment except for cause shown.

But section 1536 of Greater New York charter, requiring that persons occupying positions in any of the component cities should be assigned to similar positions under the new city, and providing that every officer given power to appoint subordinates may remove any person assigned to service under him, is held, as to this latter clause, to refer only to those persons appointed by the officers themselves, and not to those transferred by operation of law and who were at the time within the protection of the veteran act against removal. Section 537, authorizing removals by the commissioner of street cleaning, is construed in the same manner. People, Tate *v.* Dalton, 34 App. Div. 6, 53 N. Y. Supp. 1060, affirming 53 N. Y. Supp. 108, 24 Misc. Rep. 10, and affirmed in 158 N. Y. 204, 52 N. E. Rep. 1119; People, Middleton *v.* McCartney, 55 N. Y. Supp. 156, 36 App. Div. 39; People, Schumann *v.* McCartney, 34 App. Div. 19, 53 N. Y. Supp. 1047; People, Brymer *v.* Gray, 53 N. Y. Supp. 274, 32 App. Div. 458, reversing 23 Misc. Rep. 602, 51 N. Y. Supp. 1087.

Same—County Detective (Laws N. Y. 1887, ch. 708).

Under New York Laws of 1887, ch. 708, relating to employees in the various departments of the city of Brooklyn, and prohibiting the removal of such as were honorably discharged veterans, except for cause and after a hearing, a county detective, appointed by the district attorney of the county of Kings, under Laws 1896, c. 772, repealing all inconsistent acts, "to hold office during the pleasure of said district attorney," was held not to be an employee of the city. People *v.* Clarke, 66 N. Y. S. 1068, 54 App. Div. 588.

Same—Keeper in State Prison (N. Y. Laws 1889, ch. 382, § 30).

Under New York Laws 1889, c. 382, § 30, by which the authority given by the constitution to the superintendent and warden as to appointments is repeated, and which provides that each shall have the power to remove his appointees when in his judgment the public interests require it, a keeper of Sing Sing prison, who is an honorably discharged Union soldier, has no absolute right to such position, and the warden may remove him when in his honest judgment the public interests require it. People *v.* Lathrop, 24 N. Y. S. 754, 71 Hun 202.

Same—Crier to City Court (N. Y. Laws, ch. 119).

Laws of N. Y. 1888, c. 243, re-enacting Code Civil Prac. § 301, authorizing the judges of the superior court of the city of Buffalo to appoint and remove at pleasure a crier to that court, excepts that office from the operation of Laws 1888, c. 119, providing that no honorably discharged soldier of the Civil War shall be removed except for cause, etc. People *v.* Judge of Superior Court, 9 N. Y. S. 691.

Same—Clerk of District Police Court (N. Y. Laws 1892, ch. 577).

An honorably discharged veteran appointed to the position of clerk of a district police court, under provision of the Brooklyn city charter that such appointees should serve during the pleasure of the police justice, was held not to be within the *protection* of the act of 1892, ch.

Notes

577, relating to the employees of city and county governments and forbidding the removal of such as were honorably discharged veterans. People, Earl *v.* England, 16 App. Div. 97, 45 N. Y. Supp. 12.

Same—Clerk of District Court of City (N. J. Act, April 9, 1889).

So the New Jersey act of April 9, 1889, prohibiting the removal of honorably discharged Union soldiers from state, city, and county offices except for cause, was held not to apply to the clerk of the district court of a city; for the district court, although existing only in certain cities, and limited in its jurisdiction to the city in which it sits, is not a municipal institution, but a portion of the judicial power of the state. State *v.* O'Connor, 22 Atl. Rep. 1091.

Same—Veteran Appointed as Attorney to Board of Freeholders (N. J. Act, March 14, 1895).

The resolution of a county board of freeholders, appointing a member of the bar as "attorney to the board," does not place him in a public "office or position" within the protection of the New Jersey veteran act of March 14, 1895, as the statute applies only to offices and positions which are analogous to offices in the permanence of the duties which pertain to them; and as there is no law recognizing such an office as attorney to the board of chosen freeholders, the whole force of the resolution was to employ the relator as the attorney of that particular board, and when that board expired by limitation of law, his employment as attorney came to an end also. State, Rowe *v.* Board of Chosen Freeholders of Hudson County, 61 N. J. L. 120, 38 Atl. Rep. 818.

I. Due Process—Refusal of Aid of Counsel.

The dismissal from service of one entitled to the protection of the veteran act is erroneous when he was refused the aid of counsel to which he was entitled under the statute. People, Brady *v.* O'Brien, 9 App. Div. 428, 41 N. Y. Supp. 529.

Same—Insufficient Charges.

Under Laws N. Y. 1896, c. 821, § 1, forbidding the removal of veterans except upon preferred charges with due notice and opportunity for a hearing, charges of misconduct against a veteran employed as a policeman, which state neither the time nor place, nor any proximate time or place, of the alleged misconduct, are not sufficiently definite to enable him to prepare his defense. People, Miller *v.* Elmendorf, 42 App. Div. 306, 59 N. Y. Supp. 115.

Same—Notice and Hearing.

Under Laws New York 1888, c. 119, as amended by Laws 1892, c. 577, forbidding the removal of veterans holding positions in the public service "except for cause shown and after hearing had," a veteran is entitled to notice of the specific charge which will be preferred against him, and of the hearing. People, Brady *v.* Brookfield, 39 N. Y. S. 677, 6 App. Div. 445.

But chapter 716 of the Laws of N. Y. 1894, providing for the giving preference to honorably discharged veterans in appointments to office, and that the person appointing shall have power to remove for incompetency or conduct inconsistent with the position held, does not prevent such a veteran from being discharged for improper conduct or incompetency without a hearing; the words relative to notice and hearing having been omitted from that statute. People *v.* Morton, 42 N. E. Rep. 538, 148 N. Y. 156; People *v.* Brookfield, 37 N. Y. S. 718, 2 App. Div. 299.

Same—Same—Retirement on Pension Not a Removal (Laws N. Y. 1899, ch. 370, § 21).

Section 790 of Greater New York charter, authorizing the fire commissioners to retire officers of the uniformed force on a pension, when, on medical examination, they are found mentally or physically disqualified, is not repealed by the act of 1899, ch. 370, § 21—prohibiting the removal of honorably discharged veterans from public position or employment, except for incompetency or misconduct after a

hearing on preferred charges—for the reason that such retirement is not a removal; hence preferment of charges, notice, and opportunity for a hearing are not necessary steps in the retirement of a veteran holding such office. People *v.* Scannell, 164 N. Y. 572, 58 N. E. Rep. 1091, affirming 65 N. Y. S. 832, 53 App. Div. 161.

Same—Hearing—What Amounts to.

Where a veteran holding a civil service position appeared before his superior in response to a written notice stating the charges against him, and substantially admitted their truth, and was given opportunity to explain his conduct, he had a hearing within the meaning of chapter 184 of the Laws of 1898 forbidding the removal of veterans holding positions in the public service except for cause and after a hearing. People *v.* Brady, 63 N. Y. S. 1089, 50 App. Div. 372.

Same—Same—Police Commissioner Prejudiced against Accused.

Under the Act of April 19, 1899 (Laws New York 1899, ch. 370), forbidding the discharge of veterans employed in any public department or on any public works in the state without a hearing on stated charges, the police commissioner of a village is the only person entitled to hear charges preferred against a janitor of the police station, and the fact that he is prejudiced against the accused makes no difference. People *v.* Magee, 66 N. Y. S. 849, 55 App. Div. 195.

Same—Notice to Removing Officer—Injured Veteran Must Notify Head of Department That He Will Return to Work upon His Recovery.

Under Laws N. Y. 1894, ch. 716, a veteran unable to work because of personal injuries must, in order to prevent his discharge, notify the head of the department that he will return to work upon his recovery, and it is not sufficient to merely send word that he has been injured. People, Reynolds *v.* Squier, 10 App. Div. 415, 42 N. Y. Supp. 1.

Same—Same—Notice That Relator Is a Veteran—Casual Knowledge Not Notice.

A mere casual remark, made to one many years before he was in office, in regard to certain persons having been in the army, is insufficient to charge him with notice that a certain subordinate in his department is an honorably discharged veteran, and as such, entitled to protection of the act forbidding the removal of veterans. People *v.* Clausen, 63 N. Y. S. 993, 50 App. Div. 286.

Same—Same—Relator Estopped to Claim That He Is a Veteran.

Under § 704c of New York City Consolidated Acts requiring the commissioner of street cleaning to detail a registration clerk, and providing that every applicant for the position shall state on oath what services, if any, he has rendered in the army or navy in time of war, which answer shall be recorded, an applicant who answers "None," cannot, after his discharge, claim the immunity from removal which the statute extends to honorably discharged soldiers. People *v.* Waring, 62 N. Y. S. 966.

So where a discharged employee has failed to assert his right to freedom from discharge on a hearing before the discharging board, he cannot raise the point on a review of the action of the board. People *v.* Cram, 36 N. Y. S. 1117, 15 Misc. Rep. 12.

m. Waiver of Rights by Veteran (N. J. Act, March 14, 1895).

Under the New Jersey veteran act of March 14, 1895, the immunity from removal extended to veterans holding office or position in the public service, is a personal privilege, which may be waived by the beneficiary thereof, and which is waived by the appointee accepting a position in the municipal or other service for a specified time, even though the term of the position, not being otherwise fixed by law, would, but for the contract entered into by the appointee, be fixed as during good behavior by the operation of the act. State, Hardy *v.* Orange, 61 N. J. L. 620, 42 Atl. Rep. 581; State, Gilhooly *v.* Board of Freeholders of Hudson County, 43 Atl. Rep. 569; State, Heaviland *v.* Freeholders of Burlington County, 44 Atl. Rep. 963; State, Horan

Notes

v. Orange Board of Education, 58 N. J. L. (29 Vroom) 533, 33 Atl. Rep. 944.

Same (Mass. Act 1896, ch. 517, § 5).

So under the Massachusetts statute of 1896, ch. 517, § 5, forbidding the removal or suspension except after hearing of "any veteran holding an office or employment in the public service of any city or town," a veteran who signs a written contract to do work by the job, is not to be deemed suspended or removed after his special task is done, because his rights under the statute were waived by signing the contract to do work by the job. Clark *v.* City of Boston, 60 N. E. Rep. 793, 6 Mun. Corp. Cas. 718.

Same—Waiver by Accepting Position in Another Department.

The fact that the discharge from the street cleaning department of an honorably discharged veteran was unlawful because done without a hearing, will not entitle him to relief where he has acquiesced therein by accepting a place in another department and has entered upon the discharge of the duties therein. People ex rel. Sullivan *v.* Waring, 72 N. Y. S. 268, 36 N. Y. Supp. 1119.

n. Recovery of Wages by Veteran Wrongfully Removed.

The law governing the right of a veteran who has been wrongfully removed or suspended to recover wages for the period during which he was wrongfully deprived of his office or position, is the same as that applicable to all other public officers in like situation; the general doctrine being that the title to an office carries with it the right to the emoluments thereof—the emoluments being an incident to the title; hence an attempted wrongful removal or suspension, not affecting the title, does not deprive the officer of his right to the salary. The courts are not uniform upon this proposition, however, there being various exceptions; such as that payment of the fees or salary to a de facto officer filling the vacancy is a good defence to an action by the de jure officer. 19 Am. & Eng. Enc. Law (1st Ed.) 531.

In New York the decisions are uniform that a veteran wrongfully removed or suspended may recover his salary for the time that he was deprived of his office only when it has not been paid to the de facto officer assuming to fill the vacancy. Douglas *v.* Brooklyn Board of Education, 21 App. Div. 209, 47 N. Y. Supp. 435; O'Hara *v.* City of New York, 62 N. Y. S. 146, 46 App. Div. 518, affirming 59 N. Y. Supp. 36, 28 Misc. Rep. 258; Sullivan *v.* City of New York, 67 N. Y. Supp. 599, 33 Misc. Rep. 314; Higgins *v.* Mayor, etc., of New York, 131 N. Y. 128, 30 N. E. Rep. 44, reversing 14 N. Y. Supp. 554. And see also, Dolan *v.* Mayor, 68 N. Y. 275; McVeary *v.* Mayor, 80 N. Y. 185; Terhune *v.* Mayor, 88 N. Y. 247.

IV. CONSTITUTIONAL LAW.

a. Special Privileges (Ill. Act 1897, § 10 1-2).

Section 10½ of the Illinois civil service law of 1897, preferring honorably discharged veterans for appointment to civil offices, is in violation of the constitutional inhibition against granting exclusive privileges to individuals. People, Maloney *v.* Chicago Civil Service Com'rs (Cook Co. C. C.), 4 Chic. L. J. Wkly. 126.

Same (Mass. St. 1895, ch. 501, §§ 2, 6).

Sections 2 and 6, of the statutes of 1895, ch. 501, providing that, when a veteran makes application for appointment to public office under the civil service rules, and makes affidavit that he is qualified to perform the duties of the office, accompanying the affidavit with a certificate to the same effect signed by three citizens, he shall be preferred for certification and appointment in preference to all other applicants, not veterans, except women, are, so far as they purport absolutely to give veterans particular and exclusive privileges distinct from those of the rest of the community in obtaining public office, inconsistent with articles 6 and 7 of the declaration of rights, declaring, in substance, that no man, nor class of men, shall be entitled to any par-

Notes

ticular advantages or exclusive privileges, distinct from those of the community, other than what arises from the consideration of services rendered to the public (having reference to future, and not past, services), and that popular government exists for the common good and protection of all, and not for the profit, honor, or private interest of any one man, family, or class of men. Brown *v.* Russell et al., Civil Service Com'rs, 166 Mass. 14, 55 Am. St. Rep. 357, 32 L. R. A. 253, 43 N. E. Rep. 1005.

Same (Laws N. Y. 1895, ch. 344; 1894, ch. 717).

Article 5, § 9 of the New York Constitution of 1895, which provides that, "appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained as far as practicable by examinations, which, so far as practicable, shall be competitive, provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States * * * shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made,"—contemplates that in all examinations, competitive and non-competitive, the veterans of the civil war have no preference over other citizens of the state; but that when, as a result of those examinations, a list is made up from which appointments and promotions can be made, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference without regard to his standing on that list. Hence the act of 1895 (Laws of New York 1895, c. 344), which provides, in substance, that, as to honorably discharged soldiers and sailors of the civil war, competitive examinations shall not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed $4.00 per day, is unconstitutional. In re Keymer, 148 N. Y. 219, 42 N. E. Rep. 667, 35 L. R. A. 447. Chapter 717 of the laws of 1894, exempting honorably discharged soldiers and sailors from the operation of the civil service laws, was abrogated by the same section. In re Sweeley, 33 N. Y. S. 369, 12 Misc. Rep. 174, affirmed in 42 N. E. Rep. 543.

Same—Exempting Veterans from License Fee Required of Peddlers and Hawkers (Laws of Me. 1889, ch. 298).

Laws of Maine 1889, ch. 298, § 6, requiring all disabled veterans engaged in the business of hawking and peddling to obtain a license in common with all others engaged in the same business, but exempting them from payment of the license fee, is not unconstitutional; for such license fees, when paid, belong to the state, which has power to appropriate its entire revenue arising from that source to the pensioning of its disabled veterans; therefore to remit their payment to such persons is nothing more nor less than a contribution by the state to their support. State *v.* Montgomery, 92 Me. 433, 43 Atl. Rep. 13.

Same (Mass. St. 1896, ch. 517, § 2).

Massachusetts statute 1896, c. 517, § 2, providing that the names of veterans who have passed the civil service examination shall be placed upon the eligible list for the position sought in the order of their respective standing, above the names of all applicants not veterans, and that the commissioners shall cause to be certified to the appointing officers for appointment the names of all such veterans in preference to all other persons not veterans, save women, so long as there are names of veterans upon the eligible list, and that the appointment shall be made from the list so certified, is not unconstitutional. Opinion of the Justices, 166 Mass. 589, 34 L. R. A. 58, 44 N. E. Rep. 625.

Same (Mass. St. 1896, ch. 517, § 3).

Section 3 of chapter 517 of the acts of Mass. 1896, providing that veterans may apply for appointment or employment in the public service without examination, stating *in their* applications such facts

Notes

as may be required by the civil service rules, and that the appointing officers may by requisition call for the names of any or all such veterans so applying without examination, and appoint or employ them in the position sought, is not unconstitutional. Opinion of the Justices, 166 Mass. 589, 34 L. R. A. 58, 44 N. E. Rep. 625.

Same (Mass. St. 1896, ch. 517, § 6).

Section 6 of chapter 517 of Mass. Stats. 1896, providing that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth, and the towns and cities thereof, in preference to all other persons except women, is not unconstitutional if construed to mean that the civil service commissioners shall establish rules to secure the employment in preference to all other persons, except women, of only those veterans found competent to perform the labor required. Opinion of the Justices, 166 Mass. 589, 34 L. R. A. 58, 44 N. E. Rep. 625.

Same (Minn. Gen. St. 1894, § 8041).

The Minnesota veterans' act, Gen. Stats. 1894, § 8041, preferring honorably discharged veterans for appointment and employment in all departments of the public service, is not violative of any constitutional provision. State, Cowden *v.* Miller et al., 66 Minn. 90, 68 N. W. Rep. 732. See also, State ex rel. Mortensen *v.* Copeland et al., 74 Minn. 371, 77 N. W. Rep. 221.

Same (Laws N. Y. 1884, ch. 410, § 4).

Article 12, § 1, of the constitution of New York, declaring that no other oath, declaration, or test shall be required as a qualification for office than that prescribed by the constitution, was not violated by Laws of New York 1884, ch. 410, § 4, which provided that in appointments to the civil service of the state and the various cities thereof, preference should be given to honorably discharged soldiers of the civil war. Nor was such statute violative of the fourteenth amendment of the federal constitution. In re Wortman, 2 N. Y. S. 324; Sullivan *v.* Gilroy (Matter of Sullivan), 8 N. Y. S. 401, 55 Hun 285.

b. Scope of Statute Restricted by Title (N. J. Act, March 31, 1897).

So much of the New Jersey veteran act of March 31, 1897, as relates to the cities, counties, towns, and villages in the state, is inoperative, since the title of the act restricts it to persons employed in the public service of the state of New Jersey. State, Kreigh *v.* Hudson County Freeholders, 62 N. J. L. 178, 40 Atl. Rep. 625; State, Conklin *v.* Jersey City, 62 N. J. L. 168, 40 Atl. Rep. 631.

c. Special Provision in Regard to Certification (Laws N. Y. 1896, ch. 29).

New York Laws 1884, chapter 410, as amended by New York Laws 1896, chapter 29, authorizing the civil service board to transmit for appointment the names of the three veterans having the highest rating, is in violation of article 5, § 9 of the New York constitution requiring appointments and promotions in the civil service of the state to be made according to merit and fitness, to be ascertained, as far as practicable, by means of competitive examinations, except that veterans entitled to appointment or promotion shall be given preference without regard to their standing on the list of eligibles. People, Drake *v.* Syracuse, 26 Misc. Rep. 522, 57 N. Y. Supp. 617.

d. Special Provision Regulating Removal of Public Officers (Pa. Act, May 26, 1897).

The Pennsylvania act of May 26, 1897, relating to the removal of veterans from office without reasonable cause, is, except so far as it applies to judges of courts of record and the superintendent of public instruction, unconstitutional, in that it violates § 4 of art. 6 of the Pennsylvania constitution, which declares that appointed officers, other than such judges and such superintendent, may be removed by the power by which they were appointed. Brower *v.* Levan, 7 Pa. Dist. Rep. 702, 190 Pa. 182, 43 Atl. Rep. 7; Com., Koons *v.* Rutherford, 8 Pa. Dist. Rep. 349, 22 Pa. Co. Ct. Rep. 425, 15 Mont. Co. L. Rep. 151, 2 Dauph. Co. Rep. 282, 7 Northampton Co. Rep. 26.

Notes

e. Preferring Children of Veterans in Admission to Public Schools (Pa. Act, July 2, 1895).

Under article 3, § 7, of the Pennsylvania constitution, the act of July 2, 1895, amending the act of April 18, 1893, and providing that any child of a veteran residing temporarily in any school district, may be admitted to instruction in the proper common school in that district under the same conditions as children resident therein, is unconstitutional as class legislation. York City School Dist. *v.* West Manchester School Dist., 8 Pa. Dist. Rep. 97; School Dist. of Eldred *v.* School Dist., 22 Pa. Co. Ct. Rep. 233; Sewickly School Dist. *v.* Osborne School Dist., 6 Pa. Dist. Rep. 211, 19 Pa. Co. Ct. Rep. 257.

V. PREFERENCE OF CHILDREN OF VETERANS IN PUBLIC SCHOOLS.

Inmates of Soldiers' Orphans' Homes.

The Pennsylvania act of April 18, 1893 (Pub. Laws 23), providing that the children of veterans residing temporarily or otherwise in any school district of the commonwealth shall have the same right to instruction in the proper school of such district as the resident children have, although they may have come into the district for the purpose of attending such school, and although the residence of their parents, guardian, or other custodian may be in another district, does not include the inmates of a children's home, chartered, among other things, for the purpose of providing a comfortable home and maintenance for the children of deceased and disabled veterans; the state having made adequate provision in such home for their education. The fact that the managers of such home have, through neglect and misfeasance, wasted those of its funds which were appropriated for educational purposes makes no difference. Commonwealth, Parris *v.* Directors of School Dist. of Borough of Brookville, 164 Pa. 607, 26 L. R. A. 584, 30 Atl. Rep. 509.

The above act, as amended by the act of July 2, 1895, was held unconstitutional in York City School Dist. *v.* West Manchester School Dist., 8 Pa. Dist. Rep. 97; School Dist. of Eldred *v.* School Dist., 22 Pa. Co. Ct. Rep. 233; Sewickly School Dist. *v.* Osborne School Dist., 6 Pa. Dist. Rep. 211, 19 Pa. Co. Ct. Rep. 257. See "Constitutional Law," sub-head 5, supra.

For construction of Pa. Act July 12, 1897, relating to soldiers' orphans' schools, see (Atty. Gen.), 1 Dauph. Co. Rep. 182.

VI. REMEDY.

a. For Refusal to Give Preference in Appointment.

Perhaps the most common defect in the statutes requiring the preference of veterans in appointments to the public service is the failure to provide any remedy or penalty in case the mandate of the statute is not observed. The omission to provide such remedy or penalty usually has the effect to render that portion of the statute nugatory, unless there happens to be a general code provision to the effect that all violations of statutes not otherwise provided for shall be deemed misdemeanors. In re Vanderhoff, 36 N. Y. Supp. 833, 15 Misc. Rep. 434; State, Mortensen *v.* Copeland, 74 Minn. 371, 77 N. W. Rep. 221. In some of the statutes it is expressly provided that the officer or officers failing to give preference as required shall be deemed guilty of a misdemeanor, as under the Kansas act of 1886, ch. 160, and the Ohio act of March 3, 1896. See Thompson *v.* City of Emporia, 9 Kan. App. 740, 60 Pac. Rep. 480; State, Keyser *v.* Com'rs of Wayne County, 57 Ohio St. 86, 48 N. E. Rep. 136. Manifestly, such a penalty is inadequate unless it carries with it the imprisonment of the appointing officer, or the removal of the nonveteran appointee, as well as fine; as many enterprising place hunters would gladly collude with corrupt officials in paying a small fine if thereby they might obtain a lucrative appointment.

Mandamus is not, ordinarily, a proper remedy; and the reasons

Notes

why it is not applicable were so well expressed by Mitchell, J., in State, Mortensen *v.* Copeland, 74 Minn. 371, 77 N. W. Rep. 221, that we quote them as given: "The statute does not confer upon an honorably discharged Union soldier or sailor any legal right to an office or employment. It does not say that he shall have the right to be appointed. Neither does it provide any method for determining which one of several shall be appointed, nor does it provide any procedure for ousting another appointee, and installing a Union soldier or sailor in his place. It does not limit the appointment to those soldiers or sailors who have applied for the appointment. A man cannot acquire any right or priority of right to a public office or position by applying for the appointment. Any other honorably discharged Union soldier or sailor, who is qualified, has as much right as the relator to institute mandamus to compel the board to remove the present incumbent and appoint himself in his place. The appointing power is in the board, and not in the courts; and, even if the latter could compel the former to remove the present incumbent, they could not compel the board to appoint the relator. The board would still have a discretion as to what soldier or sailor they would appoint. In refusing to appoint the relator, they violate no legal right of his, but at most merely violate the general mandates of the statute. Hence, if a writ of mandamus were to issue, it would be merely to compel the board to execute the mandates of the law, not in favor of the relator in particular, but in favor of all persons within its provisions. This would be merely to duplicate the act of the legislature in enacting the statute." See also, State, Keyser *v.* Com'rs of Wayne County, 57 Ohio St. 86, 48 N. E. Rep. 136; Thompson *v.* City of Emporia, 9 Kan. App. 740, 60 Pac. Rep. 480.

However, if a statute should direct a competitive examination, and the appointment of the veteran receiving the highest rating, provided he were otherwise qualified physically and morally, it is apprehended that such an one could compel his appointment by mandamus; or if the statute should direct that in case there should be but one veteran applying, the appointment should be given to him, provided he were a proper person and qualified to discharge the duties of the place, it would seem that a mandamus to compel his appointment would issue upon proof that he possessed those qualifications.

b. For Wrongful Removal.

Where a veteran has been removed and another appointed in his stead, the proper method to try title to the office is by an information in the nature of a quo warranto; because mandamus and certiorari are not the proper proceedings to try title to an office to which the occupant holds title under apparent color of law. People, Wren *v.* Goetting, Police Justice, 133 N. Y. 569, 30 N. E. Rep. 968; Brady *v.* French, 6 Ohio N. P. 127; State, Bilderback *v.* Freeholders of Salem County (N. J.), 42 Atl. Rep. 843. But where the veteran has been removed in plain and open violation of the statute, and no other appointed to the place, he may, in general, be restored by mandamus or certiorari. Thus where a veteran was dismissed from his position as inspector of buildings without notice or hearing and without charges having been preferred against him as required by law, he was held entitled to a peremptory mandamus ordering his restoration. People *v.* Brady, 63 N. Y. Supp. 145, 49 App. Div. 238. So under the New Jersey act of March 14, 1895, a veteran removed from his position as deputy warden of an almshouse, or as bridge keeper, without notice or hearing, may compel his restoration by mandamus. State, Stuart *v.* Freeholders of Hudson County, 61 N. J. L. 117, 38 Atl. Rep. 842; Lewis *v.* Board of Public Works, 51 N. J. L. 240, 17 Atl. Rep. 112.

But in People, Tate *v.* Dalton, 158 N. Y. 204, 52 N. E. Rep. 1119, where a commissioner of water supply attempted to remove a veteran from the position of water registrar, to which position appointments were made by the deputy-commissioner, subject only to the approval of the commissioner, the appointees sustaining no confidential relation to either, it was held that the attempted removal was a mere

nullity, the commissioner having power neither to remove nor reinstate; hence a mandamus would not issue to compel him to do that which he had no authority to do.

And in People, Broderick *v.* Morton et al., the relator, an honorably discharged sailor of the Civil War who had been removed from his position as elevator conductor in the state capitol, sued for a writ of mandamus to compel the governor, lieutenant governor, and speaker of the assembly, composing the board of trustees of public buildings, to reinstate him. It was held, that as to the governor, the writ would not issue in any instance; and as to the speaker and lieutenant governor, it could not be sustained because the individuals in office when the proceeding was commenced had gone out of office, and their successors had not been brought in upon notice. People, Broderick *v.* Morton, 156 N. Y. 136, 50 N. E. Rep. 791, reversing 24 App. Div. 563, 49 N. Y. Supp. 760.

PEOPLE *ex rel.* KENNEDY *v.* BRADY, Building Com'r.

(*Court of Appeals of New York, Feb. 26, 1901.*)

[59 N. E. Rep. 701.]

Removal of Municipal Employees*—When Action of Removing Officer Not Reviewable by the Courts.

Where a messenger in the department of public buildings was removed by a commissioner or head of the department of buildings, who complied with Laws 1898, c. 186, by stating in writing the reasons for the removal, filed them with the head of the department, and gave the person so removed an opportunity to make an explanation, the action of the commissioner could not be reviewed by the court, the reasons stated for the removal being sufficient therefor on their face.

Same—Same—Certiorari.

Certiorari will not lie to review the action of the commissioner of buildings in removing a messenger in the department where he filed written reasons therefor, and gave the messenger an opportunity for explanation, as required by Laws 1898, c. 186, since his action was not a judicial proceeding.

Bartlett and Landon, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Certiorari by the people, on relation of James F. Kennedy, against Thomas J. Brady, commissioner of buildings for the boroughs of Manhattan and the Bronx, to review defendant's action in removing relator from his position as messenger in the department of buildings. From an order of the appellate division (65 N. Y. Supp. 844) reversing respondent's determi-

*See generally, as to removal of municipal officers and employees, Hallgner *v.* Campbell, 9 L. R. A. 408; State ex rel. Hastings *v.* Smith, 16 L. R. A. 791; Gregory *v.* Mayor, etc., of City of New York, 3 L. R. A. 854; State of Minnesota ex rel. Child *v.* Kiichli, 19 L. R. A. 779; State of Connecticut ex rel. Rylands *v.* Pinkerman, 22 L. R. A. 653; Speed *v.* Common Council of Detroit, 22 L. R. A. 842; Attorney General ex rel. Rich *v.* Jochim, 23 L. R. A. 669; Attorney General ex rel. Dewitt *v.* Common Council of Detroit, 37 L. R. A. 211; People, Engley, Atty. Gen., *v.* Morten, 24 L. R. A. 201; Trainor *v.* Auditors of Wayne County, 15 L. R. A. 95, and note.

nation, and restoring relator to his office, respondent appeals. Reversed.

John Whalen, Corp. Counsel (Eugene Otterbourg, of counsel), for appellant.

Julius M. Mayer and A. S. Gilbert, for respondent.

O'BRIEN, J. The relator was a messenger in the department of buildings in the city of New York, and within the provisions of chapter 186 of the Laws of 1898. That statute provides that, if a person holding a position subject to the competitive examination in the civil service of the state or of the city shall be removed or reduced, the reasons therefor shall be stated in writing, and filed with the head of the department or other presiding officer, and the person so removed or reduced shall have an opportunity to make an explanation. On the 28th of March, 1899, the defendant, then being the commissioner or head of the department of buildings, made an order dismissing the relator from his position of messenger in the department. He stated the reasons for such removal in writing, and filed the same in the department, and gave the relator before removal an opportunity to make an explanation. It is conceded that the reasons stated by the commissioner for the removal are, upon their face, entirely sufficient to justify his action, and it is also conceded that the relator had an opportunity to make an explanation. The removal was made after compliance with all the forms prescribed by the statute. The relator had notice of the charges, and a hearing or an opportunity to make an explanation.

The supreme court, however, upon the writ of certiorari issued upon the relator's petition, reversed the determination of the defendant, and reinstated the relator. There has never been any dispute in regard to the proceedings before the commissioner; that is to say, it is conceded that the reasons assigned by the commissioner for the removal are upon their face entirely sufficient, and that he had an opportunity to make an explanation, but the learned court below reversed the determination, and reinstated the relator, upon the ground that his explanation was sufficient, and, assuming that his statement was correct, the removal was unauthorized. If the relator was entitled to a trial or a judicial hearing before removal, and the court below had power to deal with the facts of the case, and to review the action of the defendant, then, I think, this court would have no power to interfere with the order of the court below, and the sole question to be determined upon this appeal is whether the learned court below had any power to interfere with the action of the defendant when it appeared that he complied with the statute by filing a statement of his reasons in writing, which, upon their face, justified the removal after the relator had an opportunity for explanation.

It seems to us that the learned court below had no power,

under the circumstances of this case, to review the defendant's action in removing the relator. The writ of certiorari to review the action of public officers cannot issue except in the two cases specified in section 2120 of the Code. These cases are—First, where the right to the writ is expressly conferred or authorized by a statute; and, secondly, where the writ issued at common law by a court of general jurisdiction, and the right to it, or the power to issue it, has not been expressly abolished by statute. There is no statute that confers the right to the writ of certiorari for the purpose of reviewing the determination of the defendant in this case, and the relator had no right to the writ unless it issued at common law in cases of like character. Official acts, executive, legislative, administrative, or ministerial in their nature or character, were never subject to review by certiorari. The writ could be issued only for the purpose of reviewing some judicial act. People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481; Same v. Board of Sup'rs, 131 N. Y. 468, 30 N. E. 488; Same v. Board of Park Com'rs, 97 N. Y. 37; Same v. Walter, 68 N. Y. 403; Same v. Betts, 55 N. Y. 600. The sole question, therefore, is whether the official act of the defendant in removing the relator was a judicial act in nature or character. Unless it was, the court below had no power to review it upon certiorari. The relator was entitled to an opportunity to make an explanation, and this he had. He was entitled to have the reasons for his removal expressed in writing and filed in the department, and this provision of the statute was complied with. He was not entitled to be sworn or to introduce witnesses with respect to the truth or merits of the reasons which were assigned for his removal. He was not entitled to a trial or a judicial hearing, and, manifestly, there was no trial or judicial hearing before the commissioner. The statute simply provides that in such cases removals, when made, shall be accompanied with certain formalities, and, if these formalities are not complied with, the party removed has a right to complain, and the action of the commissioners in such cases may be corrected, since there is no jurisdiction, and consequently it is an error of law to make the removal without complying with the statute. But there is no statute and no rule of law that gives the right to the relator to review the merits of the case upon the facts, since the power of removal is conferred upon the commissioner in the broadest terms, subject to no limitation whatever, except that embodied in the statute, which requires the reasons to be stated in writing and filed, and an opportunity for an explanation given. That is the law on the subject which was laid down by this court in the case of People ex rel. Keech v. Thompson, 94 N. Y. 451. It was held in that case that where a statement of charges, with a specification of facts furnishing sufficient cause for removal, and sufficiently distinct to

appraise the subordinate of the grounds upon which the charges are based, with notice of the time and place when an opportunity for an explanation will be given, is served upon him, and where, at the time and place specified, an opportunity for explanation is given, the requirements of the statute are met. It is not requisite that the charges and specifications should be drawn with the formal exactness of pleadings in a court of justice, nor is the subordinate entitled to a regular trial. The head of the department, if the explanations are not satisfactory to him, may, in his discretion, remove without calling witnesses to substantiate the charges or allowing testimony on the part of the subordinate. He may exercise the power of removal upon facts within his own knowledge or based upon information received from others. The reasons assigned for the removal must appear, upon their face, to justify the action,—in other words, they must be substantial, and not frivolous; but, when they appear to be sufficient to justify the determination, the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department. In other words, the sufficiency of the relator's explanation was a question for the commissioner alone to determine, and the courts have no power to interfere with his discretion in that regard. People ex rel. Munday v. Board of Fire Com'rs of City of New York, 72 N. Y. 445; People ex rel. Simms v. Same, 73 N. Y. 440; People ex rel. Keech v. Thompson, supra. It was said, in the case last cited, that "if the commissioner was to be constituted a court for the purpose of trying every charge which might properly be preferred for violation of duty, it would tend to very much embarrass the action of that officer, and also interfere with the interest of the public. If the trial was to be had, the law, no doubt, would have so provided, and not for an explanation merely. In cases where the legislature intended that the removal should not be made without cause proven, provision is made for the preferring of charges and an examination of the same. This rule prevails as to members of the police force and also as to firemen." It would seem to be quite clear, therefore, that the action of the defendant in removing the relator was not a judicial proceeding in any legal sense, and that the writ of certiorari does not lie to review his action, except, possibly, in cases where he has not complied with the laws in filing written reasons and affording the subordinate an opportunity for explanation. No case has been cited in this court where it was held that, after compliance with the formalities of the statute, the courts could institute an inquiry with respect to the truth of the charges or the existence, as matter of fact, of the grounds stated for the removal. The order of the appellate division should be reversed, with costs, and the writ quashed.

State *v.* City of Noblesville

BARTLETT, J. I dissent on the ground that the accused is entitled to know, not only what the charges are, but his explanation must be received and acted upon in good faith, and not arbitrarily. People v. La. Grange, 2 App. Div. 444, 37 N. Y. Supp. 991, affirmed on opinion below, 151 N. Y. 664, 46 N. E. 1150. I agree with the appellate division that this removal lacks good faith and was arbitrary.

PARKER, C. J., and HAIGHT, MARTIN, and VANN, JJ., concur with O'BRIEN, J., for reversal. LANDON, J., concurs with BARTLETT, J.

Order reversed, etc.

STATE *ex rel.* BARNETT *v.* CITY OF NOBLESVILLE.

(*Supreme Court of Indiana, May 28, 1901.*)

[60 N. E. Rep. 704.]

Municipal Officers—Removal by City Council*—Validity—Statutes.

Acts 1867, p. 75, § 88, authorizes the common council of any city to remove any city officer for any offense against the character or duty of his office by a two-thirds vote of its members, and Acts 1875, p. 91, declares that any person holding an office under the constitution and laws of this state may be removed for intoxication during business hours, or for habitual intoxication, on complaint of any citizen filed in the circuit court of the county in which the officer resides. Act March 8, 1897, p. 280, provides that an accusation in writing may be presented by the grand jury against any county, township, or municipal officer for misconduct in office: *held*, that the act of 1867 was not repealed by the acts of 1875 and 1897 by implication, and therefore the removal of a city officer by the common council was valid, since, as each act merely provided a different remedy for the same offense, there was no conflict among them.

Same—Same—Same—Publication of Ordinance Authorizing Removal.

Burns' Rev. St. 1894, § 3535, provides that every ordinance imposing a penalty or forfeiture for the violation thereof shall be published two weeks consecutively in some newspaper printed in the city before the same shall take effect: *held*, that an ordinance removing relator from the office of a city marshal for drunkenness was not void because not published, since it was neither penal nor for the enforcement of a forfeiture.

Same—Same—Failure to Swear Mayor and Council before Entering upon Trial of Charges.

The fact that the mayor and city council were not sworn when they entered on the trial of charges against relator as city marshal did not invalidate relator's removal, since the mayor and council acted under their official oaths, and a special oath was unnecessary.

Appeal from circuit court, Hamilton county; Theodore P. Davis, Special Judge.

Mandamus by the state, on the relation of Frank Barnett, against the city of Noblesville, to compel defendant to reinstate relator as city marshal. From a judgment in favor of defendant, relator appeals. Affirmed.

---

*Removal of city officers and employees, see cross references to People ex rel. Kennedy *v.* Brady, *ante, p. 95.*

790850

Shirts & Fertig, for appellant.
Christian, Christian & Cloe, for appellee.

DOWLING, J. Application for a writ of mandate to compel the city of Noblesville and its common council to restore the relator to the office of marshal of said city. Alternative writ issued. Demurrers to complaint and to alternative writ sustained. Judgment for appellee. Errors are assigned upon these decisions.

The complaint alleges that the relator, Barnett, was elected and duly qualified as marshal of the city of Noblesville for the term of four years from September, 1898; that he entered upon the duties of his said office, and continued to act as such marshal until prevented by the appellee; that on June 5, 1899, the common council passed an ordinance providing for the summary impeachment of city officers before that body after notice to the accused; that said ordinance was not published in any newspaper until after the commencement of the proceedings against the relator; that on the night said ordinance was passed an affidavit was filed with said common council charging that the relator, on June 1, 1899, had appeared upon the streets of said city in such a state of intoxication as prevented him from performing the duties of his said office; that on the same night the city clerk and mayor were directed to notify the relator to appear before the common council on June 9, 1899, to answer said charge; that at the time fixed the relator appeared, and moved to dismiss the proceedings; that his motion was overruled, and the hearing took place; that neither the mayor nor any member of the common council was sworn to try said cause; that at the conclusion of the investigation the relator again moved to dismiss the proceedings, but without avail; that on June 10, 1899, the common council decided that the charges were sustained, and the mayor thereupon declared the relator expelled and removed from his office of marshal; and that these proceedings were afterwards approved by the common council at its regular session held June 12, 1899. The complaint further shows that at said session the police board was authorized to choose a successor for the relator in said office; that the relator denies the validity of said proceedings, and has refused to surrender his said office, but that he is wrongfully deprived of the same by the appellee by virtue of the proceedings aforesaid. Prayer for a writ of mandate to restore the relator to his office as marshal.

The general act for the incorporation of cities expressly authorized the common council to expel or remove any city officer by a two-thirds vote of the whole number of councilmen elected, and required the common council to make provision in their by-laws or ordinances for the mode of presenting charges and the hearing of the same. Acts 1867, p. 75, § 88 (Rev. St. 1881, § 3101; Burns' Rev. St. 1894, § 3536). In 1875 the legislature enacted a statute declaring that any per-

son holding any office under the constitution or laws of this state, who should voluntarily become intoxicated within the business hours of his office, or should be in the habit of being intoxicated by the use of intoxicating liquors, should forfeit his office, and be removed therefrom, upon the complaint of any citizen filed in the circuit court of the county in which such officer resided. The act prescribes the form of procedure and the character of the judgment to be rendered. Acts 1875, p. 91 (Rev. St. 1881, § 6012; Burns' Rev. St. 1894, § 8088). By another act, which took effect March 8, 1897, provision was made for the impeachment and removal of any district, county, township, or municipal officer, justice of the peace, or prosecuting attorney, upon accusation in writing by the grand jury. Acts 1897, p. 280, §§ 21–33. The common council of the city of Noblesville proceeded under the provisions of section 88 of the act of 1867, supra, and the appellant insists that this section was repealed by the acts of 1875 and 1897, supra, and that the action of the common council was, therefore, unauthorized and void. The question of the power of the common council to remove the relator is properly presented by his application for a writ of mandamus. Burns' Rev. St. 1894, § 1182 (Rev. St. 1881, § 1168); City of Madison v. Korbly, 32 Ind. 74; Swindell v. State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50. It is said that one of the common-law incidents of all corporations is the power to remove a corporate officer from his office for just and reasonable cause. Rex v. Richardson, 1 Burrows, 517; 2 Kyd, Corp. 62; Beach, Pub. Corp. 191. In the case at bar it is claimed that section 88 of the act of 1867, supra, was repealed by implication. Therefore it is incumbent on the appellant to show that section 88 is inconsistent with some provision of one of the later enactments, or that it has been superseded by them. This, we think, he has wholly failed to do. Repeals by implication are not favored for the reason, among others, that they often result in uncertainty and confusion. They are recognized only when the earlier and the later acts are repugnant to, or irreconcilable with, each other. Where the two statutes even appear to conflict, the courts will, if possible, adopt that construction which will allow both to stand. State v. Smith, 59 Ind. 179; State v. Wells, 112 Ind. 237, 13 N. E. 722. The substance of the objections of counsel for appellant to section 88 of the act of 1867, supra, is that intoxication of a municipal officer, under certain circumstances, has been made a specific cause for removal, and that new remedies for the amotion of officers have been provided by the acts of 1875 and 1897. There can be no doubt as to the power of the corporation at common law to remove an officer for drunkenness, or other offenses, against his official character and duty. 2 Kyd, Corp. 62; Bagg's Case, 11 Coke, 98a; Rex v. Carlisle, Fortesc. 200; Id., 11 Mod. 379; Muhler v. Hedekin, 119 Ind. 481, 20 N. E. 700. But, where there is a pre-existing *right* at common law,

and an affirmative statute subsequently inflicts a new penalty, or gives an additional remedy, such statute is held to be cumulative, and not as superseding the pre-existing law. Toney v. Johnson, 26 Ind. 382; Miller v. Goodwin, 29 Ind. 46; End. Interp. St. § 236; Rex v. Robinson, 2 Burrows, 799. It is said in End. Interp. St. § 218, that: "Further, it is laid down generally that when the later enactment is worded in affirmative terms only, without any negative, expressed or implied, it does not repeal the earlier law. Thus, an act which authorized the quarter sessions to try a certain offense would involve no inconsistency with an earlier one which enacted that the offense should be tried by the queen's bench or the assizes; nor an act authorizing a proceeding to contest the validity of a will by petition to the court of common pleas any inconsistency with an earlier one providing for a proceeding by bill in chancery; and in neither case, therefore, would the later repeal the prior law." Placed in juxtaposition, the three acts under consideration may be read as the several sections of a single statute: (1) The common council of any city may, for any offense against the character or duty of his office, remove any officer of the city by a two-thirds vote of its members. (2) For intoxication in the business hours of his office, or for habitual intoxication, any person holding an office under the constitution or laws of this state shall forfeit his office, and may be removed upon complaint by any citizen of the state filed in the circuit court of the state in which the officer resides. (3) An accusation in writing against any district, county, township, or municipal officer may be presented by the grand jury of the county for or in which the officer is elected or appointed. The various acts merely provide different remedies for such official misconduct as would have authorized the removal of the officer under the rules of the common law. All are in affirmative terms only, and none of them contains any negative words indicating that the particular remedy provided is exclusive of other remedies. There is not even a seeming conflict between them, and they can, without violence, be so construed as to stand together. In their practical operation the remedies they afford are auxiliary and cumulative. If a common council refuses, neglects, or hesitates to remove a drunken officer, then any citizen has the right to file a complaint for such removal in the circuit court. If no citizen cares to incur the responsibility of such a proceeding, he can go before the grand jury, and ask that an accusation in writing be preferred by that body.

In the next place, it is said that the ordinance under which the relator was tried and removed was void, because never published. Only such by-laws and ordinances as impose a penalty or forfeiture for a violation of their provisions are required to be published before taking effect. Burns' Rev. St. 1894, § 3535. The ordinance is not in the record, and is not before us. If, as is probable, it prescribed only the man-

ner in which charges of official misconduct should be preferred, the notice to be given, and the mode of hearing the evidence, it was not penal, nor did it impose a forfeiture, and therefore publication was unnecessary.

Lastly, the point is made that the mayor and members of the common council were not sworn when they entered upon the trial of the charges against the relator. We have not been referred to any statute requiring this formality, and we have found none. The mayor and councilmen were acting under their official oaths, and it was not necessary that they should be specially sworn in the proceeding to remove the relator. There is no error in the record. Judgment affirmed.

LOWREY *v.* MAYOR, ETC., OF CENTRAL FALLS.

(*Supreme Court of Rhode Island, July 27, 1901.*)

[49 Atl. Rep. 963.]

Removal of City Officers*—Police Constable—Special Act Regulating Term of Office Not Repealed by General Enactment.

Central Falls Charter, § 4, cl. 2 (Act Feb. 21, 1895; Acts 1895 p. 110), providing that police constables shall hold their office during the pleasure of the board of aldermen, except they shall not be removed but for cause, and on charges, was not repealed by Gen. Laws, c. 40, § 34, being a re-enactment of a general law in force when the charter was granted, providing that the police constables of the several towns shall not remain in office by virtue of their election for more than 10 days after the expiration of the political year for which the town council was elected.

Same—Same—Effect of Failure to Reappoint.

Under Central Falls Charter, § 4, cl. 2 (Act Feb. 21, 1895; Acts 1895, p. 110), a failure to reappoint plaintiff as a police constable, together with the appointment of the requisite number, did not vacate his appointment.

Same—Same—Same—Failure to Choose Successor.

It was immaterial whether or not such provision is governed by section 8 of the charter (Acts 1895, p. 113), declaring that all officers under the act shall hold office during the current municipal year for which elected, "and until their successors are chosen," since, plaintiff not being the only one failing of reappointment, no person was chosen as his successor.

Same—Same—Tender of Services Not Necessary after Notice of Dismissal.

Where a police constable, reporting as usual on February 4th, was notified that he was no longer a constable, and he reported on three days following, and was finally informed that it was useless for him to do so, and, on order, surrendered his insignia, it was not necessary to continue to offer his services in order to maintain proceedings for reinstatement.

Petition by Patrick Lowrey for a writ of mandamus to compel the mayor and board of aldermen of Central Falls to rein-

*See cross references to People ex rel. Kennedy *v.* Brady, ante, p. 95.

state the petitioner in office of police constable. Order granting the writ.

Hugh J. Caroll, for petitioner.
John N. Butman, for respondents.

BLODGETT, J. The petitioner prays for a writ of mandamus against the mayor and aldermen of the city of Central Falls, commanding his reinstatement as a member of the paid police department of that city. It is conceded: That on and prior to February 4, 1901, the petitioner was a duly-qualified police constable of the city of Central Falls, and a member of the paid police department of said city, as appears by the following certificate: "City Clerk's Office, Central Falls, R. I., January 10th, 1900. I hereby certify that Patrick Lowrey was duly elected police constable for said city until the month of January, 1901, next, or until his successor shall be duly elected and qualified. Attest: C. Fred. Crawford, City Clerk." That on said date the respondent mayor nominated, and the respondent aldermen confirmed, 16 police constables for that city, and that Lowrey was not one of the number. That the police ordinance of the city fixes the number of paid members of the department at 16. That no charges of any kind have ever been preferred against the petitioner, nor has any vote of the aldermen ever been adopted, which in terms removed him from office as a police constable, or as a member of the paid police department. The contention of the respondents is, in substance, that the failure to re-elect the petitioner as a police constable ipso facto vacated his appointment as a member of the paid police department, and the petitioner denies this contention. The question turns upon the construction to be given to clause 2, § 4, of the charter of Central Falls, enacted by the general assembly February 21, 1895, which is as follows: "Clause 2. The aldermen may appoint, upon the nomination of the mayor, so many and such police constables, including the chief of police, as the ordinances of the city council may determine, which said officers shall hold their respective offices during the pleasure of the board of aldermen, except as hereinafter provided, and the mayor may at any time suspend any such officer from his office until the adjournment of the next meeting of the board of aldermen, at which meeting he shall report any and all such suspensions, with his reasons therefor: provided, however, that the members of the paid police department of said city shall not be subject to removal from office at any time except for misconduct or incapacity of such a character as the board of aldermen may deem a disqualification for said office, and all such removals shall be by the board of aldermen, upon charges made in writing and of which the officer complained of shall have had notice and opportunity to be heard thereon." Acts 1895, p. 110. By the express language of this clause, all the police constables

elected under the provisions of this section are to hold office "during the pleasure of the board of aldermen," and not for any other term. It follows that the aldermen may at any time, at their pleasure, remove such a police constable (subject to the proviso presently to be considered), but that a police constable once elected and qualified thereunder holds his office until so removed. His tenure of office is not the same as is provided by section 34 of chapter 40, Gen. Laws, viz.: "The town councils of the several towns may elect such number of police constables for their respective towns, as they may deem expedient, who shall not be required to give bond, nor shall they be authorized to serve process in civil actions, but in all other matters they shall have the same power and authority as other constables; and they shall continue in office during the pleasure of the town council and no longer. Provided, that they shall not remain in office by virtue of the election by the town council for more than ten days after the expiration of the political year for which such town council was elected." It will be noticed that the section last cited fixes the term of office of police constables elected thereunder at "the pleasure of the town council, and no longer," with a proviso that no such constable can remain in office "for more than ten days after the expiration of the political year for which such town council was elected"; but the clause of the city charter now under consideration contains no such proviso, and no such restriction upon the terms of office, and consequently not only permits the aldermen to remove a police constable at pleasure within the first year of his election, but also continues him in office indefinitely, and until such removal, subject always to the power of suspension conferred upon the mayor. Again, the aldermen can elect only so many police constables "as the ordinance of the city council shall determine," while town councils in general are authorized, under the section above cited, to elect "such number as they may deem expedient." Chapter 40, § 34, Gen. Laws, went into effect on February 1, 1896, being a re-enactment of chapter 38, § 30, Pub. St., in force when the charter of Central Falls was enacted. We are of the opinion that the special proviso contained in the charter was not repealed by the general provisions of chapter 40, § 34, Gen. Laws. In Tripp v. Torrey, 17 R. I. 360, 22 Atl. 278, Matteson, C. J., said: "It is a well-established rule of construction that special statutes are not repealed by general provision unless the legislative intent to repeal be clear;" and see cases cited.

Passing now to a consideration of the remaining provisions of the clause in question, it clearly appears that the power of removal, which is conferred in general terms as to all police constables, is restricted and strictly limited as to the members of the paid police department by the proviso above referred to; so that whenever a police constable is appointed a member of the paid police department the proviso becomes

operative, a far greater degree of stability is given to his tenure of office, and he cannot be removed from office without the preferring of charges and the hearing provided for in the act. The reason for this difference is not far to seek, for it is difficult to conceive of a state of affairs which would more tend to the entire subversion of the efficiency, of the police department of a city than an annual compaign for re-election, as it is also most clearly evident that the highest degree of efficiency in the department can be attained by a provision which makes merit the sole ground of retention in office, and duly guards the interests of the public by providing for dismissal from office for cause. Counsel for the respondent urges upon our consideration the provisions of section 8 of the charter, as follows: "All officers under this act, unless otherwise provided by law, and all officers chosen or appointed by virtue of any ordinance under the same, shall hold office during the current municipal year for which they may be elected or appointed, and until their successors are chosen or appointed, and qualified in their stead; and all vacancies shall be filled for the remainder of the term." Acts 1895, p. 113. But, if we could agree with him that the words "unless otherwise provided by law" do not apply to the police constables elected thereunder, we nevertheless cannot escape the force of the words extending the terms for which such officers are elected, as follows: "And until their successors are chosen and appointed and qualified in their stead;" and, as the petitioner was not the only one who failed of reappointment as a police constable, it is not contended that any person has been chosen as his successor. It appears by the undisputed testimony that the petitioner reported for duty on February 4, 1901, as usual, and was notified by the chief of police that he was no longer a member of the police department, and that he duly reported for duty on February 5th, 6th, and 7th, and finally was informed by the chief, as Lowrey testifies, "that it was not necessary; no need of my coming there any longer. Q. He had got orders not to let you serve? A. Yes, sir;" and that upon the order of the chief he surrendered his insignia of office. We are of the opinion that the petitioner did all that he was bound to do to preserve his rights, and that it would be unreasonable to require him to go through the idle ceremony of a daily offer of his services, in view of the instructions he had received from his superior officer. The petitioner is entitled to the relief for which he prays, and the writ may issue accordingly.

THOMPSON *v.* TROUP *et al.*

(*Supreme Court of Errors of Connecticut, July 23, 1901.*)

[49 Atl. Rep. 907.]

Removal of City Employees*—Civil Service—Clerks—Who Are—Examiner of Records.

Under the provision of a city charter including in its civil service as "clerks" those whose work was purely clerical and those requiring special knowledge, but excluding those requiring technical or professional education, an "examiner of records," whose duties were to examine the records of transfers of real estate and make abstracts as needed by the city, was a clerk, and could not be dismissed without cause shown.

Same—Same—Due Process—Notice and Hearing.

A city charter, providing that no clerk should be removed except for cause "duly shown," intended that removal should not be without a hearing given, and an order of removal without a hearing was a nullity.

Same—Same—Scope of Charter Provision Respecting Removals.

Under a city charter putting the department of public works under a director, with power to appoint necessary clerical assistance, his power to remove a clerk, whose position was one from which the civil service rule of the charter declared there should be no removal without cause duly shown, was subject to such provision.

Procedure—Mandamus—Appeal—Objection, Must Be Urged When.

On appeal from an order granting mandamus, an objection not urged below was not available.

Remedy for Wrongful Removal—Mandamus.

Mandamus is a proper remedy to compel reinstatement on wrongful removal from a municipal office of trust and profit protected by civil service rules.

Appeal from superior court, New Haven county; Ralph Wheeler, Judge.

Application by William E. Thompson for writ of mandamus to compel Alexander Troup and others to restore the petitioner to his position as clerk in the department of public works of the municipality. From a judgment granting the writ, the defendants appeal. Affirmed.

Application for a mandamus to the director of public works of the city of New Haven to compel him to refrain from preventing the applicant from exercising and performing his duties as a clerk of said city in the department of public works. Heard on issues of fact joined under an alternative writ (R. Wheeler, J.), and a peremptory writ issued. No error. The following facts appeared from the finding: William E. Thompson, the applicant for the writ of mandamus, was appointed in 1893 a clerk in the department of public works of the city of New Haven, with the title of "examiner of records." His special duties were to examine the public records of transfers of real estate situated within the city, and make such abstracts of titles as the needs of the city govern-

*See cross references to People ex rel. Kennedy *v.* Brady, ante, p. 95.

ment in any of its departments might require, and also to be in the office of the department of public works daily, during the noon hour, to answer questions and telephone calls. While occupying this position, in 1899, a new city charter was enacted, putting the department of public works under the charge of a director. He was to "appoint such clerical assistance as may be necessary for said department," and it was to be "the duty of said clerk or clerks to perform the clerical work of said board, and act as clerk of the department of compensation, and also to examine all transfers of real estate within the boundaries of said city which are matters of public record, and to make and preserve for the use of the department or board, and for the use of all officers of said city, such abstracts of titles to real estate as may facilitate the work of such department or board, or the work of any other department or officer of said city, and perform such other duties as may be by ordinance prescribed." A civil service board was also constituted by this charter, with power to make rules as to appointments to all minor positions, and it was provided that "no removals shall be made of persons holding positions in any department of the city, subject to the provisions of such rules, except for sufficient cause, duly shown, which cause shall not be political." This board made rules, to which were subjected, among others, "secretaries, clerks, copyists, bookkeepers, stenographers, typewriters, and all persons engaged in clerical work in any department of the city. These are subdivided into two sections: (1) Those doing purely clerical work, not involving any special technical skill; (2) those requiring special knowledge, such as bookkeepers, stenographers, typewriters." Another class of officials, described as "surgeons and physicians, civil engineers, electricians, attorneys, librarians, and all persons requiring technical or professional education, employed in any department of the city, excepting the regularly uniformed force of the police and fire departments," were expressly excluded from the operation of the rules. Thompson never received any technical or professional education, but had special knowledge enabling him fully to discharge his official duties, and he was discharging them efficiently, when, in 1899, the director removed him, assigning no cause. No cause of removal was set up in the return, but there was a denial of the allegation in the alternative writ that it was made "without sufficient cause, not political, duly shown." Two sufficient causes not political were claimed at the hearing in the superior court, as to which the parties were heard, and it was found that they had no existence in fact.

A. Heaton Robertson, for appellants.
Edmund Zacher, for appellee.

BALDWIN, J. (after stating the facts). The position held by the applicant in the department of public works was of a clerical nature. It could only be filled by one having special

knowledge; but that he had. The performance of its duties did not require any technical or professional education, and the trial court was fully warranted in finding that he was to be classed as a clerk, notwithstanding his title of "examiner of records." It follows that he could only be removed "for sufficient cause, duly shown, which cause shall not be political." By the words "duly shown" it is implied that opportunity shall be given before the removal for a hearing as to the sufficiency of the cause. Fisher v. Fielding, 67 Conn. 91, 103, 32 L. R. A. 236, 52 Am. St. Rep. 270. None having been afforded, the order of removal, under section 120 of the charter, was "null and void."

The superior court, therefore, properly overruled the claim that, if the director of public works believes one of his clerks to be inefficient, he can remove him without notice. His general power of appointment, had it been allowed to stand without qualification, would naturally imply a power of removal equally broad. Parsons v. U. S., 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185. But this implication is controlled by the provisions for establishing a civil service. One main object of these was to limit the exercise of an authority so liable to abuse, and thus secure minor officials from subjection to influences of fear or favor, so long as they discharge their duties well, and do nothing to disgrace their public station.

After the civil service rules were adopted, no clerk in the department of public works could be appointed except upon examination. Charter, § 119. It is argued that the applicant was virtually reappointed by being permitted to hold over, and so was properly removed, because he was never examined. No such claim was made in the trial court or raised by the appeal.

It is also contended that mandamus is not the proper form of remedy. Inasmuch as the controversy is one as to the right to a municipal office of trust and profit, by virtue of a system established by law to maintain a proper civil service, this objection is without foundation. Exception might well have been, but was not, taken to the issue of the writ in favor of the applicant, instead of in the name of the state, at his relation. State v. Towers, 71 Conn. 657, 663, 42 Atl. 1083.

The judgment file, after describing the pleadings, proceeds as follows: "The court having fully heard the parties, it is adjudged and decreed that a peremptory writ of mandamus issue, requiring," etc. No finding of the facts in issue is made, except in the special finding (to which there is no reference), prepared for the purpose of the appeal. This is a grave defect. Every judgment file should show upon its face what is the foundation of the judgment. Scholfield Gear & Pulley Co. v. Scholfield, 70 Conn. 500, 40 Atl. 182. As, however, no reason of appeal is assigned for this cause, we mention it only to recall to the attention of the clerks and of the bar the extreme importance of having judgment files properly prepared. There *is no error. The other* judges concurred.

CITY OF CHICAGO *v.* LUTHARDT.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 410.]

Removal of City Officers*—Civil Service—Liability of City for Wrongful Removal.

The act of the chief of police in dismissing the chief clerk of the detective bureau, contrary to the civil service law, is the act of the city, rendering it liable therefor where such act is based on the proceedings of the city council.

Same—Classification of Public Servants under Civil Service Act—Who Are City Officers—Chief Clerk of Detective Bureau.

Civil Service Act 1895, § 3, empowers the commissioners to classify all the offices and places of employment in a certain city, except those elected by the people, and provides that such offices and places shall constitute the classified civil service of the city. Section 4 authorizes the commissioners to make rules for carrying out the purposes of the act. The commissioners adopted rules and classified the offices and places into the official and labor service. The chief clerk of the detective bureau was classified as a member of the official service: *held*, that he was a municipal officer, and not a city employee, within the meaning of the act.

Same—Recovery of Wages by Wrongfully Removed Officer during Time of His Suspension.†

Under Civil Service Act 1895, § 12, providing that no officer or employee in the classified service of a city holding an appointment under the rules of the commissioners shall be removed or discharged, except for cause, on written charges, and after an opportunity to be heard in his own defense, where a municipal officer holding under the civil service act is unlawfully discharged, and prevented from performing the duties of his office, and the appropriation for his salary has not been lawfully expended, he is entitled to recover his salary for the period he is thus prevented from performing the duties of his office.

Same—Colorable Abolition of Office by Mere Change of Name.

The nominal change of the name of the office, the duties and the salary being the same, is not a discontinuance of the office, justifying the dismissal of a municipal officer holding under the civil service act.

Same—Recovery of Wages during Time of Suspension—Effect of Provision Forbidding the Incurring of Expense without Previous Appropriation.

Charter of Chicago, art. 7, §§ 2-4, forbidding the incurring of expense by officers of the municipality without a previous appropriation therefor, is not violated by holding the city liable for the compensation of an officer who was unlawfully discharged, where an appropriation for his salary was made, and does not appear to have been paid to a de facto officer holding the office and performing its duties.

Appeal from appellate court, First district.

Action by William H. Luthardt against the city of Chicago. From a judgment of the appellate court (91 Ill. App. 324) affirming a judgment in favor of the plaintiff, defendant appeals. Affirmed.

Charles M. Walker, Corp. Counsel, and William H. Fitz-

---

*See cross references to People ex rel. Kennedy *v.* Brady, ante, p. 95.
†See note to Stutzbach *v.* Coler, sub-head, III, n. ante, p. 90.

gerald and Roswell B. Mason, Asst. Corp. Counsel, for appellant.

Edwin Burritt Smith, Charles H. Blatchford, and Clayton R. Taylor, for appellee.

PER CURIAM. In deciding this case the appellate court made the following statement of the case, and rendered the following opinion:

"In November, 1896, appellee, having been examined by the civil service commissioners of Chicago pursuant to the civil service act of the general assembly of 1895 and of rules adopted by said commissioners thereunder, was certified, selected, and appointed as chief clerk of the detective bureau of the department of police, with an annual salary of $1,500. He thereupon entered upon the discharge of his duties, and continued the same until March 31, 1898, when he was dismissed by the chief of police of the city from his position, and from that date the chief of police refused to allow him to perform his duties until he obtained a mandamus restoring him to his position, after which he was paid his salary from January 1, 1899. He brought suit in assumpsit against appellant to recover his salary from April 1 to December 31, 1898, and recovered a judgment therefor, including interest, amounting to $1,204.69, from which this appeal is taken."

Opinion by Mr. Justice Windes:

"It is claimed that the city is not liable in this action, because the acts of the chief of police of the city in refusing to allow appellee to perform the duties of his position, which acts are based upon the proceedings of the common council of said city, had at the request of said chief, in failing to make any appropriation for the salary or compensation for the year 1898 for the office or position of appellee by the name of 'chief clerk of the detective bureau of the department of police,' were beyond the scope of the authority of said chief of police and council, and contrary to the civil service law and civil service rules. We think this claim is untenable, for the reason that the acts of the chief of police, when based, as this record shows they were, upon the proceedings of the common council giving color and a supposed authority thereto, are binding upon the city of Chicago. The city speaks and acts through the common council in such matters, and cannot thus be allowed with impunity to violate the act of the legislature and the lawful rules of the civil service commission made in pursuance of and by authority of such legislative act and rules authorized thereby, and in no way questioned in this proceeding. Maher v. City of Chicago, 38 Ill. 266; City of Chicago v. Chicago & W. I. R. Co., 105 Ill. 73; City Charter, art. 5, § 1, par. 2. Moreover, as was held in Kipley v. Luthardt, 178 Ill. 525, 53 N. E. 74, the attempt of the council to dismiss appellee and deprive him of his position was ineffectual, and

appellee's rights remained the same as if no action had ever been taken by the chief of police or the council.

"Appellant further claims that the appellee is an employee, and not an officer, of the city of Chicago, and for that reason is not entitled to any compensation, as he did not perform the services he was employed to perform; and, even if he is an officer, he cannot recover, because he rendered no services to the city for the period for which the suit is brought. The duties of appellee's office or position were as follows: To receive all letters and telegrams received by or referred to the chief of detectives relative to police business, number and index the same, and see that proper reports are made thereon, and that they are answered and filed, or otherwise disposed of, as may be directed; to prepare and send out all letters and telegrams issued from the detective bureau; to make out fugitive warrants, and prepare requisitions for extradition of fugitives from justice wanted by the Chicago police department; to see that the books and records of the detective bureau are properly made out and kept, and to prepare and make such reports as may be required. Numerous cases and authorities are cited by appellant, which, it is claimed, establish that, because appellee's duties were purely of a clerical character, his position was that of a mere employee of the city, and not an officer. Conceding that under the test of these authorities the position of appellee was not that of an officer in the strict sense, we think they are not applicable in the case at bar. In the case of People v. Loeffler, 175 Ill. 585, 51 N. E. 785, in which the supreme court had under consideration the question as to whether the positions covered by the civil service act were offices, within the meaning of section 24, art. 5, of the constitution, it was held that the offices or positions provided for under the civil service act, while not strictly offices, within the meaning of the constitutional provision, were in a sense municipal offices. The court say: 'Inasmuch as the definition of "office" in section 24 refers to state, and not to municipal, offices, there is no provision in the constitution prescribing any particular mode for the appointment of officers in municipal corporations. The legislature therefore may provide for the appointment of officers in the municipal government in the mode adopted by the civil service act. In the absence of any constitutional restriction, the power of the legislature is ample to provide the mode of appointment to be adopted in selecting municipal officers.' Section 3 of the civil service act empowers the commissioners to classify all the offices and places of employment in the city, except those who are elected by the people, and others specified in section 11 of the act, not now in question, and provides that the offices and places so classified by the commission shall constitute the classified civil service of the city. Section 4 of the same act provides that the commissioners shall make rules for carrying out the purposes of the act, and

for examinations, appointments, and removals, in accordance with its provisions. The commissioners did adopt rules, classified the offices and places of employment into two general classes, known as class 'A' and class 'B,' respectively. These rules provide (No. 3) that class A shall be known as the official service, and class B as the labor service; and under the further provisions of the rules as to classification the chief clerk of the detective bureau falls in class A, division C, and grade 5. It will thus be seen that under the civil service act and the rules of the commissioners the position of appellee was that of a municipal officer, within the meaning of this act.

"It was held by the supreme court in the case of Kipley v. Luthardt (the appellee in this case) 178 Ill. 525, 53 N. E. 74, that the appellee was illegally dropped from his position as chief clerk of the detective bureau during the time for which he seeks to recover his salary. Moreover, it appears from this record that appellee was dismissed from his position or office, and not allowed to perform the duties thereof, in direct violation of section 12 of the civil service act, which provides that no officer or employee in the classified civil service of any city, who shall have been appointed under the rules of the commission and after examination, shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. There were no charges preferred against appellee, and the only pretense for his dismissal, and the refusal by the chief of police to allow appellee to perform the duties of his office, was the failure of the common council of the city to make an appropriation for his salary in the appropriation bill for the year 1898 by the name of 'chief clerk of the detective bureau of the department of police,' and in attempting to discontinue or abolish said office or position by changing the name thereof to 'secretary of the chief of detectives, rank of lieutenant,' without in any way changing the duties of said office or position, and by making an appropriation of $1,500 for the salary of said office of chief clerk under the name and style of 'secretary to chief of detectives, rank of lieutenant.' Appellee, then, being a municipal officer, and prevented from the performance of the duties of his office by the acts of the chief of police and the common council of the city, and it not appearing from this record that the appropriation for the salary of his office has been paid to any one performing the duties of the office, appellee is entitled to recover. We think the fact that the appropriation was made under the name and style of 'secretary to chief of detectives, rank of lieutenant,' the duties of the office and the salary being the same, can make no difference. The duties of the office during the time for which recovery is sought, it is true, were performed, and the office held, by one Joyce, who was a sergeant of detectives in the department of police, for which latter position a salary of $125 per month was appropriated. It does not appear that

Joyce received the salary pertaining to appellee's office, and we regard it as immaterial that the appropriation for the police department of the city for the year 1898 is exhausted. If exhausted, it was without authority of law, so far as concerns appellee's salary, as it does not appear to have been paid to Joyce, who, without warrant of law, held appellee's office and performed its duties. 1 Dill. Mun. Corp. § 235; Stadler v. City of Detroit, 13 Mich. 346; People v. Smyth, 28 Cal. 21; Fitzsimmons v. City of Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835; Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; State v. Carr (Ind. Sup.) 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163, and cases cited; Rasmussen v. Commissioners (Wyo.) 56 Pac. 1098, 45 L. R. A. 295, and cases cited. In the Andrews Case, supra, the court say: 'The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited. While there is some conflict in the authorities which we deem it unnecessary here to review, we are of opinion that the weight of authority is as above stated, and this rule is sustained by late and well-considered cases cited supra, and seems to us just, reasonable, and in accord with sound legal principles.

"It is further said that appellee cannot recover because there has been an appropriation for his salary for the year 1898, and he must look to this appropriation, and to hold the city liable would be a violation of sections 2, 3, and 4 of article 7 of the city charter; and numerous authorities are cited in support of the contention. We cannot, without unduly and unnecessarily extending this opinion, review these authorities. They do not, in our opinion, control the case at bar. The appropriation for the salary of appellee for the year 1898 was made, and presumably is in the hands of the city treasurer. It does not appear to have been paid to a de facto officer holding the office of appellee and performing its duties. * * * It can make no practical difference to the appellant whether appellee's salary is paid from the appropriation already made or from an appropriation to be made for the purpose of paying the judgment in this case. If the appropriation for the year 1898 is still in the hands of the city treasurer,—as it should be,—appellee's judgment may be paid from such appropriation. We cannot appreciate the force of appellant's contention that to hold the city liable to appellee for his compensation would in any way violate the sections of the city charter referred to, which relate to the incurring of expense by officers of the municipality without a previous appropriation therefor.

"The only other claim of error is as to the allowance of interest. This is obviated, as in the oral argument appellee's counsel voluntarily remitted the amount of interest included in the judgment, $79.69. The judgment is therefore affirmed.

less the amount of said interest, for the sum of $1,125, and costs of the superior court. Appellant will recover its costs in this court."

The foregoing correctly states and disposes of the case, and the opinion is adopted as the opinion of this court.

The judgment of the appellate court is affirmed. Judgment affirmed.

STATE *ex rel.* TOWN OF HOLLAND *et al. v.* LAMMERS *et al.*

(*Supreme Court of Wisconsin, June 20, 1901.*)

[86 N. W. Rep. 677.]

Incorporation of Villages*—Construction of Statute—Constitutional Law.

Rev. St. 1898, § 854, provides that any part of any town or towns not less than one-half square mile in area, lying in the same county, which shall contain a resident population of not less than 300 persons thereon, or any part of any town or towns not less than one square mile in area, lying in two adjoining counties, "and which shall contain a resident population of at least 400 persons to every square mile thereof," may become incorporated as a village: *held*, that the modifying clause quoted relates only to villages containing "not less than one square mile in area, * * * lying in two adjoining counties," and hence the only limitation on area of a village where all the territory is situated "in the same county" is that it shall not be less than one-half square mile, and the only restriction as to population is that it shall contain not less than 300 resident population; but that fact does not render the statute unconstitutional or so unreasonable as to be void, as Const. art. 11, § 3, authorizes the legislature to provide for the incorporation of cities and villages, but does not attempt to prescribe any limitations as to size or density of population.

Same—Vote of Electors to Incorporate—Certificate of Inspectors of Election.

A certificate of the inspectors of an election to determine the question of incorporation of a village, which states that 91 qualified electors residing in the territory voted, and that the canvass showed that 80 ballots were cast, of which 44 were in favor of incorporation, and 36 against it, shows that a majority of the votes were cast in favor of the incorporation, as required by Rev. St. 1898, § 865, as it will be presumed, in absence of proof to the contrary, that the excess of votes over 80 were rejected for valid reasons.

Cassoday, C. J., dissenting.

---

*Incorporation of towns and cities:

Proof of incorporation, 24 L. R. A. 844, brief.

Validity of incorporation, In re Town of Holland, 4 Mun. Corp. Cas. 221.

Acceptance of act creating, State *v.* Haines, 2 Mun. Corp. Cas. 430, and note.

Judicial notice of incorporation, Town of Thornton *v.* Fugate et al., 1 Mun. Corp. Cas. 62, and note, p. 69.

Power of courts as to incorporation of, 7 L. R. A. 736, brief; 8 L. R. A. 106, brief; 27 L. R. A. 744, brief; 30 L. R. A. 576, brief; 33 L. R. A. 636, brief.

Physical characteristics necessary to incorporation of town or city, note, 25 L. R. A. 755.

Statute authorizing incorporation by court, 8 L. R. A. 106, brief.

Annexing new territory to city—City Extension Act, Daly *v.* Morgan, Treasurer of Baltimore County, and Mayor and City Council of Baltimore, 1 L. R. A. 757, and note.

State *v.* Lammers

Appeal from circuit court, Sheboygan county; Michael Kerwin, Judge.

Action by the state, on relation of the town of Holland and others, against Garrett Lammers and others, to determine the validity of incorporation of a village. From an order sustaining a demurrer to the complaint, the relators appeal. Affirmed.

Action to determine the validity of the incorporation of the village of Cedar Grove, Sheboygan county, Wis. The proceedings for incorporation were taken under sections 854–866, Rev. St. 1898, having been instituted in November, 1899. The territory attempted to be incorporated comprised a portion of the town of Holland, about two square miles, is situated entirely within Sheboygan county, and has a population numbering 317. The grounds upon which the action is based are that the petition for incorporation did not show that the territory sought to be incorporated contained a resident population of 400 persons to the square mile, and that the certificate of the inspectors who presided at the election to determine the question of incorporation does not show that the majority of the ballots given at the meeting, had thereon the word "Yes," as required by section 865. The facts relating to this last contention are as follows: The certificate filed, among other things, states: "That, as such inspectors and clerk of such meeting or election, they caused a correct poll list of such qualified electors resident in such territory as voted or exercised the franchise at the election so held on that day to be made, and that the following named qualified electors, resident in such territory, voted by ballott having thereon the word 'Yes' or the word 'No.'" Then follows a list of ninety-one names. The certificate then continues: "That after the closing of the polls of said meeting or election at four o'clock in the afternoon, and upon the canvass of the ballots thrown or given at such meeting or election being made by the inspectors and clerk thereof, it was found, ascertained, and determined by said inspectors and clerk that there were eighty ballots given or thrown at such meeting or election, by qualified electors, resident in such territory; that a majority (forty-four) of the ballots so given or thrown at such meeting or election had thereon the word 'Yes,' and that thirty-six of the ballots, a minority of the ballots so given or thrown at such meeting or election, had thereon the word 'No.'" The complaint set out the different steps taken in relation to the incorporation, and concluded with a prayer that the defendants be ousted from the offices they claimed to hold, and that the village be declared unlawful. The defendants united in a demurrer based upon the ground that the complaint did not state facts sufficient to constitute a cause of action, which was sustained. The relators bring this appeal.

Timlin, Glicksman & Conway, for appellants.

Simon Gillen, for respondents.

BARDEEN, J. (after stating the facts). Two reasons are urged why the order appealed from should be reversed: (1) The territory sought to be incorporated does not contain the requisite population; (2) it does not appear that a majority of the ballots given at the meeting of the electors to determine the question of incorporation had thereon the word "Yes," as required by section 865, Rev. St. 1898.

1. A determination of the first proposition calls for a construction of section 854, which reads as follows: "Any part of any town or towns, not less than one-half square mile in area and not included in any village and all lying in the same county, which shall contain a resident population of not less than three hundred persons thereon, or any part of any town or towns, not less than one square mile in area and not included in any village and lying in two adjoining counties and which shall contain a resident population of at least four hundred persons to every square mile thereof, may, upon compliance with the conditions of this chapter, become incorporated as a village. * * *" The theory of relators' counsel is that a fair construction of the section requires that there should be at least 300 persons on each half square mile of territory incorporated, or that there must be at least 400 persons to every square mile thereof. To secure this construction, he insists that the words "and which shall contain a resident population of at least four hundred persons to every square mile thereof" constitute a modifying clause, and relate to and modify both disjunctive parts of the subject. He admits the general rule that a qualifying or limiting clause in a statute is to be referred to the next preceding antecedent, but he insists that to do so in this case would violate the evident purpose of the legislature. Black, Interp. Law, 150. We are not convinced that the situation demands any such forced and unnatural construction. The section as a whole seems plain and easy of interpretation. We will not attempt to defend the legislative policy therein expressed. It may be that it would have been wiser to have placed a limit upon the amount of territory that might be included in the proposed corporation, and to have enacted more definite limitations as to density of population therein; but we cannot say that the failure to do so violates any provision of the constitution, or renders the law so unreasonable as to be void. The constitution gives the power and makes it the duty of the legislature to provide for the incorporation of cities and villages, and to restrict their power in certain directions (section 3, art. 11), but it does not attempt to prescribe any limitations as to size or density of population. Regulations in that regard rest with the legislative branch of the government, and generally the courts must accept its will as manifested in statutes enacted covering the subject. A brief discussion of this subject may be found in Smith v. Sherry, 50 Wis. 210, 6 N. W. 561, which holds that the territory of such organizations must be contiguous. Turning now

to the statute under consideration, we find that the legislature has said that any part of any town or towns lying in the same county, not less than one-half square mile in area, may be organized or become incorporated as a village, provided it shall contain not less than 300 persons thereon. If the territory lies in two adjoining counties, then it must be not less than one mile square in area, and contain a resident population of at least 400 persons to every square mile. The fact that there are no restrictions as to density of population as to territory wholly contained in one county, beyond the required 300, does not make the act void, although it may be sufficient to impeach the legislative policy in the minds of its critics. We are unable to find any support to the theory contended for in the history of this legislation, or by reference to section 861. That section merely requires the court to be satisfied that the population, "in number and in proportion to quantity of land therein required" by section 854, is found upon the territory sought to be incorporated. He so found in this court, and thus the demands of the law have been met.

2. Counsel for the relators assumes that, because the certificate of the inspectors recites that 91 votes were cast by the electors of the district, the subsequent finding that only 44 ballots had thereon the word "Yes" shows affirmatively that the majority required by section 865 were not in favor of incorporation. This, however, is not a fair construction of the certificate. The first statement is but a recitation of the number of voters who exercised the privilege of voting. That which follows is the finding and determination of the inspectors upon the canvass of the votes cast. They definitely find that 80 votes were cast, 44 of which were in favor of incorporation. In absence of allegation to the contrary, we must assume that the excess of votes over 80 were rejected for some valid reason. The law makes the regulations applicable to the election of town officers and the canvass of votes at a town meeting apply to such an election. If any of the ballots cast were illegal, as where several are folded together, it was their duty to reject them. The presumption is that they performed their duty according to law. So, when they found and determined that there were only 80 ballots cast, we must assume that the excess were illegal and properly rejected. The finding must prevail over the recitation of fact, and the integrity of the election be sustained, unless impeached upon some legal grounds. The majority of the ballots necessary under section 865 to determine the question of incorporation must be construed to mean the majority of the legal ballots cast on the proposition. Such was long ago established as the rule at the election of officers (State v. Tierney, 23 Wis. 430), and nothing is apparent in the section referred to to indicate that a different rule should be applied to the situation under consideration. The majority required is not of those who vote or attempt to vote, but a majority of the legal

ballots cast, as shown by the canvass of the inspectors. The record showing such majority to be in favor of the project of incorporation, it must stand until overturned or impeached in a proper way. The order appealed from is affirmed.

(June 26, 1901.)

CASSODAY, C. J. (dissenting). Section 854, Rev. St. 1898, is copied into the opinion of my Brother Bardeen in this case. That section is a literal copy of section 7, c. 287, Laws 1897. It provides for the incorporation of two classes of villages; the first containing "not less than one-half square mile in area * * * and all lying in the same county," and the second containing "not less than one square mile in area * * * and lying in two adjoining counties." The precise question presented is whether the words which follow relate back and qualify the first class as well as the second class. Such qualifying words are as follows: "And which shall contain a resident population of at least four hundred persons to every square mile thereof, may, upon compliance with the conditions of this chapter, become incorporated as a village," etc. Unless it does so relate back to the first class, it is obvious that, by the terms of that section, the only limitation on the area of a village where all the territory is situated in the same county is that it shall not be less than half a square mile, and the only condition as to population is that it shall contain not less than 300 resident population. In other words, if it contains 300 resident population, it may include any number of square miles of territory, provided only that such territory is all included in the same county. Such an absurd result should not be sanctioned unless the language of the statute imperatively requires it. If the language of the statute is fairly open to construction, then the words "a resident population of at least 400 persons to every square mile thereof" should apply to the first class, where the territory is all in the same county, as well as to the second class, where the territory is "in two adjoining counties." Certainly the reason for the one is just as persuasive as it is for the other. It is a cardinal rule of construction that words are to be interpreted with reference to the general scope and object of the statute. Thus, it has been held by the highest court in England that, "where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used." Salmon v. Duncombe, 11 App. Cas. 627, followed in Manitowoc Co. v. Truman, 91 Wis. 12, 64 N. W. 310; Somo Lumber Co. v. Lincoln Co. (Wis.) 85 N. W. 1023, 1025; State v. Shove, 96 Wis. 9, 70 N. W. 314, 37 L. R. A. 145. In this last case the language of a leading case in New York (Coster v. Lorillard, 14 Wend. 297) is quoted, as follows: "In construing statutes, the usual and proper mode is to ascertain the intention of

the legislature from the language they have used, connected with the state of the law on the same subject anterior to the passage of the statute. When the courts know for what particular mischief the legislature intended to provide a remedy, it is their duty so to construe the statutes as most effectually to suppress the mischief and advance the remedy." So it was held in this state 30 years ago that "the true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law, and thus to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words." Harrington v. Smith, 28 Wis. 43, followed in State v. Ryan, 99 Wis. 128, 74 N. W. 545. "Where the intent of a statute is manifest, effect should be given to that, rather than to the letter." Haentze v. Howe, 28 Wis, 293. So it is said to be "a fundamental rule in the construction of statutes so to interpret their language, if possible, as to give them some force and effect; and, where the construction is elliptical, the words which are obviously necessary to complete the sense will be supplied." Nichols v. Halliday, 27 Wis. 406.

By examining the prior legislation on the subject, and keeping in mind the object thereby sought to be attained, the construction of the statute in question would seem to be very plain. For many years there was no authority to incorporate a village upon territory of two adjoining counties. Thus, the statutes of 1849 declared that "any part of any town or towns not included within any incorporated village, and containing a resident population of not less than three hundred persons, and if it shall include within its boundaries a territory of more than one square mile in extent, containing a resident population of at the rate of not less than three hundred persons to every square mile of territory included within such boundaries, may be incorporated as a village under the provisions of this chapter." Section 1, c. 52, Rev. St. 1849. The same section was carried forward into the Revised Statutes of 1858 (chapter 70, § 1). The statute of 1872 provided that no village should be incorporated which contained less than five hundred resident population, and that if it should include within its boundaries a territory of more than one square mile, then it should contain "a resident population of not less than three hundred persons to every square mile of territory included within such boundaries." Section 1, c. 188, Laws 1872. The revision of 1878 declared that "any part of any town or towns not less than one square mile in area, and not included in any village, and all lying in the same county, which shall contain a resident population of at least five hundred persons, and not less than three hundred persons to every square mile thereof, may * * * become incorporated as a village,"

etc. Section 854, Rev. St. 1878. In 1880 that section was amended so as to read, "Any part of any town or towns not less than one square mile in area and not included in any village, and lying in the same county, or in two adjoining counties, which shall contain a resident population of at least four hundred persons, and not less than three hundred persons to every square mile thereof, may * * * become incorporated as a village," etc. Section 1, c. 203, Laws 1880. That was the first attempt to authorize the incorporation of a village "in two adjoining counties." In the following year the legislature professed to amend that section by striking out the words "one square mile," and inserting in place thereof the words "one-half square mile," but added "so that said section will read as follows" (section 854): "Any part of any town or towns not less than one-half square mile in area, and not included in any village, and all lying in the same county, which shall contain a resident population of not less than three hundred persons thereon, may * * * become incorporated as a village," etc. Chapter 92, Laws 1881. Whether that operated to repeal the former statute on the subject, not therein re-enacted, it is unnecessary here to determine, since it is obvious that by section 7, c. 287, Laws 1897, the legislature intended to revive, re-enact, and continue all the essential provisions of section 854, Rev. St. 1878, as amended by chapter 203, Laws 1880. True it allowed a village of "not less than one-half square mile in area," where the territory was all in the same county, instead of "one square mile," but it revived and continued the authority to incorporate a village "not less than one square mile in area * * * lying in two adjoining counties." In the act of 1880 there is no room for doubt but what the qualifying words, "which shall contain a resident population of at least four hundred persons, and not less than three hundred persons to every square mile thereof," applied not only to a proposed village "in two adjoining counties," but also to a proposed village in one county. Why should not the qualifying words found in section 7, c. 287, Laws 1897, "which shall contain a resident population of at least four hundred persons to every square mile thereof," also apply to a proposed village wholly in one county, as well as to a proposed village "in two adjoining counties"? The words, "may, upon compliance with the conditions of this chapter, become incorporated as a village," which immediately follow, certainly do relate back to a proposed village wholly in one county, as well as to a proposed village in two adjoining counties. The reason for holding that such qualifying words do relate back to a proposed village in one county is equally potent. True, the arrangement of the words employed, and the punctuation, are not as well calculated to secure such construction as they might have been. But punctuation is not to be regarded in construing a statute. Browne v. Turner, 174 Mass. 150, 54 N. E. 510; In re Gyger's Estate, 65 Pa. 311.

In this last case it was held that, "in construing a statute, the plain, common-sense interpretation of the words should be adhered to, rather than to apply refined technical rules of grammar." See, also, Sedg. St. Law (2d Ed.) 225. "The correct rule of interpretation is," said Mr. Justice Wayne, speaking for the whole court, "that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; and it is an established rule of law that all acts in pari materia are to be taken together, as if they were one law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and, if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." U. S. v. Freeman, 3 How. 564, 565, 11 L. Ed. 727, 728. In another case in the same volume it is held that, "in affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force." Daviess v. Fairbairn, 3 How. 636, 11 L. Ed. 760. In this state the rule seems to be well settled that where a statute has been repealed, and then wholly or partially re-enacted, such re-enacted portion of the statute will be regarded as a continuation of the old statute. Fullerton v. Spring, 3 Wis. 667; Laude v. Railway Co., 33 Wis. 640; Glentz v. State, 38 Wis. 549; Scheftels v. Tabert, 46 Wis. 439, 1 N. W. 156; Gilkey v. Cook, 60 Wis. 133, 18 N. W. 639; State v. Board of Sup'rs of Racine Co., 70 Wis. 543, 36 N. W. 399; Cox v. Lumber Co., 82 Wis. 141, 51 N. W. 1130. In view of the several provisions of the statutes cited, it seems to me to be in violation of the rules of construction quoted to hold that a village may be created with a resident population of only 300 persons, scattered over several square miles of territory, provided it is all in one county, but, if the territory is in two adjoining counties, then it must "contain a resident population of at least four hundred persons to every square mile thereof." But there is another reason why section 854, Rev. St. 1898, should be construed as I have contended; and that is that section 14 of chapter 287, Laws 1897, copied into section 861, Rev. St. 1898, provides that: "If the court, after such hearing, shall be satisfied of the correctness of any such survey or resurvey and census, that all the requirements of the statutes have been complied with, and that such territory as is proposed to be included contained, at the time such census was first or subsequently taken, the population in number and in proportion to the quantity of land therein required in section 7 [section 854, Rev. St. 1898] of this act, it shall make an order declaring that such territory * * * shall be an incorporated village," etc. Such language is appropriate when applied to a proposed village in two adjoining counties, but is

without significance when applied to a proposed village with one, two, three, or more square miles of territory, all situated in the same county, as construed by the majority of the court; but with the qualifying words, "which shall contain a resident population of at least four hundred persons to every square mile thereof," applied to such proposed village, situated wholly in one county, it is significant and harmonious.

DUMARS *et al.* *v.* CITY OF DENVER *et al.*

(Court of Appeals of Colorado, June 28, 1901.)

[65 Pac. Rep. 580.]

Pleading—Sufficiency of Complaint—Demurrer.

A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action will not be sustained merely because the complaint contains irrelevant, immaterial, and unnecessary matters.

Special Assessment—Bill to Restrain Assessment Void on Its Face—Parties—Multiplicity of Suits—Jurisdiction of Equity.

A court of equity, under its jurisdiction to prevent a multiplicity of suits, will take jurisdiction of a suit by one property owner on behalf of himself and all others similarly interested, though they have no joint interest, to restrain the enforcement of a special assessment, void on its face, though such assessment is not a cloud on their titles.

Sewers—Publication of Ordinance Authorizing Construction*—Sufficiency of Publication.

Under Denver City Charter, art. 2, § 8, providing that no ordinance shall take effect until published in some newspaper of general circulation, or in a book or pamphlet, one publication in a Sunday newspaper of an ordinance authorizing the construction of a sewer is a sufficient publication to support an assessment therefor.

Local Assessments—Validity—Failure to Publish Ordinance Authorizing Improvement.

Under Denver City Charter, art. 2, § 10, prohibiting the passage of a bill or resolution authorizing the expenditure of more than $5,000 until after a newspaper advertisement of five days, stating the nature of the expenditure, the passage of an order making such expenditure for a sewer without such publication invalidates an assessment therefor.

Same.

Under Denver City Charter, art. 7, § 3, requiring the board of public works to publish a newspaper notice for 20 days, of the date, nature, and manner of payment of a proposed public improvement, and the time when the resolution ordering the improvement will be considered, the failure to publish such notice of a contemplated sewer will invalidate an assessment therefor.

Invalid Assessment—When a Cloud on Title.

Where defects in proceedings for making a public improvement, sufficient to vitiate an assessment therefor, do not appear from the record, the assessment is a cloud on the title of the property owner, which will authorize a suit for its removal.

Assessment Entirely Illegal—Tender of Amount of Assessment Not a Condition Precedent to Right of Taxpayer to Enjoin.

Where a special assessment for a city improvement is entirely illegal, a taxpayer may enjoin its enforcement without first paying or tendering the amount of his assessment.

---

*See notes, 1 Mun. Corp. Cas. 560; 3 Mun. Corp. Cas. 27, 257 et seq., 396 et seq.

Error to district court, Arapahoe county.

Suit by Florus P. Dumars and others against the city of Denver and others to vacate a special assessment for the construction of a sewer, and to remove a cloud from the title of plaintiff's property, and to perpetually enjoin the enforcement of such assessment. From a decree in favor of defendants plaintiffs bring error. Reversed.

Joshua Grozier, T. J. O'Donnell, and A. C. Phelps, for plaintiffs in error.

J. M. Ellis, N. B. Bachtell, H. M. Orahood, H. L. Ritter, and Guy LeR. Stevick, for defendants in error.

John S. Macbeth, F. A. Williams, and Charles J. Hughes, Jr., amici curiæ.

THOMSON, J. This proceeding was instituted by Florus P. Dumars and a number of others, suing in behalf of themselves and all other persons similarly situated and interested, against the city of Denver and its treasurer and ex officio collector, to obtain a decree annulling an assessment ordered by the authorities of the city against the real estate of the plaintiffs and the others for the construction of a storm sewer, removing from the title of the plaintiffs the cloud occasioned by the assessment, and perpetually enjoining the defendants from enforcing it. The complaint alleged that the plaintiffs were all taxpayers and real-estate owners in the sewer district; that the proceedings creating the district were had in pursuance of the charter of the city of Denver, enacted in 1893; that the enactment was void, as being in violation of the constitution of the state of Colorado and the constitution of the United States but that, conceding the validity of the charter, the board of public works and the city council failed of compliance with its provisions in the following respects: (1) The ordinance creating the sewer district was not published in book or pamphlet form, and was not published at all, except once in the Denver Republican, on Sunday. (2) The bill authorized the expenditure of more than $5,000, and no advertisement stating the general nature of the proposed expenditure was ever made. (3) The board of public works did not, by advertisement for 2 days, in two daily newspapers of general circulation, publish in the city of Denver, or otherwise, or at all, give notice to the owners of the real estate in the district of the kind of improvements proposed; the number of installments and time in which the cost would be payable; the rate of interest on unpaid installments; the extent of the district to be assessed; the probable cost, as shown by the estimate of the engineer; the time, not less than 30 days after the first publication, when a resolution ordering the improvements would be considered by the board; showing that the map and estimates, and all resolutions and proceedings of the board, were on file, to be seen and examined at the office of the board during business hours; and stating that all complaints and objections that might be made in

writing, concerning the proposed improvements, by the owner of any real estate to be assessed, would be heard and determined by the board before its final action. The complaint also stated that the defendants were proceeding to the collection of the assessment against the plaintiffs by sale of the land belonging to them, and upon which the defendants alleged the assessment to be a lien. The defendants demurred to the complaint upon the sole ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the complaint dismissed. The plaintiffs bring error.

An objection now taken to the complaint by the defendants is that it is crowded with irrelevant and immaterial allegations. The ground of their demurrer was not that the complaint stated too many facts, but that it did not state enough; and, if sufficient can be found in it to constitute a cause of action, that it contains, in addition, a mass of unnecessary matter, is inconsequential. Baum v. Holton, 4 Colo. App. 406, 36 Pac. 154. But the principal reasons urged for the defendants in support of the judgment are thus stated in the printed argument of their counsel: "We think it very clearly appears from the foregoing synopsis of the complaint that, if the allegations made are true,—and certainly it does not lie in the mouth of the plaintiffs to deny the truth of any of them,—then the proceedings complained of, and all laws purporting to authorize the same, are, on their face, unconstitutional, and null and void, and are not sufficient even to create a cloud upon the title of the plaintiffs. For this reason the plaintiffs are not entitled to the interposition of a court of equity." Counsel neglect to distinguish between the two separate and independent grounds upon which relief is sought, namely, the unconstitutionality of the law under which the proceedings were had rendering them void upon their face, and, on the hypothesis of the constitutionality of the law, the failure of the city to comply with its provisions. Yet both of these grounds are relied upon by the plaintiffs, and each shall be subjected to examination.

Respecting the question of the effect upon title of proceedings void upon their face, the authorities are not agreed; some affirming, and others denying, that such proceedings create a cloud, the removal of which is within the jurisdiction of a court of equity. But the distinctive features of this case render it unnecessary for us to be parties to that controversy, and, proceeding on the hypothesis that void proceedings do not cloud title, we think a result can be reached concerning which all the cases are in perfect harmony. While void proceedings cast no cloud upon title to real estate, and a single individual, moving only in his own behalf, and for his own purposes, to restrain such proceedings, will be remitted to his remedy at law, yet where a number of persons are similarly affected, and the rights of all may be adjusted in one proceeding, a court of equity will assume jurisdiction, notwithstanding there is no

cloud to remove, and the ground of its jurisdiction is the prevention of a multiplicity of suits. Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65; Union Pac. Ry. Co. v. City of Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Heywood v. City of Buffalo, 14 N. Y. 534; Keese v. City of Denver, 10 Colo. 112, 15 Pac. 825; 1 Pom. Eq. Jur. §§ 260, 273. The complaint in this case shows that a number of persons are affected by the same assessment, and that to determine their rights at law would require as many suits as there are individuals; and it also shows that, while they have no common ownership in the property affected by the assessment, they have a community of interest in the questions of law and fact involved in the controversy; and upon authority so overwhelming as to be practically unanimous the case is one peculiarly of equitable cognizance. See, also, Pom. Eq. Jur. § 269. Defendants' counsel refer us to City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004, as announcing a contrary doctrine. Johnson brought an action against the city of Highlands to restrain the collection of an assessment against his land for the construction of a sewer, on the ground, among others, of a violation of the federal and state constitutions. The only allusion to this ground in the opinion, which was delivered by Mr. Justice Campbell, was the following: "That a tax or assessment is void is not sufficient to justify the interposition of a court of equity to restrain its collection." We have nowhere said that it is; and, according to the view of the law which we have taken, it is not. The idea which the learned judge intended to convey, is more fully expressed in another opinion delivered by him, and reported in the same volume: "That a tax is void is, of itself, not sufficient to justify the granting of a writ. The case must, in addition, be brought under the head of some of the well-recognized heads of equity jurisdiction." Insurance Co. v. Bonner, 24 Colo. 220, 49 Pac. 366. The prevention of a multiplicity of suits is one of those heads. Not more fortunate is another of the defendants' citations: Wason v. Major, 10 Colo. App. 181, 50 Pac. 741. Judge Wilson, delivering the opinion, specifically designated the prevention of a multiplicity of suits as one of the grounds of jurisdiction in equity. But the position of our supreme court upon the questions under consideration is not equivocal, and the law applicable to them may be regarded as settled in this state. In Keese v. City of Denver, 10 Colo. 112, 15 Pac. 825, where a number of parties united in a proceeding against the city of Denver and certain of its officers to enjoin a sale of their land in virtue of an assessment for the building of a sewer, and asking the same relief for all persons similarly situated, the decision was that, upon the facts shown, the city council was not authorized to cause the sewer to be constructed, and was, hence, not authorized to levy an assessment to pay for its construction; that the assessment was, therefore, void; and that, to the end that the rights of all per-

sons interested might be determined in one suit, it was proper for the plaintiffs to sue for all others similarly situated and interested. The judgment of the court below dismissing the plaintiffs' bill of complaint was reversed. In 1893 the general assembly passed an act, which, in terms, provided that when, by final decree of the court of appeals or the supreme court, any assessments made by the city of Denver for the construction of district sewers have been declared invalid in a direct proceeding to determine their validity, the city might, nevertheless, upon the passage of a resolution by the city council declaring the sewers necessary for sanitary purposes, assess the reasonable value of that portion of the sewers adjoining all lots in the district, the assessments for which should remain unpaid, against those lots, with interest from the date of construction. This act is section 48 of article 7 of the present city charter. Sess. Laws 1893, p. 219. The former assessments against certain property having been declared invalid in Keese v. City of Denver, supra, the city adopted the prescribed resolution, and caused the same property to be assessed for the payment of the reasonable value of the adjoining portion of the sewer. John Evans and a number of others, suing in their own behalf and in behalf of all others similarly situated, brought their action in the district court against the city of Denver and certain of its officers to restrain the collection of the assessment. Judgment was rendered for the defendants, and the case was appealed to the supreme court. That tribunal held that section 48 of article 7 of the act of 1893—being the present city charter—was repugnant to the state constitution, and void, as operating retrospectively. The judgment below was reversed, and remanded, with instruction to the district court to enter a judgment enjoining the defendants from collecting the assessment. Evans v. City of Denver, 26 Colo. 193, 57 Pac. 696. The question of the constitutionality of the law is not before this court. The decision of that question belongs to another tribunal. What I mean is, simply, that under proper conditions equity will relieve against proceedings had pursuant to a statute which is in contravention of the constitution.

But this case presents another feature, and to that I shall now direct my attention. The first ground for relief set forth in the complaint is the invalidity of the proceedings, appearing on their face. The next ground is their invalidity by reason of matters aliunde. If the allegations of fact be true, then, conceding the constitutionality of the law, the city officials failed in the performance of duties prescribed by the statute, and prerequisite to jurisdiction. The facts invalidating the proceedings do not appear on the face of the record, so that those proceedings are prima facie regular and valid; and, to avoid them, resort must be had to outside evidence. In order to a clear understanding of the situation, I deem it well to set forth in full a few of the charter provisions, dis-

regard of which by the city and its officials is charged in the complaint. They are as follows:

Art. 2, § 8: "No ordinance shall take effect until published in some newspaper of general circulation, published in the city of Denver, or in book or pamphlet form by authority of the city council."

Art. 2, § 10: "No bill granting any franchise or special privilege, and no bill or resolution authorizing the expenditure of more than five thousand dollars ($5,000), shall be passed until the expiration of at least one week from and after the introduction of the same; nor until an advertisement has been made by the city clerk for at least five (5) days in some such newspaper, stating the general nature of the proposed franchise, privilege, contract or expenditure, as the case may be."

Art. 7, § 3, proviso 2: "The board shall by advertisement for twenty days in two daily newspapers of general circulation, published in the city of Denver, give notice to the owner of the real estate in the district, of the kind of improvements proposed, the number of installments and time in which the cost will be payable, the rate of interest on unpaid installments, the extent of the district to be assessed, the probable cost as shown by the estimates of the engineer, and the time, not less than thirty days after the first publication, when a resolution ordering the improvements will be considered by said board; that said map and estimate and all resolutions and proceedings of the board in the premises are on file, and can be seen and examined at the office of the board during business hours, at any time within said period of thirty days, by any person interested: and that all complaints and objections that may be made in writing concerning the proposed improvements, by the owner of any real estate to be assessed, will be heard and determined by the board before final action of the board thereon."

Art. 7, § 23: "In ordering the construction of district sanitary sewers, and all storm sewers, the board shall proceed as required in the first, second and fifth provisos of section three (3) of this article."

We shall now inquire into the nature of these charter requirements, and the effect of their disregard.

1. As will be seen hereafter, district sewers for storm drainage must be authorized, and storm-sewer districts prescribed, by ordinance; and no ordinance takes effect until published in some newspaper of general circulation, published in the city of Denver, or in book or pamphlet form, by authority of the city council. Without publication by one of those methods, there was no ordinance. The question is whether the publication in question here, having been made on Sunday, was legal, or sufficient to give effect or impart validity to the ordinance. In Schwed v. Hartwitz, 23 Colo. 187, 47 Pac. 295, it was held that publication of a notice of a tax sale was in the nature of service of process, and that, where the pub-

lication was made only on Sunday, the sale which followed it was void. As the publication of a notice of a tax sale was the only publication in the case, the court went into no general discussion of the question what the character or purpose of a publication must be to make it equivalent to service of process; but among the cases to which it referred were two, which we shall examine, in order to deduce from them, and from the use made of them in the opinion, what the judgment of the court upon the question now under consideration would have been if the facts of the case before it had rendered such judgment necessary. Hastings v. City of Columbus, 42 Ohio St. 585; Ormsby v. City of Louisville, 79 Ky. 197. In Hastings v. City of Columbus the plaintiffs, as contractors, sought to recover the amount of an assessment for an asphalt pavement against the owners of abutting lots. The facts which gave rise to the question considered, as well as the question itself, are comprehensively stated in the following extract from the opinion: "The record discloses the fact, and the alleged error is insisted upon by the defendants, that in the Town street case the preliminary ordinance declaring the improvement to be necessary, was published in the Sunday Morning News, a newspaper published and circulated in Columbus on Sunday only, and that the notice was published in no other newspaper. The master finds that newspaper was at the time of general circulation in Columbus. It also appears that in the High street case the ordinance providing for the improvement, and the assessment ordinance for one section of that improvement, were also published in that newspaper, and no other. And it appears that at the time of these various publications other newspapers, dailies and weeklies, were published and generally circulated in the city of Columbus on week days only. The Municipal Code of 1869, amended in 1870 (67 Ohio Laws, p. 71), and then in force, provided (sections 100, 103), among other things, that all ordinances 'providing for improvements shall be published in some newspaper of general circulation in the corporation; if a daily twice, and if a weekly once, before going into operation. And no ordinance shall take effect until the expiration of ten days after the first publication of such notice.' And that 'it shall be deemed a sufficient defense to any suit or prosecution, under any ordinance, to show that no such publication * * * as herein required, was made.' The question whether such publication in a Sunday newspaper is a legal or valid notice being thus directly presented, we have bestowed upon it that care which its importance demanded, and will now state the result." It appears also from the opinion that there was a statute in force in Ohio forbidding common labor on Sunday. As I shall have occasion for further quotation, I notice this as explanatory of an expression occurring later in the opinion. The court, after an elaborate examination of the common law and of the legislation in Ohio affecting the question to be determined,

announced its conclusion in the following language: "It follows from the foregoing, irresistibly and necessarily, that a summons or notice served by a sheriff, coroner, or constable on Sunday is, in Ohio, lawfully served. In saying so we do not intend to intimate that such officer ought, ordinarily, to make such service on Sunday, or that he would be guilty of any breach of duty whatever by declining to make such service on that day. Nor are we to determine whether the law is right or wrong. We have simply to inquire, what is the law? and, having ascertained that, declare the result. When the citizen receives a newspaper containing a legal notice, and reads such notice, the object which the legislature had in view is to that extent accomplished, and such publication is quite analogous to service of a summons. If the newspaper is mailed, the citizen commits no offense whatever by receiving it at the post office on Sunday, and reading it; nor does he commit any offense by buying it on that day of the publisher, or a carrier, or newsboy, and reading it, however it may be with respect to an offense by the publisher or carrier or newsboy. A Sunday newspaper is not an unlawful publication, and the fact that persons engaged upon it may have violated the statute against common labor in preparing and circulating it no more affects the legality of the notice than the fact that the sheriff may have committed some offense at the time he served a summons would affect the legality of the service. In one case, as well as the other, the service is, in fact, effectual in giving actual notice, and we see nothing in the common law or our statutes which would warrant us in holding that such publication is illegal or invalid." It will be observed that the result reached by the Ohio court and that reached by our own supreme court differ. We find, however, that the seeming disagreement involves no principle. The conclusions are different, because the premises are different, but there is no conflict of opinion. Our court does not agree that the Ohio decision is contrary to its own, except apparently, and says that the entire reasoning of the opinion is in favor of its own conclusion. It is, therefore, proper to ascertain what the Ohio court decided. The law was that all ordinances providing for improvements should be published in some newspaper, etc., and an ordinance adopted in conformity to that law was published only on Sunday. The character of that ordinance was similar to the character of this ordinance. The purpose of that was to provide for the improvement; the purpose of this to authorize the improvement; and requirements respecting the publication of one would be applicable to the other. Throughout the entire opinion the court calls the publication of such an ordinance "notice"; and the decision was that, because in Ohio the sheriff might lawfully serve a summons or notice on Sunday, notice might lawfully be published on Sunday; and that the violation of the statute against common labor, in preparing and circulating newspapers, had no

effect upon the legality of the publication, it being in the nature of service of process, which was lawful. The importance of that decision to the present discussion consists in the fact that it places the publication of an ordinance providing for a public improvement upon the same footing with service of process. If it had been the opinion of our supreme court that by the law if this state publication of such an ordinance is not in the nature of service of process, instead of referring to the Ohio decision as being only apparently contrary to its own view, it would have simply said that the case was not in point. But, instead of so doing, it designated the case as being based on a statute of Ohio, and expressly approved its reasoning.

In Ormsby v. City of Louisville, the same question of the legality of a Sunday publication of an ordinance was considered. The charter of the city of Louisville provided that all ordinances of the city of Louisville should be published in at least two papers having the largest bona fide circulation in the city. The court said: "A publication of the levy ordinances on Sunday, and on no other day, before seeking to enforce them, is not such a publication as the charter requires, or the law of this state approves. It is not a judicial day, nor is it a day upon which any work, labor, or calling can be legally pursued, unless of necessity or charity. Legal process cannot ordinarily be legally served upon Sunday, and there is no reason shown why the publication of an ordinance of the city of Louisville on Sunday should be held as a compliance with its charter requiring publication of such ordinance. The publication is a violation of law, and no citizen is bound by any law known to us to read secular newspapers on Sunday to entitle himself to the benefits which may flow from publications contained in them. If he chooses, he may refuse to read them on Sunday altogether, and none of his legal rights will be thereby forfeited." It may be thought that in the matter of compliance with the law a distinction of some kind was recognized between levy ordinances and other ordinances, but a careful examination of the language quoted will dissipate the supposition. It is true that the quotation begins with the terms "levy ordinances," but that expression, looked at in its connection, has no significance, because the ordinance before the court was a levy ordinance, and in commencing the discussion the court simply called it by its name. But the charter provision was confined to no class of ordinances; and the court confined its reason for holding the Sunday publication invalid to no class of ordinances. The court refused to hold that the publication on Sunday, not of a levy ordinance, but of an ordinance, was a compliance with the charter, and said that the publication—referring to the publication mentioned immediately before, of an ordinance simply, and not of a levy ordinance—was a violation of law. What follows, as it seems to me, renders a

misunderstanding of the court's meaning impossible. The court says that no citizen is bound to read secular newspapers on Sunday, and that he forfeits no right by refusing to read them. If publication on Sunday of ordinances other than levy ordinances had been considered legal, the language would not have been so sweeping. The court would have said that no citizen is bound to read publications of levy ordinances on Sunday, and would forfeit no rights by not doing so. But, according to the court's language, he loses nothing by not reading the paper at all, and it is immaterial what ordinance or other matter it may contain. Now, the reason given by the court why the publication of an ordinance —not a levy ordinance—on Sunday is unlawful is that process cannot be legally served on Sunday, and so, at last, the same result is reached as in the Ohio case, namely, that the publication of an ordinance is in the nature of service of process. Why did our supreme court cite in support of its opinion that the publication of a notice of a tax sale only on Sunday was illegal, a decision that the publication of an ordinance only on Sunday was illegal, unless it regarded the purpose and effect of the publication of an ordinance and the purpose and effect of the publication of a notice of a tax sale as the same? In Schwed v. Hartwitz our supreme court also cited in support of its decision the case of Scammon v. City of Chicago, 40 Ill. 146. The question in that case concerned the legality of the publication on Sunday of a notice of assessment in condemnation proceedings. The court held that the notice stood in place of process, and that its publication on Sunday was invalid, because service of process on Sunday would be invalid. The court, of course, confined itself to the subject before it. It decided the case with reference to the particular notice involved, and went into no general discussion of classes of notices. It rested its decision upon the following statutory provision: "Any person who shall knowingly disturb the peace and good order of society, by labor or amusement on the first day of the week, commonly called Sunday, works of necessity and charity excepted, shall be fined," etc. It is evident that the mere publication of a notice in a newspaper on Sunday would not necessarily disturb the peace or good order of society, and so the court applied the statutory provision to the case before it as follows: "A large and most respectable portion of the community consider it immoral to issue Sunday newspapers, and, if these notices should be published in such newspapers only, property holders entertaining these opinions would have little chance of learning of the assessment." The foregoing language would include a legal publication of any kind. Persons refusing to read a Sunday newspaper would be as ignorant of an ordinance as of a notice of assessment which it might contain, and from that language we see no escape from the conclusion that, if the case before the Illinois court had been

the case of the publication of an ordinance on Sunday, instead of what it was, the court's decision would have been the same.

My apology for the space occupied in reviewing the foregoing authorities is the strong effort made in argument to avoid what I believe to be their effect. I can conceive of no publication required by law the purpose of which is not to give notice of something to particular persons or to the public. The reason for the publication of an ordinance is that the public may receive notice of its provisions. Any notice which the law directs to be given is in the nature of process; and its publication, when so required, is in the nature of service of process. The publication of the ordinance in question being, in effect, the publication of a notice, was, according to the decision in Schwed v. Hartwitz, not such a publication as the law requires; hence the ordinance never took effect, and all the proceedings which followed it were void.

2. I come now to a consideration of section 10 of article 2, and preface the discussion with the following further charter provisions:

Art. 7, § 2: "Whenever the board of public works shall by resolution, order any of the local improvements herein mentioned, the same shall be authorized by ordinance; which ordinance shall be in form recommended by the boards of public works by endorsement thereon, and shall not be subject to amendment by the city council."

Art. 7, § 20: "The board of public works may order the construction of district sewers for storm drainage for districts to be known as storm districts, the same to be prescribed by ordinance."

The question to be settled is whether the ordinance required by sections 2 and 20 of article 7 is an ordinance authorizing the expenditure of money, within the meaning of section 10 of article 2. While the board of public works may order local improvements, the improvements must be authorized by an ordinance. The order is ineffective without the ordinance. While the ordinance cannot be amended by the council, but must be adopted, if it is adopted at all, in the form recommended by the board, it is still subject in other respects to the rules prescribed for the enactment of ordinances; and as no distinction is made between an ordinance for one purpose and an ordinance for another purpose, and as the words "authorizing the expenditure of more than five thousand dollars" are unqualified, if the ordinance in question authorized the expenditure of more than $5,000, the advertisement required by section 10 of article 2 was essential to its validity. It is said that the complaint describes the ordinance as an ordinance authorizing the expenditure of more than $5,000, and that, as the demurrer admits that the allegation is true, it must be so accepted by us; but the nature of the ordinance and the power of the city council in respect to it are *defined* by the charter,

and a provision embraced in it which the charter does not warrant is null. No right to relief could be based on such provision, and a party asserting it could derive no benefit from an admission of its existence. From a careful examination of the provisions of the city charter relating to local improvements, and, in the matter of their construction, to the division of power between the board of public works and the city council, I have reached the conclusion that the ordinance required by sections 2 and 20 of article 7 is not, and cannot legally be, an ordinance for the expenditure of money. Sections 35 and 36 of article 3 vest in the board of public works the exclusive management and control of the construction of all public and local improvements. Section 7 of article 6 authorizes the city council to contract an indebtedness on behalf of the city by borrowing money and issuing bonds of the city for the purpose of constructing and maintaining public sewers. By section 40 of article 3 full, complete, and exclusive authority is given the board of public works to expend for the city the proceeds of such bonds; and by the terms of section 43 of article 7 bonds and warrants issued in payment for local improvements must be issued by the city treasurer upon the estimates and orders of the board of public works, approved by the mayor, without being audited by the city auditor or auditing committee or allowed by the city council. The duty of the treasurer to issue the bonds and warrants, and of the mayor to approve the estimates and orders of the board, is mandatory. So that the issuance of the bonds and warrants, and their amount, are within the exclusive control of the board of public works. McMurray v. Hayden, 13 Colo. App. 51, 56 Pac. 206. In so far as public improvements are concerned, it is the board of public works only by which the expenditure of money is authorized, and the grants of authority to it leave the city council without power in the premises. The ordinance required by sections 2 and 20 of article 7 is an ordinance authorizing the improvements ordered by the board of public works, and, when such improvements consist of district sewers for storm drainage, prescribing the storm-sewer districts. When the council has authorized the work and prescribed the districts, its power is exhausted, and with the expenditure of the money required by the work it has no manner of concern. It may be said that to authorize the improvement is inferentially to authorize the expenditure which the improvement renders necessary, but, when all the charter provisions relating to the subject are considered together, the supposition becomes untenable. The council may say whether the improvement shall be made or not, and when it has said that the improvement may be made—that is, when it has authorized it—its work is done. All else is left to the board of public works.

3. If the notice required by section 3 of article 7 was not

published for 20 days in two daily newspapers of general circulation, published in the city of Denver, the board of public works was without jurisdiction or power to move further, and all subsequent proceedings were void. The allegation of failure to publish the notice is not specific, and is a clumsy piece of pleading; but it avers that the notice was not published for the necessary period. The requirements concerning the notice are jurisdictional. It must be given by the board of public works, it must contain all the matters specified in the section providing for it, and it must be published for the requisite length of time. In the matter of authorizing and constructing public improvements by a municipality, the mode provided by the charter must be strictly pursued, and any departure from the formula prescribed vitiates all proceedings under it. Merritt v. Village of Portchester, 71 N. Y. 309; Town of Durango v. Pennington, 8 Colo. 257, 7 Pac. 14; Keese v. City of Denver, supra; Tifft v. City of Buffalo (Sup.) 49 N. Y. Supp. 489; Carlyle v. Clinton Co., 140 Ill. 512, 30 N. E. 782; Moore v. Mayor, etc., 73 N. Y. 238, 29 Am. Rep. 134; Ogden v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Hawley v. City of Ft. Dodge, 103 Iowa, 573, 72 N. W. 756. Section 3 of article 7, after providing, among other things, that if, within the time specified in the notice we have been considering, a remonstrance against the making of the improvements subscribed by the owners of the majority of the frontage to be assessed shall be filed with the secretary of the boards, the proceedings shall cease, and shall not be renewed for six months, concludes with the following provision: "The finding of the city council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal." The last section of the so-called ordinance prescribing the sewer district reads as follows: "The city council finds that, after notice duly given, the resolution of said board of public works of the city of Denver creating said storm-sewer districts, and ordering the construction of storm sewers therein, was unanimously adopted by said board of public works." It is argued that the courts cannot go behind this finding, and that therefore omissions or failures in the previous proceedings are no longer available against the assessment. It is unnecessary to inquire into the meaning or intended effect of the statutory provision we have quoted, because there was no finding in accordance with its terms. The finding must be by ordinance. The finding I have quoted occurs in the so-called ordinance, which, because of failure in its publication, never took effect. As has been already seen, it never became an ordinance; and the finding which it contained, as well as all its other provisions, was nugatory. A similar finding was con-

tained in a subsequent ordinance making the final assessment; but the invalidity of the first ordinance rendered all subsequent proceedings, including this last ordinance, void, and the finding was no better than the ordinance. Section 62 of article 7 provides as follows: "No action or proceeding shall be commenced to review any proceedings, or acts, or to question the validity or enjoin the collection of the bonds, warrants or assessments authorized by this article unless commenced within ninety (90) days after the passage of the ordinance making the final assessment." As has been seen, it is my opinion that the ordinance making the final assessment was void. The council had no power to pass it. Not having been legally passed, it could not be the starting point of the period of limitation, and the section I have quoted is irrelevant to the case.

While the provisions of section 10 of article 2 are not applicable to the ordinance required by sections 2 and 20 of article 7, and the averment of failure of compliance with its terms in the passage of the bill and the publication of the required advertisement would not entitle the plaintiff to the relief sought, and, on motion, would have been stricken out, matters were alleged which, if true, would avoid the assessment. These matters do not appear on the face of the record. Prima facie, the proceedings were regular and valid, and sufficient to create a cloud upon the title of the plaintiff; and, to remove the cloud, the power of a court of equity was properly invoked. Speaking to this point in Ogden v. Armstrong, supra, Mr. Justice Shiras said: "When the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence aliunde, so that the record would make out a prima facie right in one who should become a purchaser, and the evidence to rebut this case may possibly be lost, or become unavailable from death of witnesses, or when the deed given on a sale of the lands for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the lands until the irregularities were shown, courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent."

At the oral argument it was maintained by counsel of the defendants that, to entitle the plaintiffs to relief by injunction, it was incumbent upon them to pay or tender the amount assessed against them severally, and that the want of an allegation that they did so pay or tender was fatal to the complaint. In answer to this contention, I quote the following from the opinion delivered by Mr. Justice Harlan in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 42 L. Ed. 443: "Mr. High, in his treatise on Injunctions, says that no principle is more firmly established than that requiring a taxpayer who seeks the aid of an injunction against the enforcement

or collection of a tax first to pay or tender the amount which is conceded to be legally and properly due, or which is plainly seen to be due. But he also says: 'It is held, however, that the general rule requiring payment or tender of the amount actually due, as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed.' The present case is not one in which, as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments, it can be plainly or clearly seen from the showing made by the pleadings that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is, rather, a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum, as representing what she supposed, or might guess, or was willing to concede was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights."

The complaint is amply sufficient, and the demurrer should have been overruled. The judgment should be reversed.

McDougald *v.* Town of Lumberton.

(*Supreme Court of North Carolina, Nov. 5, 1901.*)

[39 S. E. Rep. 826.]

Public Works—Personal Injuries—Assumption of Risk—Nonsuit—Error.

Plaintiff, in the employ of defendant town, was injured by the caving in of a ditch. The ditch was on made soil, with mud and quicksand at the bottom, and where plaintiff was injured there was no bracing. As the quicksand was baled out with buckets, other quantities of it would come out from under the bank. Plaintiff alleged that the ditch was unsafe, and that he was apprehensive of injury, but that he began the work on the assurance of the persons in charge that it was safe: *held*, that a nonsuit on the ground that plaintiff had assumed the risk was error.

Ground of Nonsuit—Record on Appeal.

Where the record does not show whether a nonsuit was entered on the plea of contributory negligence or of assumption of risk, and there is no evidence of the former, but some tending to show the latter, ground, it will be presumed that the nonsuit was granted on the plea of assumption of risk.

Contributory Negligence—Assumption of Risk—Separate Issues before Jury.

Where evidence is introduced under the pleas of contributory negligence and assumption of risk, it is the better practice to have separate issues submitted to the *jury on* those questions.

McDougald *v.* Town of Lumberton

Appeal and Error—Assignments of Error—Sufficiency.

The appeal will not be dismissed because of the failure of plaintiff to point out in his assignments of error the relations of one part of the evidence to another, where the evidence on which the nonsuit was granted was direct and simple.

Appeal and Error—Demurrers to Evidence.

On appeal from judgments sustaining demurrers to the evidence or nonsuits for want of evidence, the particular parts of the evidence on which the appellants rely to prove the cause of action must be pointed out.

Appeal from superior court, Robeson county; Moore, Judge.

Action by E. McDougald against the town of Lumberton. From a judgment in favor of the defendant, plaintiff appeals. Reversed.

McLean & McLean, for appellee.

MONTGOMERY, J. The plaintiff was employed by the defendant in the excavation of earth for sewerage purposes in the town of Lumberton, and was injured by the falling in upon him of earth from the top of the ditch. The excavation was about 14 feet deep, 4 feet wide at the bottom, and 20 feet wide at the top, as we understand the dimensions of it from the evidence. The plaintiff was injured while at work at the bottom of the ditch, where there was quicksand. As the quicksand would be baled out with buckets, other quantities of it would come out from under the bank. The plaintiff in his complaint alleges that the ditch or trench was in an unsafe condition, and that he himself was apprehensive of injury if he entered upon the work, and yet that, upon the assurance of the persons in charge that it was safe for him to go in to work, he relied upon their assurance, and entered upon his labors. The defendant in its answer put in the pleas of contributory negligence and assumption of risk on the part of the plaintiff. Upon an intimation of his honor that the plaintiff could not recover upon the evidence, his counsel submitted to a nonsuit, and appealed.

We cannot tell from the record whether his honor thought, as a matter of law, that the plaintiff had contributed to his own injury (upon evidence of the plaintiff about which there could be no reasonable difference of opinion), or had assumed the risk of employment. We fail to discover any evidence tending to show that the plaintiff was doing his work in a careless or negligent manner, and therefore presume that his honor was of the opinion that he had assumed the risk of his employment, thinking that the evidence on that question was uncontradictory, and so clear that reasonable men could come to no other conclusion about it. An employee assumes, of course, the ordinary risk attendant upon the employment; and, if this excavation had been through and into firm and solid earth, then there would have been no negligence on the part of defendant, and the plaintiff would have assumed the risk attendant upon the employment. But there was evidence going to show that the ditch was cut through alluvial or made

soil, with mud and quicksand at the bottom, and that where the plaintiff was hurt there was neither bracing nor walling. If that was not negligence in law on the part of the defendant, it certainly was strong evidence of it. But did the plaintiff from the evidence know or have reasonable ground to believe that the danger and risk were such that as a prudent man he was bound not to assume them, and to refuse to enter upon the work, or to continue it after he had begun it? He was not compelled to quit his work unless such was the case. 14 Am. & Eng. Enc. Law, 845, and authorities there cited.

Upon the assurance made to the plaintiff by those in charge of the work that it was safe for him to enter upon it, it would seem that the danger must have been more than a suspicion of it, and that the chances of safety were fewer than those of injury, before the plaintiff could be said to have assumed the risk. Hinshaw v. Railroad Co., 118 N. C. 1047, 24 S. E. 426. We cannot say, as a matter of law, that the danger was so apparent and so obvious as to put the plaintiff on his guard, and to show that he not only saw the risk and the danger, but willingly made up his mind to assume it. We think, therefore, that there was error in the ruling of his honor in dismissing the action.

In the consideration of this case, we have concluded that it is better in the trial of causes in which the pleas of contributory negligence and assumption of risk are entered (evidence, of course, under those pleas being introduced) to have separate issues submitted to the jury on those questions. While it is not necessary to submit separate issues, as we have pointed out in Rittenhouse v. Railway Co., 120 N. C. 544, 26 S. E. 922, yet we have found out from experience, since that decision was made, that it is a better practice.

Defendant made a motion to dismiss this appeal on the ground that the appellant had failed in the statement of the case to point out, in his assignments of error, the relations of one part of the evidence to another, and the special effect and importance of such parts of the evidence, and that that view of the case had been called to the attention of the court below, and citing the case of Gregory v. Forbes, 96 N. C. 77, 1 S. E. 541, as authority for the motion. The evidence in that case must have been greatly more prolix and complicated than in this. Here the evidence upon which the plaintiff was nonsuited was direct and simple, and related to the questions of contributory negligence and assumption of risk by the plaintiff, and, while there was a good deal of it, we have had no difficulty in finding it.

We shall hereafter, however, require that, in all cases of sustaining demurrer to the evidence or nonsuit for want of evidence, the particular parts of the evidence which the appellant relies upon to prove the cause of action be either pointed out in the case on appeal, or called to the attention of this court by brief or in the oral argument.

Error.

CITY OF ROME *v.* CHENEY.

(*Supreme Court of Georgia, Nov. 9, 1901.*)

[39 S. E. Rep. 933.]

Dangerous Sewer—Death by Drowning—Liability of City.

The undisputed evidence being to the effect that the sewer in which the plaintiff's minor son was alleged to have been drowned was properly constructed, and was necessary to prevent the streets and private property from being damaged by overflow from heavy rains, and there being no evidence of any negligence on the part of the city or its employees, the verdict against the city was contrary to law and the evidence.

Same—Same—Same—Contrivance Attractive to Children.

A properly constructed drain four feet wide and two feet deep, made for the purpose of carrying off surface water, is not such a contrivance as would be so inviting to a child nine years old that the city would be liable for his death by drowning, due to his playing in the drain during or just after a very heavy rain.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by M. H. Cheney against the city of Rome. Judgment for plaintiff.

Defendant brings error. Reversed.

Halsted Smith and Alexander & Hillyer, for plaintiff in error.

Seaborn Wright and Dean & Dean, for defendant in error.

LEWIS, J. Mrs. Cheney sued the city of Rome for $25,000 damages on account of the death of her nine year old son, upon whom she alleged that she was largely dependent for a support. Her petition set up that the defendant had negligently constructed and permitted to remain in a dangerous condition a large open sewer on the edge of the sidewalk on a named street in the city, which open sewer emptied into a large underground covered sewer, leading to the Oostanaula river; that these sewers are and were so constructed that they have great fall, and decline rapidly towards the river, and in times of heavy rains great volumes of water flow with great rapidity through them to the river; and that at the point where the open sewer enters the underground sewer there is and was a large hole, which the city left with no bars or grating or other means to prevent objects or bodies from being washed into the underground sewer,—all of which facts were, or should have been, known to the defendant. She alleged that on a named day, at a time when a heavy rain was falling or had just fallen, and a large volume of water was in consequence flowing rapidly down the sewers, her minor son, while walking along the streets of the city, fell into the open sewer, and was washed through the hole into the underground sewer, and drowned. The petition, after setting forth the expectancy and the capacity to labor of the deceased child,

prayed for the recovery of the full financial value of his life as above set out. The answer of the defendant was, in substance, a general denial of negligence and of liability. The case was tried before a jury, and a verdict rendered for the plaintiff for $4,750, and, the defendant's motion for a new trial being overruled, it excepted.

The evidence showed that on the day of his death, just after an usually heavy rain, when the open sewer referred to in the petition was swollen with a large volume of water, Paul Cheney, the plaintiff's son, was seen wading in the water in the vicinity of the trap or hole connecting the surface sewer with the underground sewer. This hole was directly under a plank walk which bridged the open sewer at a street crossing, and the boy was seen to get down into the water from this plank walk or bridge, and wade about in the water which filled the gutter. The current of the water was very swift, but not so swift as to prevent him and other children from wading about in the stream. Presumably, the plaintiff's son lost his footing, and was swept into the open hole connecting with the underground sewer and drowned. There were no eye-witnesses to the occurrence, but the child's body was afterwards found in the Oostanaula river, near the mouth of the sewer, and his umbrella was picked up near where he had been seen wading in the water of the open sewer. It was admitted that there were no bars or grating of any sort covering the hole connecting the two sewers. It was shown, however, that the sewers were properly constructed and properly maintained, and were necessary to the preservation of the streets of the city and the private property of its citizens; and it was also shown that any impediment to the flow of water in the nature of bars or grating over the hole connecting the two sewers would have resulted in the grating becoming clogged with mud, rocks, and trash, causing the gutter to overflow in times of heavy rains, and do serious damage. It was not contended that the defendant was negligent in the construction or maintenance of the sewer, except in its failure to provide some device to prevent the passing of solid bodies through the hole or trap connecting the open with the underground sewer.

1. Under the evidence contained in the record, we do not think that the plaintiff was entitled to a recovery. No negligence whatever was shown to have been committed by the city or any of its employees. The failure to place bars or grating across the top of the trap connecting the open with the underground sewer was explained by the defendant in a manner entirely relieving it from any liability, for it was proven by uncontradicted expert testimony that such a device would have obstructed the flow of the surface water, and caused it to overflow, and inflict serious damage to the streets of the city and the property of its citizens. If these witnesses are to be believed, not only was the city not negligent in keeping the

sewers thus open and unobstructed, but a failure to do so would have rendered it liable to property owners who might be damaged by an overflow of water in times of heavy rain. See, on this subject, 10 Am. & Eng. Enc. Law (2d Ed.) 246; 2 Dill. Mun. Corp. (4th Ed.) § 980. Certainly, the city could not be charged with the duty of guarding against so unusual and unlikely an occurrence as the washing of the body of a child through this trap or hole. There was, indeed, evidence tending to contradict the plaintiff's theory of the accident, and to show that it was impossible for the child's body to have been washed through the underground sewer as contended. There seems to be grave doubt as to whether the closed sewer was large enough to permit of the passage through it of the body, and the fact that there were few marks or bruises on the body when found in the river gives considerable force to the contention of the defendant that the child was not drowned in the sewer, but immediately in the river. But conceding, for the sake of the argument, the correctness of the plaintiff's theory as to the manner in which her son lost his life, we are not prepared to hold that it was the duty of the city to go to the extent of rendering itself liable to civil actions for damages in order to exercise the more watchful care over the safety of children who might play in the gutters after a heavy rain,—a care which we think devolves more upon parents than upon the city. To entitle the plaintiff to recover in an action of this sort, it must clearly appear that the municipal authorities were guilty of negligence, and that this negligence was the preponderating cause of the injury inflicted. See Gaskins v. City of Atlanta, 73 Ga. 746; City of Columbus v. Ogletree, 96 Ga. 178, 22 S. E. 709 (3); and many other authorities might be cited to the same effect. As has been stated, the plaintiff in the present case entirely failed to prove that the city had been negligent in any particular, or had violated any duty which it owed to her or her minor son.

2. It appeared that the gutter, or open drain, in which the plaintiff's son was last seen to be playing, and which is alleged to have been partly the cause of his death, was, on the side nearest the sidewalk, about two feet deep. On the other side the bank of the gutter was irregular, and its depth varied somewhat, at no point being more than two feet. Its width was about four feet across the top, and something less in the bottom, owing to the sloping sides of the drain. In no possible view of the case can such a drain or sewer be considered as a device that would be naturally alluring or inviting to children of tender years, in the sense and to the extent that the city would be liable for injuries received by children playing in its waters. We think the true rule upon this subject is to be found in the case of Clarke v. City of Richmond (Va.) 5 S. E. 369, 5 Am. St. Rep. 281,—a case which in many respects bears a strong analogy to the one now before us. In that case, a child six years old, while walking on a stone

coping adjacent to the sidewalk, the top of the coping being from fifteen inches to two feet high, fell into an excavation which had been made by the city, receiving injuries for which he brought suit. It was held that this coping was not an enticing structure, within the meaning of the rule which holds persons liable for damages if they neglect suitable barriers around dangerous objects near the streets and sidewalks, likely to allure children to their hurt. In the course of the opinion the court uses the following language, which we think is directly applicable to the case now before us: "The obligation of municipal corporations to erect barriers around areas adjoining or extending into its sidewalks or highways grows out of the duty which rests upon municipal corporations to maintain their streets and sidewalks in safe condition for those who may be rightfully using them, whether they be grown persons or children; but this duty cannot be held to extend to the protection of children against every sudden freak that may possess them." In the present case, as has been seen, the sewer under discussion was necessary to the preservation of the streets of the city and the private property of its citizens from damage by overflow of surface water. From aught that appears in the record, it was skillfully constructed and carefully maintained. It was not shown to have been dangerous in and of itself, and the fact (as appears from the evidence) that children frequently waded about in it when it was full of water, and that no accident had ever happened to them, goes far to disprove the contention that it was an alluring attraction, fraught with peril to unwary children. No attempt was made to bring home to the city authorities notice of its alleged dangers, nor was it proven to have been dangerous. The defendant rebutted every presumption of negligence which was brought against it, and we hold that the court below should have granted the motion for a new trial on the grounds that the verdict was contrary to law and the evidence.

Judgment reversed. All the justices concurring.

BARKER *v.* BOSTON ELECTRIC LIGHT CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, April 3, 1901.*)

[60 N. E. Rep. 2.]

Electric Light Company—Use of Streets—Poles on Private Land of City—Use of Poles by City—Injury to City Employee.*

The defendant electric light company had permission from the city

*See Hector *v.* Boston Electric Light Co., 161 Mass. 558, 25 L. R. A. 554, and cases cited in briefs; Illingsworth *v.* Boston Electric Light Co., 161 Mass. 583, 25 L. R. A. 552. In this last case it was held that the employee of one of two joint users of a frame for supporting electric wires did not, in going upon the frame, take the risk of the wires of the other company being in bad condition, unless he had actual knowledge that they were in bad condition, and voluntarily exposed himself to danger; and that the whole question of his contributory negligence was one of fact. See also, Clements et al. *v.* Louisiana Electric Light Co., *44 La. Ann. 692*, 16 L. R. A. 43.

to erect poles in the street on condition that the city might maintain a cross-bar on each pole for the use of its fire-alarm department. The defendant and the city had also permitted, on request, an interchangeable use of the poles erected by the respective parties without a money consideration. Defendant erected poles on private land of the city by the authority of the water board controlling the land, and 18 months thereafter the fire-alarm department placed a cross-arm on one of the poles, and plaintiff's intestate, an employee of the city, was injured while lawfully engaged in work on the pole: *held*, that the question whether plaintiff's intestate was a mere licensee or not, and whether the defendant was bound to use reasonable care for his protection, were for the jury.

Action for Wrongful Death—Question of Negligence—Directing Verdict.

The direction of a verdict for defendant in an action for the intestate's death was erroneous, since the questions of defendant's negligence and of the assumption of risk by the intestate were for the jury.

Exceptions from superior court, Suffolk county; Henry K. Braley, Judge.

Action by one Barker against the Boston Electric Light Company. Verdict ordered for defendant, and plaintiff brings exceptions. Exceptions sustained.

Roger F. Sturgis and W. O. Cotton, Jr., for plaintiff.
E. W. Burdett and Chas. A. Snow, for defendant.

HAMMOND, J. At the time of the accident the plaintiff was lawfully upon a pole owned by the defendant, and the main question is whether, being there as an employee of the fire-alarm department of the city of Boston, he was a mere licensee. The pole was the fifth of a line of five poles belonging to the defendant, all located upon the reservoir lot owned by the city of Boston, and abutting on a public way called "White Street" in that part of the city called "East Boston." The poles were just within the fence separating the sidewalk of the street from the reservoir lot, and were erected in July, 1886, by the Citizens' Electric Light Company, the predecessor in title of the defendant, in pursuance of a license from the water board of the city, which reads as follows: "Voted, that the petition of the Citizens' Electric Light Company for permission to locate poles on the edge of the reservoir lot in East Boston be granted, in accordance with the recommendation of the engineer." The defendant is a corporation engaged in the manufacture and supply of electricity for light and power throughout the city, and for its transmission and distribution maintains lines of wires of which some are attached to cross-arms upon poles in the public streets, some are carried in conduits under streets, some are attached to various kinds of support on roofs of buildings, and in a few instances some, as in this case, are attached to poles upon property of the city. In 1890 the defendant became the owner of all the poles and lines of wires of the Citizens' Electric Light Company, and has ever since maintained them. Upon this fifth pole there were two arms or cross-bars, each about five feet long. To the lower arm,

which belonged to the defendant, were attached its wires, with certain insulating contrivances. The wires came from the other four poles upon the reservoir lot to this pole, and then ran obliquely across White street to an arm belonging to the defendant company, and attached to a pole of the fire-alarm department, which was placed in the sidewalk of the street. Ever since it became the owner of the pole, the defendant has maintained the cross-bar and the wires attached in the manner above stated without objection from the city or any of its agents. The upper arm of the pole belonged to the city of Boston, having been placed there in December, 1887, by the fire-alarm department, and to it were attached two fire-alarm wires. These wires came across from the other side of White street to this arm, and from there led down to two hooks on a small cross-piece below the cross-bar of the defendant, and from these hooks passed into a lead pipe, and through the pipe to a fire-alarm box affixed to the pole, and projecting over the top of the street fence, so that a person standing upon the sidewalk could use the box. This short cross-piece, the lead pipe, and the box all belonged to the fire-alarm department, and had been attached by it to the pole. The above arrangement of the wires, cross-bar, small cross-piece, lead pipe, and box had existed and had been used by the fire-alarm department ever since December, 1887, without objection from the defendant, so far as appeared. The wires of each party were so affixed to the cross-bars and pole as not to touch or interfere with the wires of the other in their usual and intended position. The Citizens' Electric Light Company, referred to above, was organized December 4, 1885, and acquired the property in East Boston of the Union Electric Light & Power Company, a Maine corporation, which was the first company to erect electric light poles and fixtures in East Boston. Subject to the defendant's exception, the plaintiff put in evidence three separate orders of the mayor and aldermen of the city, dated, respectively, June 24, 1884, December 8, 1886, and November 13, 1888, granting permission to the defendant, or to its predecessors in title, to erect poles for the support of wires in certain public streets, therein respectively named, in East Boston. The aggregate number of poles authorized by these orders was 231, and each order contained the following condition: "Also upon condition that any department of this city shall have the exclusive use of the upper cross-bar and top of each pole, free of cost, for the purpose of placing wires thereon." The plaintiff also introduced in evidence an ordinance of the city, passed in 1890, which has been in force ever since, providing that the superintendent of streets, when thereto authorized by an order of the board of aldermen, should issue permits to persons to open and occupy portions of the streets for the purpose of placing and maintaining poles therein for the support of wires; that the grantee of such permit should allow the

departments of the city the exclusive use of the upper cross-bar and top of each pole, free from all charge, for the purpose of placing wires thereon, and should not suffer or permit any person to place or keep wires upon its poles or fixtures without permission first obtained in writing from the board of aldermen. It was conceded that these three orders and the ordinance applied only to poles in the public streets. One Mills, an employee of the defendant, and called by it, stated on cross-examination that, as respects poles to be erected in the streets, the fire-alarm people, as a rule, did not put their arm on a pole before it was set, but "a gain is left in the top of the defendant company's poles for the fire-alarm people, as a general thing, every time a pole is set; that in every pole set there is a mortise cut in the pole for a fire-alarm arm, and that is what it is intended for, and that is true of nearly all the poles that are set." He further stated that only a very few poles of the defendant company are on private land. The plaintiff testified that he was familiar with the use of poles and fixtures of different companies, and that prior to the accident and since he had seen wires of the defendant company attached to roof standards owned by the city and run by the fire-alarm department, and also upon poles of the fire-alarm department in the streets. Without going further into detail, it is sufficient to say that the evidence tended to show that the defendant had many more structures, especially upon buildings, than the fire-alarm department; that there was a general interchangeable use by the defendant and the fire-alarm department, each, of the poles and fixtures of the other, and that this use was not confined to poles set in the streets; that in each individual case the party desiring to make use of a pole of the other would apply for a permit covering that case, except that the fire-alarm department did not ask permission to use a pole of the defendant set in the public street; and that nothing was ever paid by either party to the other for such permits or use. It did not appear to what extent, if any, applications by either party to the other for permits were refused, save that the city had in some cases imposed restrictions. As to this particular pole, no witness could recollect any application for permission to put the fire-alarm wires upon it, but the superintendent of that department testified that when he found that he needed to attach the department wires to a pole it was his custom to ask the company's permission to put the wires there, and that he had no recollection about this pole. He supposed that he followed his usual custom with respect to it. He further testified that he had no recollection that he or his department had anything to do with the setting of this particular pole; that "he did not know anything, and had no reason to know, about what permission, if any, was obtained by the said company for the setting of the poles upon the land or premises of other city departments than his own; and that, so far as the water

board was concerned, he had no reason to know why, or how, or under what conditions, if any, in what form or manner, they granted permits for the use of their property for the setting of poles"; and that he had nothing to do, directly or indirectly, with the granting of a license by the water board for the setting of this pole, or any of these poles, on the reservoir lot. When asked whether or not his department was in any way consulted about it before it was done, he replied "that he was not clear as to that; that he was requested to move his box around from the section where it was formerly placed over on the other side of the reservoir lot, but that he did not know whether this was at the time the water board granted permission for the setting up of this pole or afterwards; and that they were also requested to take up the pole that they had around on the other side, and that he was perfectly willing to do it, because it shortened the loop; and that was all he knew about it." Except as above stated, there was no evidence of any contract or agreement between the city and the defendant as to the inter-changeable use above mentioned, or as to this particular pole.

What may be inferred fairly and legally from this evidence? Is it sufficient to warrant a finding that the right of the city to the use of the pole for its fire-alarm department was something more than that of a mere licensee, and so understood by the parties? So far as respects poles in the public streets, it is clear that from the first the defendant and its predecessors in title accepted and acted upon permits to erect poles granted upon the condition that the city departments should have the exclusive use of the upper cross-bar and top free of cost; and that to this end the poles were made with a mortise therein to receive this cross-bar for such use. As to any such pole, the company erected it under the condition that the city should use a part of it, and the pole was fitted for that purpose; and there can be no doubt that when the city comes to such a pole it comes not as a mere licensee, but under a claim of right, to which the company assents. It is to be noted, however, that the pole upon which the accident occurred was not in the public street, but upon the private property of the city, and that the permit to erect it was granted, not by the board of aldermen of the city acting as public officers under the statutes, but by the water board, acting not as public officers, but as the agents of the city. The permission under which the defendant uses this pole is the permission of the owner of the land, and in this respect the city stands like any private landowner. It can revoke the permit at any time, if there be no contract or agreement, express or implied, to the contrary. The vote of the water board was merely to the effect that the petition to locate poles be granted. It does not appear why these five poles which were placed upon the reservoir lot were not placed in the street close adjoining. They were erected in July, 1886, and

in December, 1887, the wires and box of the fire-alarm department were changed to one of them. Upon this pole, from and after that time, were wires of the company, which came from the other poles upon the lot, and crossed over to an arm of the defendant company attached to a pole of the city controlled by the fire-alarm department, and placed in the sidewalk of a public street; and there were wires of the fire-alarm department, which came from across the street. At the time the pole in question was erected, the policy of reserving the upper part for the fire-alarm department had been begun, and the company which erected this pole had acted upon permits granted in accordance with that policy, and the evidence would warrant the inference that when this pole was put up it had the mortise in it for the upper cross-arm afterwards placed upon it by the city. It is true that permits were asked by each party of the other, except in the case where the city desired to use a pole of the company set in the public street, but we cannot consider that fact as decisively showing merely an interchange of courtesies, as contended by the counsel for the defendant. Considering the conditions annexed to the permissions granted to the defendant and its predecessors in title as to poles erected in the public streets, the facts that the policy of annexing such conditions had been adopted by the public authorities, and that such permits had been received and acted upon by the grantee for some time before the vote of the water board as to the pole in question; that this pole was erected upon the private land of the city, and was revocable at any time; that there is evidence warranting the inference that the mortise for the upper arm was upon the pole when it was erected; that in about 18 months the city began to use it, and has ever since continued such use; that the wires upon the pole are connected with the general system of the defendant and of the fire-alarm department; that there has been an interchangeable use by each party of the poles of the other, not only upon the public streets, but elsewhere, and especially upon this reservoir lot, owned by the city; that no money ever was paid by either party to the other for this interchangeable use; and that no request to use a pole is shown ever to have been refused,—we think that a jury, although not so compelled, nevertheless would be warranted in finding that there was a general understanding and agreement between the parties that each should use the poles of the other; and that, while no money was paid to or by either to the other for such use, yet the consideration received by each is found in the right to a similar use of the poles of the other and in the nature of the right granted to erect the poles; and that the permits from time to time were not granted as interchanges of courtesies, but in pursuance of such an agreement; and that the pole in question came within the scope of this agreement. We think, therefore, that the ques-

tion whether the plaintiff was merely a licensee or not should have been submitted to the jury.

If the jury should find for the plaintiff as to these facts, then the defendant was bound to use reasonable care for the protection of those members of the fire-alarm department who had occasion to go upon the pole. Illingsworth v. Light Co., 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552.

The questions whether the defendant was negligent as against the plaintiff, and whether the latter was in the exercise of due care or assumed the risks, were also questions for the jury.

As the case must go back for a new trial, it does not seem necessary, in the absence of any demurrer to the second count, to decide in advance whether it is a statutory count, and, if so, whether it is maintainable as such. The issue of another trial may be such as to render that question immaterial. Exceptions sustained.

TOWN OF GOSPORT *v.* PRITCHARD *et al.*

(*Supreme Court of Indiana, April 2, 1901.*)

[59 N. E. Rep. 1058.]

Lighting Contract—Action to Recover Contract Price of Lights—Necessary Averments.

Since Burns' Rev. St. 1894, § 4301, give towns authority to contract for the lighting of streets and alleys, and since fraud or abuse of discretion is never presumed, but must be averred, it was not necessary for plaintiff, suing a town for the contract price for lighting streets, to state the population, amount of taxables, current expenses, etc., in order that the court might know that the contract was not ultra vires or oppressive.

Same—Same—Form of Action.

Where plaintiff agreed to furnish a certain number of lights for the streets, and the town agreed to pay a certain rate per year, payments to be made every month, but not in advance, and after a certain month the town refused payment, not because it lacked funds, but asserting that the contract was void, plaintiff's action for the amount due was properly brought on the contract, instead of by application for mandamus.

Same—Contract Made by City Officers Binding on City.*

A contract for lighting streets, purporting to be the contract of the town, and signed by one as president of the board of trustees, and attested by the clerk, and entered on the proceedings of the board of trustees, is binding on the town, and is not merely the contract of the persons whose names are signed.

Same—Action to Recover Price of Lights—Defence Set Forth Insufficient in Law—Demurrer.

In an action against a town for the contract price for lighting its streets, defendant's answer stated that its population was 600, its taxable property $197,960, polls 105; that the rate of taxation was $2.45 on each $100 for all purposes, and a poll tax of $3.50; that the tax rate for general purposes was 35 cents on each $100; that no levy had been made to meet the expense of lighting; that the town's indebtedness was $1,000, and its current expenses $800 per annum;

*See Over *v.* City of Greenfield, 107 Ind. 231, 5 N. E. Rep. 872; City of Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. Rep. 587; Township *v.* Township, 11 Iowa 506.

and that a levy to pay the indebtedness, current expenses, and expense of plaintiff's contract would be burdensome and oppressive: *held*, that a demurrer was properly sustained, as the answer did not show nor allege that such contract placed defendant's indebtedness beyond the constitutional limit, nor mention the items of current expenses, nor show that the town had not sufficient money on hand to pay plaintiff's claim.

Same—Contract Need Not Be Authorized by Ordinance*—Publication of Ordinance Unnecessary.

The power of a municipal corporation to contract for electric lighting being discretionary, and not legislative, no ordinance was necessary to authorize a contract for that purpose; hence it was immaterial that an ordinance for such purpose was not published in a newspaper, as required by Burns' Rev. St. 1894, § 4357, subd. 16.

Appeal from circuit court, Owen county; George W. Grubbs, Judge.

Action by Caleb A. Pritchard and others against the town of Gosport. From a judgment in plaintiffs' favor, defendant appeals. Affirmed.

Inman H. Fowler, Thomas G. Fowler, and Ed. S. Davis, for appellant.

L. A. Downey and Willis Hickman, for appellees.

MONKS, J. Appellees brought this action against appellant to recover the contract price for lighting the streets of said town with electric lights. The cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon, and final judgment rendered in favor of appellees.

It is first insisted that the court erred in overruling the demurrer to the complaint. It is claimed that the complaint, in order to make it sufficient, should allege "all the surrounding circumstances under which it was executed, such as the population of the town, the amount of its taxables, the amount of its current expenses, etc., to the end that the court might know that the contract was one which appellant had the power to make, and was not wrongful and oppressive." In this state towns have the authority to contract for the lighting of the streets and alleys and other public places, with electric or other forms of light. Section 4301, Burns' Rev. St. 1894; Acts 1883, p. 85; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268; Crowder v. Town of Sullivan, 128 Ind. 486, 488, 28 N. E. 94, 13 L. R. A. 647. Fraud or abuse of discretion is never presumed, but must be averred and proven. Seward v. Town of Liberty, 142 Ind. 551, 553, 42 N. E. 39; Wallace v. Mattice, 118 Ind. 59, 20 N. E. 497; Morgan v. Olvey, 53 Ind. 6; Stewart v. English, 6 Ind. 176. See, also, Town of Petersburg v. Petersburg Elec-

*See City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. Rep. 433, 27 L. R. A. 514; City of Vincennes v. Citizens' Gas Light and Coke Co., 132 Ind. 114, 16 L. R. A. 485; Crowder v. Sullivan, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. Rep. 94; City of Logansport v. Dykeman, 116 Ind. 15, 17 N. E. Rep. 587; Seward v. Town of Liberty, 142 Ind. 551, 42 N. E. Rep. 39.

tric Light, Power & Waterworks Co., 16 Ind. App. 151, 44 N. E. 814.

It is next insisted by appellant that appellees' remedy was a writ of mandate to compel the board of trustees to discharge their duties under the contract sued upon, and not to recover a money judgment for the contract price for lighting said town. The parts of the contract and complaint necessary to the termination of this question are substantially as follows: The contract sued upon provides that appellant should pay appellees for each of the 10 arc lights furnished the sum of $60 per year, and pay the same monthly, but not in advance; and, in the event that cash payments could not be made, appellees were to accept warrants on the town treasurer, due one year after date, with 6 per cent. interest from date. It is alleged in the complaint that appellant complied with its part of said contract until the month of April, 1898; that for said month, and for all months since, appellant's board of trustees has refused to allow or pay appellees for lighting the streets and alleys of said town under said contract, and has refused to issue its warrants for the same or any part thereof, but has repudiated said contract, and asserted that the same is void, and of no effect, and that all of appellees' claims under said contract are invalid and void; that appellees have in all respects fully complied with the terms of said contract. It will be observed that appellant did not refuse to pay for lighting said town for the month of April, 1898, and since, because it did not have the money, but it refused to pay or issue its warrants on the ground that the contract was void, and all claims for lighting the town under said contract were invalid. Appellant could, under said contract, have availed itself of the right to execute its warrants for lighting said town for the month of April, 1898, and each month thereafter, but when it failed to do so, and repudiated said contract, appellees had the right to sue at once for the amount due. Scearce v. Gall, 82 Ind. 255. This was an adequate remedy. The rule is that the writ of mandamus is not proper when there is another adequate remedy. State v. Real Estate, Building & Loan Association, 151 Ind. 502, 505, 51 N. E. 1061. The contract recites that it is an agreement between the town of Gosport, Owen county, Ind., of the first part, etc., and is signed by "Joseph Mullen, President of the Town Board of Gosport, Ind. John Howard, Trustee. Attest: W. I. Brighton, Clerk." Appellant insists that said contract did not bind the town, but only the persons who signed the same. There is nothing in this objection. The contract purports to be the contract of the town of Gosport, party of the first part, and is signed by a person as president of the board of trustees, and by one of the trustees, and attested by the clerk, and entered among the proceedings of said board of trustees. The objections urged against the complaint are not tenable.

The court overruled a *demurrer to the* second paragraph of

appellant's answer, and this is assigned for error. It appears from said paragraph of answer that the town of Gosport had, when said contract was made, and when the action was commenced, a population of 600, taxable property $197,960, 105 polls; that the rate of taxation was $2.45 on each $100 for all purposes, state, county, school, and town, and poll tax of $3.50; that the tax rate of said town for general purposes was 35 cents on each $100; that no levy had been made to meet the expenses for electric lights; that the indebtedness of the town was $1,000; that the current expenses of the town were $800 per annum, all of which are payable out of the general fund; that said town is only authorized to levy a corporation tax of 50 cents on each $100 of valuation. It is also alleged that "the levy of sufficient taxes to raise the money to pay appellees for the period of 10 years and said indebtedness of $1,000, in addition to the taxes already levied, and those necessary to be levied each year to maintain said town, is and would be very oppressive and burdensome to the taxpayers of said town, and a gross abuse of the discretion of the board of trustees of said town." The facts alleged in said answer do not show, nor does appellant claim, that by said contract appellant became indebted beyond the constitutional limit, as fixed by article 13 of the constitution of 1851, being section 220, Burns' Rev. St. 1894 (section 220, Rev. St 1881; section 220, Horner's Rev. St. 1897). City of Laporte v. Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 471, 45 N. E. 588, 35 L. R. A. 686; Cason v. City of Lebanon, 153 Ind. 567, 575-577, 55 N. E. 768. The law authorizes a town to levy a tax of 25 cents on each poll, 50 cents on each $100 valuation of taxable property for general purposes and 15 cents for electric light purposes (sections 4357, 4362, Burns' Rev. St. 1894); making a total of 65 cents on each $100 valuation. Moreover, there are other sources of revenue not mentioned in said paragraph of answer, such as dog tax licenses of different kinds, fines and penalties for the violation of ordinances. There are no facts alleged showing what the different items of current expenses were for which $800 per annum is expended, nor are there any facts alleged showing that the same are necessary current expenses of said town. For all that appears from said answer, appellant may have enough cash on hand to pay the amount sued for in this action, and its income sufficient to pay the $600 per annum for lighting said town and all other necessary current expenses. It is the law in this state that the expense of light and water is essential to the maintenance of corporate existence, and constitutes current expenses, payable out of the current revenues, which may be applied to such purpose, even though the effect is to postpone judgment or other creditors. Foland v. Town of Frankton, 142 Ind. 546, 550, 41 N. E. 1031. The power of municipal corporations to contract for the lighting of streets is purely a business power, and is discretionary. Discretionary powers vested in such corporations are not sub-

ject to judicial control, except in cases where fraud is shown, or the discretion is grossly abused to the oppression of the citizen. Seward v. Town of Liberty, 142 Ind. 551–553, 42 N. E. 39, and cases cited. As was said in Robling v. Board, 141 Ind. 522, 40 N. E. 1079, in speaking of such discretion, when "they determine that question, it is final, unless it is shown that their decision was brought about by fraud or corruption, or is so manifestly wrong and prejudicial to the public interests as to create a conviction that it was the result of fraud, and a plain disregard of official duty." The presumption is in favor of honesty and fair dealing, and that said contract was made in good faith. There is no charge of corruption, fraud, or bad faith in the execution of said contract, but the allegations of said paragraph of answer show a mere difference of opinion or judgment in regard to the propriety or necessity for lighting said town, as provided therein. This is no defense to said contract, nor does it furnish any reason for interference therewith by injunction or otherwise. Seward v. Town of Liberty, 142 Ind. 551, 553, 42 N. E. 39. At the time the contract sued upon was made, appellant's board of trustees adopted a special ordinance, granting to appellees by name the right to erect, maintain, and operate along and on the streets and alleys of said town a system of poles, wires, lamps, and other appliances necessary, convenient, and proper for the lighting of said town by electricity. Said ordinance also authorized the president of the board of trustees of said town to execute the contract sued upon, which is set out, and made a part of said ordinance. This contract purported to be between appellant and appellees, and provided for the lighting of said town by electricity. It is insisted by appellant that said ordinance never took effect, because it contained no emergency clause, and was not published, as required by clause 16, § 4357, Burn's Rev. St. 1894, and therefore the contract was invalid. The ordinance only granted appellees a license to erect and maintain their poles, wires, lamps, etc., on the streets and alleys of said town. It did not regulate, or attempt to regulate, the whole subject of lighting said town, but only granted appellees the right to use the streets and other public places for that purpose, and the town was free to license rival companies at any time. Crowder v. Town of Sullivan, 128 Ind. 486, 489–491, 28 N. E. 94, 13 L. R. A. 647. It is settled that the power of municipal corporations to contract for lighting the streets is not a legislative power, but purely a business power, and is discretionary. Seward v. Town of Liberty, 142 Ind. 551, 552, 553, 42 N. E. 39, and cases cited; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 116, 117, 39 N. E. 433, 27 L. R. A. 514; City of Logansport v. Dykeman, 116 Ind. 15, 16, 17 N. E. 587; Over v. City of Greenfield, 107 Ind. 231, 5 N. E. 872. There being no statute requiring such contracts to be

by formal ordinance or resolution, they need not be executed in that manner, and are valid although there is no ordinance on that subject. City of Logansport v. Dykeman, 116 Ind. 18-21, 17 N. E. 587. Under such circumstances, even if such contract were made in the form of an ordinance, being the exercise of a purely business, and not legislative, power, the same would be effective without an emergency clause, although not published. Clause 16 of section 4357, supra, does not apply to such an ordinance. Finding no error in the record, the judgment is affirmed.

ST. PAUL GASLIGHT COMPANY, Plff. in Err., *v.* CITY OF ST. PAUL.

(*Argued March 21, 1901. Decided April 15, 1901.*)

[21 Sup. Ct. Rep. 575.]

Gas Street-Lamp Posts—Obligation of Contract Not Impaired by Ordinance Requiring Removal.

An ordinance commanding the removal of gas street-lamp posts which are no longer in use because the streets are lighted by electricity instead of gas, and declaring that no interest will thereafter be paid to the gas company on account of such posts, does not impair the obligation of a contract under which the gas company erected such posts and the city agreed to pay interest on their cost, since, if the city is still liable under the contract after the substitution of electricity for gaslights, that obligation will not be affected by this ordinance, and the declaration that payment will not be made will be ineffectual.

Gaslight Contract—Impairment of Obligation by Ordinance*—Effect of Ordinance Forbidding Comptroller to Audit Claims Arising under.

The fact that a comptroller is precluded from auditing the claims of a gas company as a prerequisite to the appropriation of money to pay them, by the passage of an ordinance declaring that no money will be paid on account of them, does not impair the obligation of a contract under which the claims arose, where the auditing by the comptroller would be, at the most, merely advisory, and would not authorize payment without the passage of an appropriation by the city council.

Same—Same—Effect of Ordinance Denying Liability under—When Federal Question Not Presented.

A claim that the obligation of a contract is impaired by an ordinance the enforcement of which could not constitute such an impairment, although it denies liability on the contract, does not present a Federal question for review by the Supreme Court of the United States on writ of error to a state court.

In Error to the Supreme Court of the State of Minnesota to

---

*See New Orleans Waterworks Co. *v.* La. Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607, 8 Sup. Ct. Rep. 741; William *v.* Bruffey, 96 U. S. 176; Insurance Co. *v.* City Council, 93 U. S. 116; Hamilton Gas Light & Coke Co. *v.* City of Hamilton, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90; Water Co. *v.* Easton, 121 U. S. 388, 7 Sup. Ct. Rep. 916; City of Walla Walla *v.* Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77; Butchers' Union Slaughter-House Co. *v.* Crescent City Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652; Murray *v.* City Council of Charleston, 96 U. S. 432, 24 L. Ed. 760.

review a decision reversing a judgment in favor of a gas company against a city. Dismissed.

See same case below, 78 Minn. 39, 80 N. W. 774, 877.

Statement by MR. JUSTICE WHITE:

The charter of the St. Paul Gaslight Company was granted in 1856, and it expires in 1907. The corporation was empowered to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas. It may be assumed, for the purposes of the question arising on this record, that the corporation discharged its duties properly under its charter, and that from the time the charter became operative the company has lighted the city in accordance with the contracts made for that purpose from time to time with the municipal authorities. The charter did not purport to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one. It may also be assumed for the purposes of this case that the rights which the corporation asserts on this record were not foreclosed by any of the contracts which it made, at different periods, with the city. The question which here arises concerns only § 9 of the charter, which is as follows:

"Sec. 9. That it shall be the duty of the St. Paul Gaslight Company to prosecute the works necessary to the lighting the whole city and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: Provided, That whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up, and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of 8 per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gaslight would not be sufficient to defray the expenses of furnishing the same."

Under the foregoing section the gas company, by direction of the city, constructed street lamps, and up to January 1, 1897, they numbered 3,362. *The interest on* the cost of these

lamps, at the rate fixed by § 9, was regularly paid by the city up to January 1, 1897. About or shortly after that date, in certain portions of the city, the use of electricity for lighting the streets was by direction of the municipality substituted for gas, and hence the street gas lamps in those portions of the city which were lighted by electricity were no longer used. It is fairly to be deduced from the record that either by its original charter or by amendments thereto the gas company was empowered to supply electricity as well as gas, and in virtue of this power, it constructed an electrical plant and contracted with the city to supply the electric lights in those portions of the city where the use of gas had been dispensed with. The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps. As the result of this disagreement the city, in 1897, passed the following ordinances:

"Resolved, That the St. Paul Gaslight Company be and it is hereby required forthwith to remove the gas street-lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street-lamp posts not now in service in said electric-light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said street-lamp posts."

Thereupon the gas company commenced this suit to recover the interest on the cost of the construction of the lamps referred to in the ordinance. Without going into unnecessary detail it is adequate to say that the complaint alleged that the city was obliged by § 9 of the charter of the company to pay the interest on the cost of the lamps, although they were no longer in use for lighting purposes. The ordinance of the city which we have reproduced was expressly referred to in the complaint, and it was therein alleged that the ordinance in legal purview amounted to action by the state impairing the obligations of the contract embodied in § 9 of the charter, and was hence void because repugnant to the Constitution of the United States. After answer and due proceedings the case was decided by the trial court in favor of the gas company. On appeal the judgment of the trial court was reversed by the supreme court of Minnesota, and a final judgment was ordered against the gas company. 78 Minn. 39, 80 N. W. 774, 877. To this judgment of the supreme court of the state this writ of error is prosecuted.

Messrs. F. W. M. Cutcheon and George C. Squires, for plaintiff in error.

Mr. James E. Markham, for defendant in error.

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court:

The supreme court of Minnesota held that the charter of the gas company did not impose on the city the obligation to pay the interest on the cost of constructing the lamps not used. Construing the whole charter, the court decided that as it provided for contracts between the parties from time to time for the supply of lights, the sole obligation imposed was that the interest on the cost of the construction of the lamps should be paid by the city only during the time it was agreed that the lamps should be used, and not during the life of the charter. We excerpt in the margin an extract from the opinion of the supreme court of Minnesota which more fully expresses the reasoning by which the court sustained the construction of the contract which was expounded.*

Because the supreme court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligation of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case the state court has decided that there was no impairment either because the contract had never existed, or because from an interpretation

*"It seems to us that it would be unreasonable to hold that if, at the inception of the fifty years which this charter was to run, the city had ordered such street lamps to be erected, had used them ten years under a contract for lighting the streets which expired at the end of that time, and then, on account of some such contingency, had ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, connecting pipes and meters for forty years more, and to permit them to encumber the streets for that length of time, although the city had not a particle of use for such street lamps during all of that time. Again, it would be unreasonable to hold that the city council might, under § 9, compel the gas company to erect street lamps, and then, after using them a month or a year, abandon the use of gas for street-lighting purposes, and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps than 8 per cent. per annum, during such use, on the cost of erecting the same.

"But we are of the opinion that § 9 does not give the council the right in its discretion to compel the erection of street lamps regardless of how long the city may use them, and without protecting the gas company by stipulating a length of time during which the city shall use them.

"Section 9 provides that whenever the city shall 'by resolution of the board of aldermen direct lamps to be erected and lighted in the streets of the city,' the *gas company shall* erect the same and keep

of its provisions it was found that the obligations which it is asserted were impaired never arose. Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 77, 44 L. Ed. 673, 680, 20 Sup. Ct. Rep. 545, and cases cited. In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what obligations arose from it? and, Has there been state legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation. As, however, the authority to review the judgment of the supreme court of Minnesota in this case, and in doing so to interpret the contract and enforce its obligations, arises solely because of the assertion that the obligations of the contract have been impaired by subsequent legislation, we will first consider whether, under any view which may be taken of the contract, there is shown on this record any act of state legislation which can be properly said to have impaired the obligations of the contract in the constitutional import of these words. That is to say, we propose first to consider, even although it be conceded arguendo that the supreme court of the state of Minnesota erroneously decided that the contract relied upon did not impose the duty on the city to pay interest on the cost of construction of the unused gas lamps, whether there has been any state legislation impairing the obligation of such contract. While it is not pretended that there is any law of the state of Minnesota by which the obligation of the contract was impaired, it is asserted that such consequence results from the ordinance adopted by the municipal council of the city of St. Paul, the text of which ordinance has been reproduced in the statement of the case.

It is no longer open to question that "a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law

---

them in repair. But, as we have seen, the city has no power under the charter to compel the streets to be lighted except by making for that purpose a contract voluntary as to both parties. When making such a contract the gas company can refuse to contract for lighting any street lamps except those already erected; and before the city can compel the erection of more lamps it must first make a contract for lighting them. In making such a contract, the gas company can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the 8 per cent. per annum to be paid during that time will remunerate the gas company for erecting the lamps. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to use.

"This, in our opinion, is the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We therefore hold that the city is not liable for such compensation for street lamps after it has ceased the use of the same and abandoned the use of gas in lighting its streets."

within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States." New Orleans Waterworks v. Louisiana Sugar Ref. Co., 125 U. S. 18, 31, 31 L. Ed. 607, 612, 8 Sup. Ct. Rep. 741, 748; Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77.

Referring to the ordinance in question, from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to: the first, a command by the city to the gas company to "forthwith remove the gas street-lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;" and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If, then, there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas-lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be

its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error.

It is argued, however, that as under the charter of the city of St. Paul the comptroller of the city was empowered to audit the claims of the gas company as a prerequisite to the appropriation by the city council of the necessary money to pay such claims, therefore the ordinance, to the extent that it deprived the comptroller of the power to audit, devested him of an attribute which he could otherwise have exercised on behalf of the claim if he favored its payment, and hence the ordinance impaired the contract obligations. But it is not pretended that the effect of the auditing by the comptroller would have been to authorize the payment of the claim, or indeed that it was anything but advisory; since even after he had audited, the payment could not have been procured without the passage of an appropriation by the council for that purpose. A large number of cases were cited in the argument at bar, under the assumption that they sustain the proposition that wherever a mere denial of contract liability is made by a municipality such denial is an impairment of the obligations of the contract, since it is a refusal to comply with the contract and hence is a disregard of the obligations which the contract created. We do not stop to refer to all these cases thus relied upon, because we think it results from the statement of the proposition that it is without foundation. However, we briefly advert to a few of the cases to show how inapposite they are to the proposition which they are cited to maintain. Thus, in Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760, the decision which was under review had given effect to an ordinance of the city of Charleston deducting a sum of taxation from the bonds held by the complainant. In Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77, the decision of the state court gave effect to a municipal ordinance which provided for the construction by the city of a new waterworks plant which was to become a competitor with the contracting company. In McCullough v. Virginia, 172 U. S. 102, 43 L. Ed. 382, 19 Sup. Ct. Rep. 134, it was expressly held, although the state court

had rested its decision on the ground that there was no contract, in view of the previous decisions of this court and of the state court, relating to the contract which was under consideration, that the necessary effect of the ruling was in substance to give effect to an act of the legislature of Virginia, passed subsequent to the contract, and which impaired its obligations. In Houston & T. C. R. Co. v. Texas, 177 U. S. 74, 44 L. Ed. 679, 20 Sup. Ct. Rep. 548, this court, after noticing the fact that the state court had decided the case "without reference to the act of 1870 which the plaintiff in error (the railroad company) alleges to be an impairment of the contract set up by it in the pleadings," said: "We think the judgment of the court did give effect to that act." And the soundness of this conclusion the opinion then proceeded to demonstrate, it being apparent that the legislative act of impairment which the court found had been given effect to by the state decision was not a mere denial of liability, but amounted to an impairment of the substantial rights conferred by the contract.

As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court.

Dismissed for want of jurisdiction.

OGDEN *v.* CITY OF MADISON.

(*Supreme Court of Wisconsin, Oct. 15, 1901.*)

[87 N. W. Rep. 568.]

Disorderly Houses—Suppression of—Validity of Ordinance Imposing Fine.

Laws 1882, c. 36 (Madison City Charter, c. 4, § 3), provides that the council shall have power to enact ordinances for the suppression of vice and immorality, declaring and imposing penalties, and to enforce the same against any violators thereof; and subdivision 1 authorizes the abatement and removal of nuisances under the ordinances or at common law, while subdivision 3 grants the power to suppress and restrain disorderly houses and houses of ill fame. Section 5 declares all houses of ill fame to be public nuisances. Madison City Ordinances, c. 7, § 4, prescribes that any one convicted of keeping or maintaining a disorderly house or house of ill fame shall be fined a sum not exceeding $100: *held*, that the ordinance was valid, the power to suppress and restrain including the power to punish by a fine.

Penal Ordinance—Procedure to Punish Violation of—Effect of Statute Regulating Punishment of Misdemeanors.

Rev. St. 1898, § 3294, provides that an act or omission punishable by "fine and imprisonment" or by "fine or imprisonment" shall be

deemed a misdemeanor: *held*, that the word "fine" does not include penalties imposed for the violation of municipal ordinances, so as to require the procedure employed in misdemeanor cases to be used in punishing the violation of a city ordinance, punishable by fine only.

Same—Same—Jury Trial*—Same Act Constituting Distinct Offenses.* Rev. St. 1898, § 4589, punishes the keeping of a house of ill fame by imprisonment in state prison or by fine and imprisonment in the county jail. The keeper of such a house is also indictable at common law. Madison City Ordinances, c. 7, § 4, punishes keeping such a resort by a fine of $100: *held*, that the offense against the city being distinct from that against the state, as perpetrated against a different sovereignty, the constitutional right to trial by jury guarantied to a violator of the state law did not extend to a prosecution for a violation of the city ordinance.

Error to circuit court, Dane county; Robert Siebecker, Judge.

Francis A. Ogden was convicted of keeping and maintaining a disorderly house and house of ill fame in violation of an ordinance of the city of Madison, and he brings error. Affirmed.

This action was commenced in the municipal court of Dane county on a complaint charging the plaintiff in error with having been guilty of "keeping and maintaining a disorderly house and house of ill fame," contrary to the provisions of section 4, c. 7, of the ordinances of the city of Madison. A warrant for his arrest was issued, and he was arrested and taken before the court. A plea of not guilty was entered, and a trial was had before the court without a jury. He was found guilty, and was adjudged to pay a fine of $100 and costs, or, in default of the payment of such fine and costs, that he be committed to the county jail of Dane county at hard labor until said fine and costs were paid,—not, however, to exceed 90 days. An appeal was taken to the circuit court, where a trial was had before a jury, and a verdict of guilty rendered. A similar fine, with costs, was imposed, with imprisonment in the county jail not exceeding 3 months in case of nonpayment. The accused brings the case to this court by writ of error.

H. W. Chynoweth, for plaintiff in error.

John A. Aylward, for defendant in error.

BARDEEN, J. (after stating the facts). Two propositions are presented for our consideration: (1) The city of Madison has no power to enact the ordinance under which the plaintiff in error was convicted; (2) the provisions of law providing for the summary trial of the accused without a jury are in violation of the constitution of the state and of the United States.

1. The first proposition must be determined upon a consideration of the powers granted the common council of the city of Madison under its charter (chapter 36, Laws 1882),

*See notes at end of case.

with the amendments thereto. Section 1, c. 1, says: "The city of Madison shall have the general powers possessed by municipal corporations at common law and, in addition thereto, shall have the powers hereinafter specifically granted." Section 3, c. 4, provides that the common council shall "have full power to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and immorality, for the prevention of crime, and for the benefit of the trade, commerce and health, as it shall deem expedient; declaring and imposing penalties, and to enforce the same against any person or persons who may violate any of the provisions of such ordinance, rule or by-law, and such ordinances, rules and by-laws are declared to be and have the force of law: provided they are are not repugnant to the constitution of the United States and of the state. * * *" Subdivision 1 grants the power to provide for the abatement and removal of nuisances under the ordinances or at common law. Subdivision 3 is as follows: "To prevent any riots, noise, disturbances or disorderly assemblances, suppress and restrain disorderly houses or groceries and houses of ill-fame, and to authorize the destruction of all instruments used for the purpose of gaming." Section 5 of said chapter 4 declares all "gambling houses, houses of ill-fame, disorderly taverns," to be public or common nuisances. Section 4 of chapter 7 of the city ordinances provides that, if any person shall voluntarily be guilty of keeping or maintaining any disorderly house or house of ill fame, he shall, on conviction, be fined a sum not exceeding $100, and the further sum of $100 for each 24 hours such house shall be continued after the first conviction, or after such person shall have been ordered "to suppress, restrain or discontinue the same." The argument is that the charter provisions noted give the common council no power to enact an ordinance punishing a person for keeping a disorderly house or house of ill fame; that its power is limited to suppression and restriction. There can be no doubt of the rule that a municipal corporation possesses and can exercise only such powers as are granted in express words,—such as are necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. § 89. If there is great doubt concerning the existence of the power, the corporation cannot exercise it. The books are full of cases in which this subject has been considered. The field has been explored from all directions. Some of the cases are narrow and technical in their construction of the powers granted, while others adopt a somewhat broader view. We get but scanty assistance from adjudged cases, because of the want of uniformity in the language used in granting the power, and the great variety of circumstances deemed proper to be considered in arriving at the legislative

intent. Two cases presented for our consideration are deemed decisive of this case in favor of the plaintiff in error. In Re Lee Tong (D. C.) 18 Fed. 253, the power granted was "to suppress bawdy-houses, gaming and gambling houses." The ordinance forbade and declared it to be unlawful for any person to play any one of a long list of games of chance "for or with any thing of value," and provided that any person violating the ordinance shall be punished by imprisonment or by fine or both. Lee Tong was arrested for gaming and convicted, and sought his release on habeas corpus. Judge Deady held that the power "to suppress gaming" did not carry with it power to define and punish the crime of gaming. He laid some stress on the fact that the legislature had passed a law punishing gaming, and that in frequent amendments to the charter by the legislature power to punish for offenses had only been given in cases where the state law had not prescribed a penalty. This, he believed, showed a legislative intent, and, with the other circumstances, was sufficient to support the conclusion reached. He cites the other case (City of Mt. Pleasant v. Breeze, 11 Iowa, 399) relied on by counsel here as purporting his decision. This case holds that, where the power granted was "to suppress" gambling, it gave no power to enact an ordinance making gambling a misdemeanor and prescribing a punishment therefor. The city had no power to punish that which it was only authorized to suppress. In a subsequent case (City of Chariton v. Barber, 54 Iowa, 360, 6 N. W. 528, 37 Am. Rep. 209) the court, in referring to this case, say: "The decision is not without grave objections as to the reasons upon which it is based. But it has been accepted without question or challenge for more than nineteen years. We ought not, at this late day, disturb it." They accordingly held that the power to suppress and restrain disorderly houses did not authorize the passage of an ordinance declaring the keeping of such a house a misdemeanor, and imposing a punishment by the fine and imprisonment for the offense. In the case of City of Centerville v. Miller, 57 Iowa, 56, 10 N. W. 293, the court say they are not disposed to extend the rule announced in the Mt. Pleasant Case, and remark "that they know of no more effective way of preventing the commission of an offense than a provision providing for its punishment." See case, same title and volume, page 225, 10 N. W. 639. We appreciate quite fully the difficulty the court found in following the early decision. It is based upon narrow and technical grounds. It leaves but a mere shadow where substance was necessary. It takes the spirit and the life from the law, and leaves but a feeble and flickering remnant. It must be assumed that the legislature intended that the words of the charter should have their usual and ordinary signification. The following definition of the words "suppress" and "restrain" are instructive in this connection: Bouvier: "Suppress: To put a stop to when

actually existing." Anderson: "To prevent; never, therefore, to license or sanction." Standard: "To put down or put an end to by force; overpower; crush; subdue." Century: "To overpower; subdue; put down; quell; crush; stamp out." Webster: "To overpower and crush; to overwhelm; to subdue; to put down; to repress; to destroy." As to the word "restrain," the lexicographers all agree that it means "to curb; to check; to repress; to debar; to prevent; to hinder." If these words are to be understood to have the meaning here ascribed to them, then it would seem clear that, when the power to suppress and restrain an act is given, the power to adopt such measures as are essential and incident to such express grant of power must follow. Without it the grant would be barren and futile. If the grant of power to suppress and restrain means that the corporation may overpower, crush, subdue, and prevent the evil aimed at, then certainly it may affix reasonable penalties for the commission of such act. As suggested by the Iowa court, we know of no better or more effective way of suppressing a disorderly house, or preventing or crushing them out, than to provide a penalty against the keeper. The power to restrain houses of ill fame would be barren indeed if no means of punishment could be prescribed and enforced. The charter expressly authorizes the council to declare and impose penalties for the breach of its ordinances. The penalty imposed by the ordinance is by fine. Imprisonment only follows in case the fine is not paid. The case of Schwuchow v. City of Chicago, 68 Ill. 444, is somewhat instructive on the question above discussed. It holds that, where the power was granted to suppress groceries where liquor was sold, the city might absolutely prohibit sales, or license, as it pleased. The case of Wong v. Astoria, 13 Or. 538, 11 Pac. 295, is somewhat in point. Jennie Wong was prosecuted under a city ordinance as the keeper of a bawdy house. The power given in the charter was to "suppress and prohibit." The validity of the ordinance was challenged. In disposing of this question the court says: "The power to suppress and prohibit practices that are demoralizing and pernicious would be of little avail if it could not be vindicated. The offense directly affects the welfare of the city, and how could the latter suppress and prohibit it unless it had the right to adopt a by-law against it, and affix a penalty thereto?" In City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791, the power granted was "to pass all such ordinances, not inconsistent with the provisions of this charter, or the laws of the state, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufacture, and to enforce the same by fines and penalties." It was held that the city might legally adopt an ordinance prohibiting cruelty to animals, and enforce it by proper penalties. But we need not multiply cases. They only illustrate the diversity of opinion among

courts in somewhat similar situations. In this connection the plaintiff in error makes the further argument that the ordinance is void because it conflicts with section 3294, Rev. St. 1898, which reads as follows: "In all cases, not otherwise specially provided for by law, when a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment, or by fine or imprisonment, or is specially declared by law to be a misdemeanor it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture, as used in this chapter, shall include any penalty, in money or goods, other than a fine." The claim is that the offense charged in the complaint in this action is a misdemeanor, under the laws of this state, and therefore any procedure for its punishment, other than that which is applicable to misdemeanor, cannot stand. This argument is based upon an erroneous assumption. The offense charged in the complaint is not the same offense made penal by section 4589. It is a separate and distinct offense, as will be discussed and shown in a later portion of this opinion. Moreover, the word "fine," as used in section 3294, does not include penalties imposed for the violation of municipal ordinances. City of Oshkosh v. Schwartz, 55 Wis. 483, 13 N. W. 552. The ordinance does not provide for "fine and imprisonment" or for "fine or imprisonment." It simply says that the person found guilty of violating it shall, "on conviction, be fined." Imprisonment follows only upon neglect to pay the penalty. See State v. Grove, 77 Wis. 448, 46 N. W. 532. Without further elaboration, we hold that the provisions of the charter are broad enough to, and do, include the power to prescribe and enforce a penalty against the keepers of disorderly houses or houses of ill fame.

2. The record shows that the plaintiff in error was arrested upon a warrant issued by the municipal court. He was taken before the judge, and was tried and convicted without a jury. He then took an appeal to the circuit court, where he was tried by a jury and again convicted. It is now insisted that the offense charged was a misdemeanor under the laws of this state, and he could not be properly convicted in any other way than by the verdict of a jury in the municipal court. But is the prosecution here for a misdemeanor under the state law? It is true that the state law makes the keeping of a disorderly house known as a "house of ill fame" a penal offense, and that the keeper thereof was indictable at common law. We may assume for the purpose of this decision that the person accused of such an offense was entitled to a jury trial when prosecuted under the state law. In State v. Newman, 96 Wis. 258, 71 N. W. 438, this court said: "It seems to be the clear weight of authority that an act may be a penal offense

under the laws of the state, and that further penalties, under proper legislative authority, may be imposed for its commission by municipal by-laws or ordinances, and the enforcement of the one would not preclude the enforcement of the other." That this proposition has most ample support may be seen by reference to the cases collected in Cooley, Const. Lim. 239, and 1 Beach, Pub. Corp. § 510. A few cases illustrative of the point we desire to make will now be noticed: In Mayor, etc., v. Allaire, 14 Ala. 400, a city ordinance imposed a fine for assault and battery, which was also punishable under the state law. The defendant was arrested and convicted under the city ordinance, and took an appeal. Pending his appeal he was prosecuted and fined under the state law, which fine he paid. On the trial of the case on the appeal the court charged the jury that the conviction under the state law was a complete bar to the plaintiff's recovery on the appeal. The supreme court disposed of the case in the following language: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offense against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the state tribunal has interfered and exercised its powers in bringing the defendant before it to answer for the assault and battery, for whether he has been there punished or acquitted is alike unimportant. The offenses against the corporation and the state, we have seen, are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis. The one contemplates the observation of the peace and good order of the city. The other has a more enlarged view,—the maintenance of the peace and dignity of the state." A case more nearly in point is State v. Lee, 29 Minn. 445, 13 N. W. 913. The defendant was arrested under a state law for keeping a house of ill fame. She set up as a defense a prosecution and conviction under a city ordinance of the city of St. Paul for the same offense. The opinion is long and instructive. It holds that an offense against a municipal by-law proceeding from the same act which also constitutes a felony under the state law is not for that reason to be considered the same offense. The two are distinct in their legal character, both as to the nature and quality of the offenses and the jurisdictions offended against. Quoting from the opinion: "One who is within the limits of the municipal jurisdiction must not only obey the laws of the state, but must adjust his conduct to the requirements of local by-laws. An act which, outside a city, would subject him to punishment by the state only, committed inside its limits, by reason of the

place and the consequent aggravation attending it, will render him liable also for the additional penalty. The same act prohibited by both the city and the state may thus constitute two offenses, which are intrinsically and legally distinguishable." The case of Wong v. Astoria, 13 Or. 538, 11 Pac. 295, is this case on all fours, as to the points involved for decision. The prosecution was for keeping a bawdy house. The validity of the city ordinance was contested, and the further point was made that the police court did not allow a jury trial. The court said: "The appellant's counsel claims that a trial by jury is secured to a party by the constitution of the state. This is undoubtedly so as to all criminal prosecutions, but the enforcement of a penalty for violating a city ordinance is not a criminal prosecution, within the meaning of the provision of the constitution upon that subject. The right of trial by jury provided for in the constitution of the United States and of various states is understood to mean the common-law trial by jury. If the appellant had been allowed a jury trial under the charter of the city, it would not have been a compliance with the constitutional provisions. It must have been by a jury of twelve good and lawful men, to have fulfilled its terms. Nor is it the deprivation of the right of a jury trial proper because the party is not able to obtain it in the inferior court. If it can be secured upon appeal by a reasonably simple procedure, the conditions of the guaranty will be answered. * * * The procedure was to administer the regulations of the city, and the constitution of the state authorizes the creation of municipal courts for that purpose. It was in no sense a trial for a crime against the state." In City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305, it is said: "Offenses against ordinances enacted by municipal corporations, in the exercise of its legitimate police authority, * * * are not generally construed to be criminal cases, in the proper sense of the term 'criminal,' and the prosecutions therefore are not criminal prosecutions, within the meaning of the constitution, which refers to prosecutions for offenses essentially criminal under the general laws of the state. * * * Prosecutions for offenses against municipal by-laws, which in cities, from the number and nature of such cases, must necessarily be summary to be effective, are on the same footing with prosecutions for petty offenses, which in some jurisdictions are summarily tried, and a jury held not to be required, even though the penalty be a limited imprisonment." Again, in State v. Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33, the court said: "It has repeatedly been decided by this court, as it has elsewhere, that municipal ordinances are not criminal statutes; that violations thereof are not crimes, nor are such violations governed by the rules of the criminal law, save in certain specified exceptional particulars." A most interesting discussion of the question here involved may be found in the case of McInerney

v. City of Denver, 17 Colo. 302, 29 Pac. 516. It is said: "An ordinance must be authorized and must not be repugnant to a statute in force over the same territorial area; but, if there is no other conflict between the provisions of the statute and the ordinance save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question that the same act may constitute two offenses, viz. a crime against the public law of the state, and a petty offense against a petty local municipal regulation. The weight of authority likewise fairly sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other. * * * But we are told that admitting that the same act may be an offense against each of two sovereignties or laws, and that the actor may be punished for each of the offenses, it does not follow that the procedure may be different. And it is confidently asserted that summary proceedings without a jury in cases like the present cannot be constitutionally sustained." The court then asserts the rule in that state to be that in prosecutions for the violations of ordinances, where the offensive act is not a misdemeanor by general statute, the constitutional provisions relating to indictments and trials by jury do not apply, and the fact that imprisonment in the first instance may be part of the penalty does not affect the question. It then proceeds to discuss the question of whether a summary proceeding to punish a violation of a municipal by-law, which is also a misdemeanor under a public statute, punishable by indictment and jury trial, is proper. The discussion bears with some considerable directness upon the question here for decision. It is said the inquiry is not, was the act complained of a public misdemeanor by statute or at the common law? but, does the offense charged belong to a class of offenses that were usually proceeded against summarily? The fact that the legislature saw fit to give the power to cities to enact the ordinance gives rise to the inference that they believed the offense to be, as against the city, one of those petty offenses regarded as local injuries. The public welfare, requiring the maintenance of peace and good order and the preservation of public morals in cities, renders summary proceedings in such cases a necessity. The court then says: "A careful examination of authorities has led us to the conclusion that both in this country and England the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order and otherwise promoting the general welfare within cities and towns had for more than a century prior to the adoption of our constitution been generally prosecuted without a jury;" citing a large number of authorities. A case in Maryland has some bearing upon the question under discussion. Under the charter and ordinances the mayor of Hagerstown was given authority to try and fine disorderly

persons and lewd women found within the corporate limits. It was insisted that the exercise of this power was the exertion of judicial power, which by the constitution was confided to certain specified classes of persons, and that the mayor was not included in the enumeration. The court said: "This argument would be entitled to great weight if we thought the power exercised by the defendant was, in the sense of the constitution, a part of the judicial power. But we entertain no such opinion. We regard it as but a part of the police power, as contradistinguished from the regular judiciary powers of the state. From time immemorial a distinction has been observed between the two, both in England and this country. It would be next to, if not quite, impossible for a large city like Baltimore to preserve order within its limits, preserve the streets free from interruption,—indeed, to do most of the thousand things necessary to be done to carry on its various and indispensable operations,—if in every case it were a necessary preliminary that the offender should be regularly prosecuted by presentment, indictments, and trial. * * * We regard the power conferred on the corporation of Hagerstown to summarily punish persons of the description of the defendant, Elmira, is admitted to have been, as falling directly within the definition of a police regulation. She was punished for an offense against the decency and morals of Hagerstown, and not against those of the state. She offended within the corporate limits, and for such offense she was made to answer. This did not wipe out all responsibility for the offense to the dignity and sovereignty of the state." Shafer v. Mumma, 17 Md. 331, 79 Am. Dec. 656. One of the points under discussion may be further illustrated by reference to the decisions of the United States supreme court with reference to counterfeiting. In Fox v. Ohio, 5 How. 410, 12 L. Ed. 213, the court held that passing a counterfeit coin, which was punishable under federal law, might also be punished by the state as a crime, and that, although the party might be convicted for violating both statutes, still he would not be twice put in jeopardy for the same offense. This doctrine was held sound in Moore v. Illinois, 14 How. 13, 14 L. Ed. 306, and the status of double allegiance was discussed, and liability to both sovereignties upheld. See note to this case, 5 Notes, U. S. Rep. 213.

It is not to be understood, however, that the authorities are uniform in their holdings on these questions. Some of the cases hold that, when the ordinances and state law prescribe a penalty for the same act, a conviction under one is a complete bar to a conviction under the other. State v. Cowan, 29 Mo. 330; State v. Thornton, 37 Mo. 360; State v. Welch, 36 Conn. 215. They deny the principle made prominent in the cases cited, that the same act may constitute two distinct and several offenses, and each be subject to punishment by the proper tribunals of the state and the municipality. Of

course, if the act complained of constitutes but one offense, then it must be punished in the way prescribed by the constitution, and if, under the state law, it is only triable by a jury, it cannot be dealt with summarily when prosecuted under the ordinance. If the rule already quoted from State v. Newman is to be sustained, it must be upon the theory that what may be a felony or misdemeanor under the statute, when dealt with by a city by ordinance or by-law, loses its criminal aspect because of its local character, and the greater necessity for more stringent police regulation in cities. It cannot be sustained upon any other logical theory. If it is the same offense when prosecuted under the ordinance that it is under the state law, then the constitutional guaranty of a jury trial must be recognized. If, when prosecuted under the ordinance, it is a petty offense, local in character and insignificant as to results, then it comes within that class of cases that have long been dealt with summarily, and a jury trial is not necessary. The point is made here with great earnestness that the offense with which the plaintiff in error stands charged is a misdemeanor, indictable at common law, and only triable by jury. We have already referred to this contention. We have endeavored to show that the offense under the ordinance is not the same as the offense under the statute. It is admitted by counsel for plaintiff in error that the same act may be an offense against each of two different sovereignties, and that each may punish, but it is claimed the procedure may not be different. Whether or not the procedure may be different must depend upon the conclusion reached as to the essence of the offense. In State v. Municipal Court of Milwaukee, 89 Wis. 358, 61 N. W. 1100, this court made use of the following language: "The sale of intoxicating liquors without a license is an offense against a municipal regulation. But it is more. It is an offense against the general law of the state as well. It is a misdemeanor (section 1550, Rev. St. 1898) and indictable (Allen v. State, 5 Wis. 329). The prosecution of such an offense, even under a municipal ordinance, is a [quasi] criminal prosecution (City of Boscobel v. Bugbee, 41 Wis. 59; Village of Platteville v. McKernon, 54 Wis. 487, 11 N. W. 798; State v. Grove, 77 Wis. 448, 46 N. W. 532), and is not a summary proceeding; while actions for such violation of municipal ordinances as are not also misdemeanors are civil actions (Village of Platteville v. Bell, 43 Wis. 488; City of Oshkosh v. Schwartz, 55 Wis. 483, 13 N. W. 552), and are within the summary jurisdiction." The decision seems to assume that the act of selling intoxicating liquor without a license, contrary to a city ordinance, arose to the grade of a misdemeanor for no other reason than that it was also forbidden by the state law. Why this conclusion should follow is not pointed out. It is, as we have seen, contrary to the great weight of authority, and, followed to its logical result, would so blend the two offenses that a prosecution for one

would be a bar to a prosecution for the other. When it is admitted that the same act constitutes an offense both against the city and against the state, and that both may punish, then it follows that each may punish in accordance with the rules of procedure prescribed therefor, unless some constitutional inhibition prevents. When the peace and dignity of the state are being vindicated the constitution says the accused may have a jury trial. When some local municipal by-law has been invaded the constitutional guaranty does not apply. In the language of the supreme court of Colorado in McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516, we say: "Whatever may be the view concerning the gravity of the offense against a state law, the fact that the legislature authorizes the city to deal with the same subject by ordinance indicates that to the legislative mind the act also properly constitutes one of those petty offenses regarded as local injuries. The public welfare, requiring the maintenance of peace and good order as well as careful sanitary regulations in cities and towns, renders summary proceedings in many cases a necessity. And we are not now prepared to inaugurate the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable requisite." The statute (section 2517, Sand. & B. Ann. St.) empowers the municipal judge of Dane county to deal with this class of offenders in the manner he did with the plaintiff in error. There is a most respectable line of decisions holding that, even if the law providing for summary proceedings without a jury is invalid, yet if the defendant is entitled on an appeal to a trial by jury, and there be no unreasonable limitation connected with the appeal, the constitutional provisions are satisfied. Steuart v. Mayor, etc., 7 Md. 501; Jones v. Robbins, 8 Gray, 329; City of Emporia v. Volmer, 12 Kan. 622; Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186; State v. Beneke, 9 Iowa, 203; Haines v. Levin, 51 Pa. 412; Turnpike Co. v. Burket, 26 Ind. 53; 1 Dill. Mun. Corp. (4th Ed.) § 439. This court made a similar holding in a civil case at an early day. Gaston v. Babcock, 6 Wis. 503. The doctrine of the state courts was somewhat modified by the United States supreme court in Callan v. Wilson, 127 U. S. 540, 32 L. Ed. 223,—a case involving an offense against a federal statute. See Natal v. Louisiana, 139 U. S. 621, 35 L. Ed. 288; Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. We hold that this prosecution is for an offense against a mere police regulation for the good order of the city, for the collection of a penalty prescribed by the ordinance, and that the plaintiff in error was not entitled to a jury trial as a matter of right.

The judgment is affirmed.

NOTES.

Summary Proceedings in Municipal Courts.

Notwithstanding the provision of Magna Charta to the effect that no citizen should be deprived of life, liberty, or property but by the

Notes

judgment of his peers or by the law of the land, and other provisions more or less extensive securing the right of trial by jury, a distinction was early made in England between grave offenses, classified as pleas of the crown, and triable upon an issue of "not guilty" between the king and the subject, and lesser or petty offenses punishable by fine or amerciament upon presentment in court-lect or inferior jurisdictions; a jury trial being required in the former, while summary proceedings were customary in the latter. See 4 Bl. Com. 280; 3 Burns' Justice, tit. Lord's Day; Bac. Abr. tit. Justice of the Peace (E); Hale's Pleas of the Crown, vol. I, ch. lii; vol. II, ch. xix; Stephen's History of the Criminal Law, vol. I, ch. iv; Proffat on Jury Trial, § 95; Cooley, Const. Lim. 410, note. So the holding of the court in the principal case, that those minor offenses which were triable without jury at common law, remain so under the provisions of our written constitutions perpetuating the right of trial by jury, is, as a general proposition, as well settled as any doctrine in the law; indeed, as a general proposition, it is no where disputed; the only dispute being as to how far and to what offenses it shall be applied. That it extended at common law to violations of municipal ordinances and by-laws, is abundantly proved by the authorities cited; and that it still extends to such offenses under our written constitutions, we see exemplified in every-day practice; that is not where the dispute lies. As said by the supreme court of Wisconsin in City of Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. Rep. 305: "Offenses against ordinances enacted by a municipal corporation in the exercise of its legitimate police authority, for the preservation of the peace, good order, health or morals of the community, are not generally construed to be criminal cases in the proper sense of the term criminal, and the prosecutions therefor are not criminal prosecutions within the constitutional guaranty that the accused shall have the right of trial by jury in all criminal prosecutions, as that provision was intended to preserve and continue the right of trial by jury as already existing when the constitution was adopted; whereas, before the adoption of the constitution, and generally in this country and in England, except when expressly ordained by legislative enactment or constitutional provisions, the prevalent rule and practice was to dispense with jury trials in municipal prosecutions for the violation of ordinances. Prosecutions for offenses against municipal by-laws, which in cities, from the number and nature of such cases, must necessarily be summary to be effective, are on the same footing with prosecutions for petty offenses which in some jurisdictions are summarily tried and a jury held not to be required, even though the penalty be a limited imprisonment."

But conceding that the generality of offenses arising under municipal ordinances are punishable in a summary manner, it is equally true that there are, or may be, violations of ordinances which are not punishable in a summary manner; or, stated differently, there is a limit beyond which a municipality may not go in defining what acts shall constitute municipal offenses. But just where to draw the line is a question susceptible of no categorical answer, under the varying provisions of the state constitutions. All minor offenses coming within the police authority and affecting the peace, order, health, or morals of the community are clearly so punishable; for example, the sale of lottery tickets: State *v.* Dobard, 45 La. Ann. 1412, 14 So. Rep. 254; disturbing the peace by an assault and battery: Ex parte Gayles, 108 Ala. 514, 19 So. Rep. 12; keeping a disorderly house or being a lewd, vagrant, or disorderly person: Wong *v.* City of Astoria, 13 Ore. 538, 11 Pac. Rep. 295; Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 658; storing gunpowder in violation of ordinance: Williams *v.* Augusta, 4 Ga. 509; selling intoxicating liquors without license or in violation of Sunday ordinance: Beasley *v.* Town of Beckley, 28 W. Va. 81; Theisen *v.* McDavid, 34 Fla. 440, 16 So. Rep. 321; People, Presmeyer *v.* Board of Com'rs of Brooklyn, 59 N. Y. 92, 96 (liquor license summarily revoked by municipal board of

Notes

exercise); the vending of adulterated milk: State *v.* Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249; violating ordinance regulating markets: Natal *v.* Louisiana, 139 U. S. 621, 11 Sup. Ct. Rep. 636, 35 L. Ed. 288; Sabbath breaking and disturbing religious meetings: Ex parte Marx, 86 Va. 48; Inward *v.* State, 42 Ohio St. 188; State *v.* Harris, 50 Minn. 128, 52 N. W. Rep. 387; and in many similar cases: City of Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. Rep. 305; Village *v.* Platteville *v.* Bell, 43 Wis. 488; State *v.* Lockwood, 43 Wis. 403; McGear *v.* Woodruff, 33 N. J. L. 213; Carter *v.* Camden Dist. Ct., 49 N. J. L. 600; Floyd *v.* Com'rs, 14 Ga. 354, 58 Am. Dec. 561; Hunt *v.* City of Jacksonville, 34 Fla. 504, 43 Am. St. Rep. 214; State *v.* Conlin, 27 Vt. 322 (see State *v.* Peterson, 41 Vt. 504); People *v.* Justices, 74 N. Y. 406; State *v.* Lee, 29 Minn. 459, 13 N. W. Rep. 913; Com'rs *v.* Morrison, 22 Minn. 181; Murphy *v.* People, 2 Cow. (N. Y.) 815; State *v.* Glenn, 54 Md. 572; Ex parte Penn, 51 Cal. 280; Work *v.* State, 2 Ohio St. 308; Emerick *v.* Harris, 1 Binn. (Pa.) 416; Byers *v.* Commonwealth, 42 Pa. St. 89 (see Barter *v.* Commonwealth [Pa. 1831], 3 Pen. & W. 253).

In Duffy *v.* People, 1 Hill (N. Y.) 355, a statute authorizing a magistrate to summarily convict of being disorderly one who had abandoned his family, and to require from him sureties of good behavior was held not to be unconstitutional.

In Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. Rep. 414, the question arose upon an action for malicious prosecution as to whether the acquittal of the then plaintiff in a summary proceeding, in which he was charged with having used profane and obscene language in violation of an ordinance, was a sufficient termination of the former litigation to enable him to maintain the then present action. It was held that it was.

In Zylstra *v.* Charleston, 1 Bay (S. Car.) 382 (1794), it appeared that the charter gave to the city council power to levy fines for all offenses against the by-laws of the city without fixing a limit to the amount of the fines. The court of wardens, which was the municipal court, was given power to commit for fines and penalties. Under an ordinance prohibiting the exercise of the trade of soap and candle making within the city limits under penalty of £100, the defendant was prosecuted and fined that amount. Upon motion to obtain a prohibition, it was held that the proceedings of the court of wardens was void; that under the constitution, that court could not be invested with a jurisdiction greater than that exercised by a justice of the peace; and that in order to compel payment of so large a fine the petitioner must first be tried by a jury.

Same—Pecuniary Penalties Recoverable in Civil Action.

Under the common law, municipal by-laws were usually enacted in pursuance of implied power; they did not extend to matters criminal in the graver sense of that term; and in the absence of statute, or valid custom, they could be enforced only by fines or pecuniary penalties, usually for a small sum, fixed in amount, to recover which, the corporation might maintain an action of debt or assumpsit. Piper *v.* Chappell, 14 M. & W. 624; Wood *v.* Searl, J. Bridg. 139; Gee *v.* Wilden, Lutw. 1320; Rawlinson on Corp. 665, note. Accordingly, there are American cases holding that in the absence of statute a municipality may enforce obedience to its ordinances by means of pecuniary penalties only, and not by imprisonment, save as a means of enforcing payment of the fine. Thomas *v.* Ashland, 12 Ohio St. 124; Inwood *v.* State, 42 Ohio St. 186; Markle *v.* Town Council of Akron, 14 Ohio 586. In Wisconsin, by statute, in all cases where the act or omission for which a pecuniary penalty is imposed is not also a misdemeanor, the penalty may be sued for and recovered in a civil action. See City of Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. Rep. 552; Platteville *v.* Bell, 43 Wis. 488; State *v.* Mun. Court of Milwaukee, 89 Wis. 358, 61 N. W. Rep. 1100; State *v.* Lockwood, 43 Wis. 403; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. Rep. 414. See also, City of Durango *v.* Reinsberg, 16

Notes

Colo. 327, 26 Pac. Rep. 820; Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. Rep. 1.

Where Constitution Declares That Trial Shall Be by Jury "In All Prosecutions."

In Rolfs *v.* Shallcross, 30 Kan. 758, 1 Pac. Rep. 523, Brewer, J., in delivering the opinion of the court, conceded that many minor offenses which were triable in summary proceedings by inferior courts at common law, remained so under a constitutional provision declaring that the right of trial by jury shall remain inviolate, but laid great stress upon the fact that the constitution of Kansas, not only declared that the right of trial by jury should remain inviolate, but contained an additional provision declaring that in *all prosecutions* the accused should be entitled to a speedy and public trial by an impartial jury, and called attention to the fact that in the constitutions of Pennsylvania and other states, where summary convictions had been sustained, this latter provision was wanting. Accordingly, the petitioner, who had been summarily convicted of maintaining a nuisance, a well-known common-law crime and indictable as such, was ordered discharged from custody, the court saying: "I know that there is to-day much hostile criticism on juries, a criticism intensified by the not infrequent failure of juries to ignore prejudice and respond to the demands of absolute justice. But whatever theories I may have individually as to the propriety of jury trials, or what notions I may have of the wisdom of the system, I may not as an officer of the law disregard its plain provisions. *Ita lex scripta est*, is, as to a judge, the beginning and the end, the *alpha* and *omega* of official duty." In State *v.* City of Topeka, 36 Kan. 76, 59 Am. Rep. 534, arising three years subsequent to the above case, the personnel of the court having been changed in the meantime also, the court lays it down that the right of municipal courts in that state to try all violations of ordinances in a summary manner, notwithstanding they may amount to indictable misdemeanors, is not restricted by the words "in all prosecutions," as used in the state constitution, basing its opinion upon the theory that the same act may constitute two offenses, one against the state and the other against the corporation. But an examination of the case will show so much of the opinion to be mere dictum, the case having arisen upon quo warranto proceedings to test the validity of a dog tax, the validity of any criminal or quasi criminal proceeding, summary or otherwise, not being involved.

Where Offense Is an Indictable Misdemeanor.

In some cases the contention has been made that in no case could the accused be tried in a summary proceeding if the act constituted an indictable misdemeanor either at common law or under the state law. Thus in Slaughter *v.* People, 2 Doug. (Mich.) 334 (1842), it was held that the word "crimes," as used in the constitution, included both felonies and misdemeanors; hence under a provision declaring that no person should be held to answer for any criminal offense, save on the presentment or indictment of a grand jury, a summary proceeding by complaint in the mayor's court, convicting the accused of keeping a house of ill-fame in violation of a city ordinance, and sentencing him to pay a fine, was unconstitutional, the keeping of a house of ill-fame being a crime both by the common law and by the statute law of the state. See also, Welch *v.* Stowell, 2 Doug. (Mich.) 332 (1846). In City of Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. Rep. 1, and City of Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. Rep. 820, the court merely decided that a prosecution under a municipal ordinance for an offense not amounting to a misdemeanor, was a civil action, and hence might be tried in a summary manner. But in McInerney *v.* City of Denver, 17 Colo. 302, 29 Pac. Rep. 519, the court went further, and held that prosecutions under municipal ordinances might be conducted in a summary manner, even though the act was an indictable misdemeanor.

In Wisconsin, under statute, actions for such violations of munici-

Notes

pal ordinances as are not also misdemeanors, and not indictable under the general law, are civil actions, and may be proceeded with in a summary manner; while as to those violations which are also misdemeanors under the state law, and indictable, a summary proceeding is improper. State *v.* Mun. Court of Milwaukee, 89 Wis. 358, 61 N. W. Rep. 1100; City of Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. Rep. 552; Platteville *v.* Bell, 43 Wis. 488.

In State *v.* Corporation of Savannah, 1 T. U. P. Charlton 235, 4 Am. Dec. 708 (1809), the court recognized the validity of the doctrine that minor offenses may be tried by municipal courts in a summary manner, but ruled against the city in that instance upon the double ground that the accused had been convicted upon an *ex parte* accusation, without process, notice, or opportunity for a hearing, and for an indictable offense, of which class of crimes the constitution conferred exclusive jurisdiction upon the superior courts.

In City Council of Anderson *v.* O'Donnell, 29 S. Car. 355, 13 Am. St. Rep. 737, it was held that the jurisdiction of the municipal court to proceed in a summary manner against persons charged with violation of the municipal ordinances, was not to be restricted to only such cases as did not amount to misdemeanors.

Statutory Crimes.

Again it has been contended that the constitutional guaranty is to be construed as applying only to those offenses which were known and recognized as such, and in the prosecution of which the accused might demand a jury trial, at the time of the adoption of the constitution. Thus in Markle *v.* Town Council of Akron, 14 Ohio 586, Wood, C. J., speaking for the court, says: "It is true that for an offense strictly criminal or infamous, punishment can only be inflicted through the medium of an indictment or presentment of the grand jury. Const. of Ohio, art. 8, sec. 10. There are, however, many offenses, made so by statute, which are but quasi criminal, and where the legislature may direct the mode of redress untrammeled by this constitutional provision. Such are Sabbath breaking, selling spirituous liquors on Sunday, and the disturbance of religious meetings, with many others. Swan's Stat. 255, 256. Long acquiescence in these enactments goes far to show the construction which has been placed by all on the constitution, and that there may be many offenses, though decidedly immoral and mischievous in their tendencies, that are not crimes, but at most only quasi criminal. Of such, jurisdiction may be given to a justice of the peace or the mayor of an incorporated town." The true inquiry, however, is conceived to be (and the foregoing case is not inconsistent therewith), does the offense in question belong to the class of cases punishable summarily at common law or at the time of the adoption of the constitution, and not whether the particular offense is statutory and created since the adoption of the constitution; or, as expressed by the Colorado court: "Though the particular offense may have been unknown to the common or statutory law before the adoption of the constitution, yet if it clearly belongs to a class of offenses which at common law, or prior to the adoption of the constitution, were triable in a summary manner, the constitutional guaranties relating to jury trial do not apply." Helm, J., in McInerney *v.* City of Denver, 17 Colo. 302, 29 Pac. Rep. 519, citing Proffat on Jury Trial, § 98; State *v.* City of Topeka, 36 Kan. 76, 12 Pac. Rep. 310; Duffy *v.* People, 6 Hill (N. Y.) 79; People *v.* McCarthy, 45 How. Pr. 97. The converse of this proposition, namely, that if the subsequently created offense belongs to a class which prior to the adoption of the constitution were triable only by jury, the constitutional guaranties relating to jury trial do apply, would seem, on reason and principle, equally true.

Where Right of Appeal to Jury Trial Is Given.

In some jurisdictions it has been held that summary convictions in municipal courts, in seeming violation of the constitutional guaranties

Notes

respecting jury trials, could be sustained, provided the accused were given the right of appeal, clogged with no unreasonable restrictions, to an appellate court in which he might have the right of trial by jury. State *v.* Whitaker, 114 N. Car. 818, 19 S. E. Rep. 376. In City of Emporia *v.* Volmer, 12 Kan. 622, this doctrine was followed; although the constitution expressly declared that the right of trial by jury should remain inviolate, and that "in all prosecutions," the accused should be entitled to a speedy and public trial by an impartial jury of the county or district in which the offense was alleged to have been committed. See also, Rolfs *v.* Shallcross, 30 Kan. 758, 1 Pac. Rep. 523.

In McInerney *v.* City of Denver, 17 Colo. 302, 29 Pac. Rep. 518, the court quoted with approval the words of Mr. Justice Blatchford in Re Dana, 7 Ben. 4, denying the doctrine, and said that, even had it been sound law, it could have no application to the case at bar, for the reason that an appeal from the judgment of a police magistrate, wherein the accused must first execute a bond, with approved sureties, conditioned, not merely for his appearance in the appellate court, but also for the payment of any judgment rendered on appeal, and in addition pay all costs accrued in the police court as a condition precedent, could not be said to be clogged by no unreasonable restrictions. And according to the better view the doctrine is wholly unsound. It is strongly disapproved of by the Supreme Court of the United States in Callan *v.* Wilson, 127 U. S. 540, 32 L. Ed. 223, 8 Sup. Ct. Rep. 1301. In that case the petitioner, with others, was tried upon a charge of conspiracy, and convicted upon a summary proceeding in the police court of the District of Columbia, and upon default in the payment of a $25.00 fine, was sentenced to thirty days' imprisonment. Upon appeal to the Supreme Court of the United States from a judgment refusing a writ of habeas corpus, the accused was ordered released from custody, and Mr. Justice Harlan, speaking for the court, said: "Conceding that there is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which if committed in this district, may, under the authority of congress, be tried by the court and without a jury, we are of opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his co-defendants, is by no means a petty or trivial offense. * * * But the argument made in behalf of the government implies that if congress should provide the police court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted, even for crimes punishable by confinement in the penitentiary, such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the police court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the constitution. Except in that class or grade of offenses called 'petty offenses,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void."

Jury of Less Than Twelve.

It is well settled that the word "jury," as used in the constitutional provisions perpetuating the right of trial by jury, imports a common-law jury of twelve men; but this does not prevent nor render unconstitutional the act of the legislature in making provision for the trial by a jury of less than twelve of any or all those petty offenses which

Notes

were punishable by summary proceedings at common law, or by a jury of less than twelve prior to the adoption of the constitution. Thus in People, Murray *v.* Justices, 74 N. Y. 406, it was held that the prisoner, who, upon being arrested and brought before the police court upon a charge of assault and battery, elected to be tried in the court of special sessions, was not entitled to a trial by a jury of twelve under a constitutional provision declaring that, "The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever"; the reason being that trial by jury in the court of special sessions was unknown at the time of the adoption of the constitution, although it had subsequently been authorized to try by a jury of six, offenses against which it had formerly proceeded in a summary manner. See also, Murphy *v.* People, 2 Cow. (N. Y.) 815, and note. So in Iowa, the bill of rights and statute providing for the trial of minor offenses in the police and other inferior courts without a jury, or by a jury of less than twelve, is held not to violate article 2 of the Ordinance of 1787, securing the right of trial by jury. State *v.* Bryan, 4 Iowa 349; State *v.* Beneke, 9 Iowa 203.

Same Act Giving Rise to More Than One Offense—Where the Offenses Are Indentical in Character.

In the earlier cases there was much conflict of opinion as to whether the same act, or the same series of acts, might constitute two distinct offenses, similar or identical in character—one against the state and the other against the corporation; but the great weight of authority has long been to the effect that the same act or series of acts may constitute two such offenses, and that trial, conviction, and punishment by the one jurisdiction is no bar to a prosecution by the other. There are not wanting, however, a respectable minority of cases and text writers who still maintain that the opposing view is the sounder of the two. The disappearance of the conflict of opinion to so great an extent, and the sweeping change leading to the adoption of the majority view in so many jurisdictions, was, it is believed, influenced, and in a great measure brought about, by the decisions of the Supreme Court of the United States establishing the doctrine that the same act or series of acts may constitute two offenses, one against the United States, and the other against the state, and that the punishment by both jurisdictions of the respective crimes growing out of the same act or series of acts, is no violation of the constitutional inhibition against dual punishment, either as contained in the federal constitution or that of a state. See Fox *v.* Ohio, 5 How. 410, 433; U. S. *v.* Marigold, 9 How. 560, 569; Moore *v.* Illinois, 14 How. 13, 19; Ex parte Siebold, 100 U. S. 371, 390; Cross *v.* North Carolina, 132 U. S. 131, 10 Sup. Ct. Rep. 47.

We submit, with deference, that the supposed analogy does not exist. As between the state and the United States, each is supreme and absolute within its own sphere, neither taking any notice or making any pretense of enforcing the criminal laws of the other any more than will one state enforce the criminal laws of another state or of a foreign government. The constitutional inhibition against dual punishment contained in the federal constitution simply prohibits the twice placing in jeopardy by the United States for a crime against the United States: the inhibition against dual punishment in the state constitution simply forbids the twice placing in jeopardy by the state for a crime against the state. Suppose, for example, that by the laws of Virginia it is made a crime (as is the actual case) for a white person and a negro, residing within the state, to attempt, by going beyond the limits of the state, and intermarrying, and then returning to reside within the state, to evade the statute prohibiting intermarriages between the races; and let us suppose, also, that the laws of England forbid and make criminal the intermarriage of the races within the limits of the United Kingdom; would the inhibition against dual punishment, contained in the constitutions of both countries, be any bar to the punishment by both or either of a white

Notes

person and a negro who left Virginia, intermarried in England, and then returned to reside in Virginia? As between the different states of the United States, or as between the states and the United States, the case is exactly analogous. But as between a state and a municipal corporation within that state, the analogy does not hold, for the reason that the corporation, although it is an organization called into being at the pleasure of the state, and to which the state has delegated certain powers looking to the local government of a prescribed area, is still within the state limits and under the protecting ægis of the state constitution. Looked at in one sense, it is a state agency, instituted for the purpose of better maintaining the peace, dignity, and good order of the state within the prescribed limits. But the same may be said of the organized judiciary, or the hierarchy of courts existing under the laws of a state; for they too are state agencies acting within prescribed jurisdictions and territorial limits for the purpose of maintaining the peace and dignity of the state. In fact, the state can only act through its various agencies, and there is no danger of its violating the constitutional principle in question except through one or another of those agencies. The corporation being an instrumentality of the state, it follows, therefore, that an offense under an ordinance is in reality an offense against the state; and since no part is greater than the whole, but each part being a component of the whole, and bound by the same constitutional principles which bind the whole, it savors of mere quibbling to say that the peace and dignity of the state may, by the commission of one act, sustain two shocks, *identical in character*—one through the violation of the ordinance and the other by reason of the infraction of the general law—and that each may be punished through separate state agencies. We apprehend that the constitutional principle in question can be evaded in no such manner.

But if such is the case, we see no reason why the state may not create corporations within corporations—wheels within wheels, as it were—and make offenses committed within the precincts of the innermost, punishable by the courts in each succeeding periphery from centre to circumference; or why it may not enact twenty statutes, each an exact duplicate, *ad literatim, et verbatim, et punctuatim*, of the others; each declaring that a person stealing personal property to the value of fifty dollars or more shall be deemed guilty of grand larceny, and prescribing a penalty therefor; each contained in a separate numbered section of the Code,—and so punish the same act of larceny twenty times, upon the theory that it gave rise to twenty separate offenses. The validity of every ordinance rests, in the last analysis, upon the force and validity of the statute authorizing its passage, and each is virtually a state enactment.

As supporting the minority view, see Wightman *v.* State, 10 Ohio 452 (1841); Hamilton *v.* Municipal Court of Milwaukee, 89 Wis. 358, 61 N. W. Rep. 1100 (special statute); State *v.* Keith, 94 N. Car. 933; State *v.* Corporation of Savannah (1 T. U. P. Charlton 235), 4 Am. Dec. 708 (1890); Savannah *v.* Hussey, 21 Ga. 80 (1857); Vason *v.* Augusta, 38 Ga. 542 (1868); Reich *v.* State, 53 Ga. 73 (1874); Rice *v.* State, 3 Kan. 141 (1865); Pleasant *v.* Breeze, 11 Iowa 399 (1860); In re Lee Tong, 18 Fed. Rep. 253; State *v.* Cowan, 29 Mo. 330 (1860); State *v.* Gordon, 60 Mo. 383 (1875); Indianapolis *v.* Blythe, 2 Ind. (Carter) 75 (1850); Madison *v.* Hatcher, 8 Blackf. (Ind.) 341 (1846), overruled by Ambrose *v.* State, 6 Ind. 351; Re Sic, 73 Cal. 142 (1877), 14 Pac. Rep. 405; Leach *v.* State, 36 Tex. Cr. Rep. 248, 36 S. W. Rep. 471; 1 Beach Pub. Corp. § 510.

As sustaining the majority view, see State *v.* Newman, 96 Wis. 258, 71 N. W. Rep. 441; McInerney *v.* City of Denver, 17 Colo. 302, 29 Pac. Rep. 517, 518; Hughes *v.* People, 8 Colo. 536, 9 Pac. Rep. 50; State *v.* Lee, 29 Minn. 445, 13 N. W. Rep. 913; Waldo *v.* Wallace, 12 Ind. 569; State *v.* City of Topeka, 36 Kan. 76, 12 Pac. Rep. 310; Greenwood *v.* State, 6 Baxt. 567; Howe *v.* Treasurer, 37 N. J. L. 145; Mayor of Mobile *v.* Allaire, 14 Ala. 400; Hamilton *v.* State, 3 Tex.

Notes

App. 643; Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 658; State *v.* Sly, 4 Ore. 277; Johnson *v.* State, 59 Miss. 543; Wragg *v.* Penn. Twp., 94 Ill. 11; McLaughlin *v.* Stevens, 2 Cranch C. C. 148; City *v.* Cofferata, 24 Mo. 96; Rogers *v.* Jones, 1 Wend. 238; Wong *v.* City of Astoria, 13 Ore. 538, 11 Pac. Rep. 296; McRea *v.* Mayor, 59 Ga. 171; Brownsville *v.* Cook, 4 Neb. 101; State *v.* Lindsay, 34 Ark. 372; State *v.* Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249; City Council of Anderson *v.* O'Donnell, 29 S. Car. 355, 13 Am. St. Rep. 737, 7 S. E. Rep. 523; State, Burton *v.* Williams, 11 S. Car. 292; City of Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. Rep. 307; Robbins *v.* People, 95 Ill. 178; Hunt *v.* City of Jacksonville, 34 Fla. 504, 43 Am. St. Rep. 214, 16 So. Rep. 398; Theisen *v.* McDavid, 34 Fla. 440, 16 So. Rep. 321; City of Brooklyn *v.* Toynbee, 31 Barb. 282; Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. Rep. 38; Mayor, etc., *v.* Linck, 12 Lea 499; Cooley, Const. Lim. (5th Ed.) 241, 242, note 1; Bish. St. Cr. § 23; Whart. Cr. Pl. & Pr. § 440; Grant on Corp. (Eng.) 82.

Same—Where the Offenses Are Totally Different.

But where the offenses arising out of the same act are essentially and entirely different in their character, and not merely in the name given and in the fact that the thing done is prohibited by both statute and ordinance, there is no reason why the offender may not be punished more than once without violating the principle which forbids dual punishments. For example, one selling intoxicating liquors on Sunday, to a minor, and without a license, may, by the one act, violate the law against Sunday selling, the law against selling to minors, and the law against selling without a license. And upon the same principle there is no reason why the offender may not become amenable to the city, state, and federal governments for one and the same act. Arrington *v.* Commonwealth (Va.), 10 L. R. A. 242; Com. *v.* Harrison, 11 Gray 308; Com. *v.* Vaughn (Ky.), 45 L. R. A. 858. This, it will be observed, is very different from the case where an assault and battery is held to be punishable, as such, under both the statute and ordinance, as in Mayor, etc., *v.* Allaire, 14 Ala. 400; or where it is charged as an "assault and battery" under the one, and as a "breach of the peace" under the other, as in Hunt *v.* City of Jacksonville, 34 Fla. 504, 43 Am. St. Rep. 214, 16 So. Rep. 398. See also, Wong *v.* City of Astoria, 13 Ore. 538, 11 Pac. Rep. 296, and other cases cited as supporting the majority opinion above.

Same—Where Ordinance Varies from Statute.

As said in McInerney *v.* City of Denver, 17 Colo. 302, 29 Pac. Rep. 517, the ordinance must be authorized and must not be repugnant to a statute in force over the same territorial area; but in State *v.* Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249, the court held that where the sale of adulterated milk was made penal by both statute and ordinance, it was immaterial that the standard of adulteration adopted by the ordinance differed from that fixed by the statute. And in Theisen *v.* McDavid, 34 Fla. 440, 16 So. Rep. 323, an ordinance relating to the keeping open of certain business houses on Sunday was assailed as being invalid on the ground that it was inconsistent with and repugnant to the state law on the same subject, in that it excepted from its inhibition various business pursuits, such as drug stores, newspaper stands, soda founts, cigar and tobacco stores, etc., which were not excepted in the state law. But the objection was held to be without merit, the court saying, per Taylor, J.: "Because the municipality does not see proper to cover the same ground, and to make penal the exercise on Sunday of all of the same occupations as does the state law, does not render it either inconsistent with or repugnant to the state law. The effect of the exceptions in the ordinance is that we, by this ordinance, do not undertake to legalize or license the exercise on Sunday of these excepted occupations that are rendered unlawful by the state law, but we simply abstain from making their exercise on Sunday within our municipality an additional offense against the city's laws."

CITY OF NEW ORLEANS *v.* CHAPPUIS.

(*Supreme Court of Louisiana, March 18, 1901.*)

[29 So. Rep. 721.]

Criminal Law—Accusation—Bill of Particulars.

A party charged with crime is entitled to be fairly informed of the nature and cause of the accusation against him. There is a class of cases where, by reason of the special nature of the offense, the charge may be general; but in such cases the court or the party may require the prosecuting officer to furnish the defendant with a bill of particulars showing the particular facts relied on.

Violation of Ordinance—Appeal—Review.*

Parties sentenced to fine or imprisonment under a municipal ordinance have the right to have the legality and constitutionality of the ordinance tested in the supreme court, and to have matters placed in the lower court in such shape as to enable the appellate court to have the issue properly presented. The supervisory powers of the supreme court can, in proper cases, be invoked to secure that right.

Same—Same—Same.

The supreme court is not authorized on an appeal to it from a sentence of fine and imprisonment under a municipal ordinance to reverse the judgment for an error in the decision of the facts upon which are dependent not the legality or constitutionality of the ordinance, but the guilt or innocence of the accused under the ordinance.

Same—Same—Same—Constitutional Questions—Appeal Dismissed.

Where, on an appeal to the supreme court from a sentence of fine and imprisonment under a municipal ordinance, the record discloses the existence in the lower court of an issue upon which the sentence could be made to rest independently of any question as to the legality and constitutionality of the ordinance, and evidence under that issue supporting the sentence, the appeal will be dismissed.

Criminal Ordinance—Constitutionality—Construction.

A criminal law is not to be pronounced unconstitutional merely because of following literally its broad and general terms, acts perfectly legal might be made the subject-matter of a criminal accusation. The proper course is to read out of the purview of the law matters clearly not intended to fall under it. State *v.* Keasley, 23 South. 900, 50 La. Ann. 761.

Same—Same—Valid in Part.

A charge of unconstitutionality, directed as a whole against an ordinance containing six different sections, will fail if any of the sections are sustainable. The charge should be made against a particular specified section or sections.

House of Ill Fame—Removal of Occupant.†

The owner of a building in which she has maintained a house of ill fame will not be forced to move from her house on notice from the mayor to that effect, if she immediately alters her conduct, and abandons her occupation; though she may be punished for her past acts on substantive charges and proof.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; Andrew P. Marmouget, Judge.

Alice Chappuis was convicted of violating a city ordinance, and she appeals. Dismissed.

---

*See State *v.* Mayor of City of Bayonne, 1 Mun. Corp. Cas. 299, and note, p. 305; State *v.* Town of West Hoboken, 2 Mun. Corp. Cas. 636, and note, p. 639.

†See L'Hote *v.* City of New Orleans, 3 Mun. Corp. Cas. 561.

Samuel L. Gilmore, City Atty., and Arthur McGuirk and M. Dracos Dimitry, Asst. City Attys., for appellee.

NICHOLLS, C. J. The affidavit before the recorder, on which the judgment appealed from was rendered, charged the defendant with having on the 5th day of July, 1900, "willfully violated City Ordinances 13,032 and 13,485, Council Series, relative to lewd and abandoned women." By this judgment defendant was condemned to pay a fine of $5, and, in default thereof, to imprisonment for 10 days. Referring to the record, we find copies of two city ordinances; one ordinance containing nine sections, the other ordinance containing one section. The second ordinance is an amendment of the first. Both ordinances refer to the same subject. The defendant demurred to the complaint, charging that the ordinances were unconstitutional. The recorder overruled the demurrer, and the case went to trial, and, on evidence adduced, defendant was found guilty. A party charged with crime is entitled to be fairly informed of the nature and cause of the accusation made against him. There is a class of cases in which the charge may be general by reason of the special nature of the offense, but in such cases the court or the party may require the prosecuting officer to furnish the defendant with a bill of particulars showing the particular facts relied on. Clark, Cr. Proc. § 62 et seq.; Id. § 151 et seq.

Parties sentenced to fine or imprisonment under a municipal ordinance are entitled by constitutional provision to test the legality and constitutionality of the ordinance by appeal to the supreme court, and carries with it the right to have matters placed in the recorder's court in such a shape as to have the legality and constitutionality of the ordinance fairly submitted to the appellate court. If that right be denied them, they have the right, after exhausting proper efforts in the recorder's court to have matters so placed, to have recourse for relief to this court under its supervisory power.

Where an ordinance contains six or nine sections, one or more of the sections may be constitutional, and the others not. A general charge of having violated the ordinance as a whole, followed by a trial and judgment without specific findings, would leave matters uncertain as to the violation of which section of the ordinance the accused had been found guilty. If he had been found guilty under one of the constitutional sections, he would have no right to contest the unconstitutionality of the other sections. The defendant did not call for a bill of particulars in the recorder's court, but she, after filing a demurrer, went to trial on the general charge of having violated the two ordinances. When found guilty, she did not appeal to the criminal district court for the parish of Orleans, under article 139 of the constitution, nor did she come to this court under its supervisory powers, but came to it through an appeal, in which form of remedy its powers are extremely limited. We are not authorized to reverse the

judgment for an error in the decision of the facts upon which are dependent not the legality and unconstitutionality of the ordinance, but simply the guilt or innocence of the accused under the ordinance. We cannot tell from the record before us of the violation of which section or sections of the ordinances the recorder found the appellant guilty. There are sections of the ordinance which could constitutionally form the basis for a legal judgment of conviction for their violation, if sustained by evidence, and there is evidence in the record tending to support a judgment under one or more of these sections. If defendant in fact violated section 5 of the ordinance, she could have been legally convicted to fine or imprisonment under section 6, independently of any action whatever having been taken by the mayor.

A notice from the mayor in the premises would have been merely in the nature of a putting in default. The simple act itself of "failing to obey the mayor's notice," would not constitute a substantive offense. The notice and the violation of the notice would only enter incidentally into the accusation as one of the steps leading up to the prosecution. We cannot say the recorder undertook to convict defendant of having simply violated a notice from the mayor, without having had affirmatively proved to his satisfaction the existence of the facts upon which that notice was based, and which would legally justify the conviction. It will be observed that the judgment of the court was, not that the appellant should move from her house and home, but that she should be fined five dollars or imprisonment for a certain established prior illegal act. If defendant, being guilty under section 5 of the ordinance, and served with the notice from the mayor, which is referred to in the ordinance, had not obeyed it by moving, but had none the less at once changed her mode of life, or given up her illegal occupation, we scarcely think the recorder would have made the mere refusal to move the ground for his judgment. He might well, however, in spite of this fact, have found her guilty, and sentenced her for having violated the ordinance prior to the change in her life or business. In State v. Mack, 41 La. Ann. 1079, 6 South. 808, this court said that ordinances should receive a reasonable construction. We cannot pronounce laws or ordinances unconstitutional from the simple fact that their terms are so general that, by following blindly and literally their very letter, parties might be convicted and punished for acts perfectly legal,—because, in other words, their provisions might be extended in their application beyond their legitimate and intended scope. State v. Keasley, 50 La. Ann. 761, 23 South. 900. The proper course to be followed under such circumstances is to read out of the purview of the law or the ordinance, as not intended thereby, matters which, if necessarily to be enforced under them, would render them unconstitutional. It is to be presumed that judges will follow that course. There are sec-

tions in the ordinances in this case which would not be sustainable if they were intended to be made, and could forcedly be made, to cover all cases falling under their very broad and general terms; but we must assume, as we have said, that when they are sought to be applied they will be restricted within proper limits. It will be time enough to discuss the question of the force and authority of the city council to deprive a citizen of the benefit of a shelter, or a house or home, simply because she may be an immoral person, if, when in the occupancy of that house or home, she be not guilty there of immorality (Hubbard v. Moore, 24 La. Ann. 592), when any case of that character should arise and call for a decision.

Appellant urges that the recorder refused to allow evidence to show that she had, after she received notice from the mayor, done no act by reason of which she could be legally found guilty under the ordinances, and counsel insists that the recorder was without warrant or justification in bringing under the term "lewd and abandoned women" a woman whose relations with a particular man were those of husband and wife without their being such in fact. It is true that the recorder did restrict the evidence, but we cannot say that the reason for restricting it was that suggested. He may well have deemed the evidence irrelevant in view of other evidence going to show proper cause for the conviction outside of the particular issue which appellant was seeking to raise. We have no reason to suppose that the recorder construed, as it is suggested he did, the term "lewd and abandoned women." If the recorder merely misapplied the law, defendant had means of relief from the error by appeal to the criminal district court.

We cannot say from the record that the judgment of the recorder was not a legal conviction, based upon a constitutional section of the ordinance. The demurrer was a general one, directed against the ordinance as a whole. He was justified in overruling it if parts of the ordinances could successfully resist the attack. We think there were sections of that character in the ordinances. As matters stand, we cannot reverse the judgment. The appeal is dismissed.

CITY OF NEW ORLEANS *v.* CHAPPUIS.

(*Supreme Court of Louisiana, March 18, 1901.*)

[29 So. Rep. 723.]

House of Ill Fame—Notice to Abandon—Procedure.*

A house without the prescribed limits, as defined by ordinances of the city of New Orleans, which is being used for purposes of prosti-

*See preceding case; also, L'Hote *v.* City of New Orleans, 3 Mun. Corp. Cas. 561.

City of New Orleans *v.* Chappuis

tution, may be proceeded against and closed to such purposes, and its occupants forced to remove; but whenever a house is denounced as one of ill fame, and notice to vacate is given, the occupant is entitled to raise and have tried the issue of the immoral use of the premises, or the character of the house, before conviction for not moving can legally be made.
(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; Andrew P. Marmouget, Judge.

Alice Chappuis was convicted of violating a city ordinance, and she appeals. Dismissed.

Samuel L. Gilmore, City Atty., Arthur McGuirk and M. Dracos Dimitry, Asst. City Attys., for appellee.

BLANCHARD, J. Defendant was proceeded against for violation of City Ordinance No. 13,032, as amended by Ordinance No. 13,485, Council Series. The time laid was July 2, 1900; the place, house No. 1,021 Customhouse street. The first section of the ordinance prescribes the limits within which, for the present, public prostitutes, or women notoriously abandoned to lewdness, may reside. To be more exact, it prescribes the limits without which they shall not reside and ply their vocation. The second section makes it unlawful to rent or lease any house, building, or room to any woman notoriously abandoned to lewdness, or for immoral purposes, outside of the limits prescribed in the first section. The third section forbids abandoned women to stand upon the sidewalks in front or near the premises they occupy, etc., or to accost persons passing by, or to stroll about the city streets indecently attired, or to behave in public in such way as to offend good morals, etc. The fourth section makes it unlawful for lewd women to frequent barrooms, etc. The fifth section makes it unlawful for any person to establish or conduct a house of prostitution or assignation without the limits prescribed in section 1. The sixth section declares that whenever such a house, within or without the limits, may become dangerous to public morals, the mayor may order the occupant of such house or room to remove therefrom within five days; prescribes how the notice of removal shall be given or served; and declares that any occupant of a house or room so notified to vacate, who fails to do so within five days, shall be punished as prescribed in section 8 of the ordinance. The seventh section gives the mayor power to close such house or room in the event the occupant fails to remove, notwithstanding the infliction of the penalty for not removing upon the notice given. The eighth section declares that any one violating the provisions of the ordinance shall be punished by the recorder having jurisdiction by fine not exceeding $5, or 10 days' imprisonment in default of payment, for the first offense; and by fine not exceeding $10, or 20 days' imprisonment in default of payment, for the second offense, etc. The

ninth section declares each day any person continues to violate the provisions of the ordinance shall constitute a separate offense. What one or more of the many different acts and things this ordinance describes and prohibits the defendant was accused of violating does not appear. The affidavit made charges her, in general terms, only with violating the ordinance. When the case was called for trial, it was defendant's right to require the prosecution to specify what particular provision or provisions of the ordinance she was accused of violating. She did not do this, but, instead filed a plea setting up the unconstitutionality and illegality of the ordinance, and charging it to be unreasonable, oppressive, etc. On the issue thus made trial was had, with the result that she was convicted on the general charge of violating the ordinance, and this appeal followed.

This tribunal has not the jurisdiction to go into the evidence adduced, and to determine the facts of the case,—whether from the testimony the accused is guilty or not. Undoubtedly, many of the provisions of the ordinance attacked are constitutionally and legally valid, and since to that alone is our inquiry limited, and since we know not what one or more of its provisions she stands convicted of having violated, we must needs sustain the conviction and dismiss the appeal. We would say, however, it may well be that some one or more of the provisions of the ordinance might not stand the test of legality applied to same, especially in the manner of the enforcement thereof. For instance, had it appeared from the record of this case that the mayor had by ex parte order adjudged this woman's house to be a house of ill fame, and, so judging, had given her notice to vacate within five days, and she had failed to so vacate, and had then been proceeded against solely for not vacating, and had been convicted and fined on this charge, she might well be entitled to relief on appeal here. The notice to vacate given by the mayor, if a house be in use for immoral purposes, is well enough, but the occupant of the house is entitled to raise and have tried the issue of the immoral use of the premises or character of the house before conviction for not moving can legally be made; and, when this issue is raised, it is incumbent on the prosecution to show the character of the house to be such as justifies the notice to vacate, and warranting the conviction demanded for not vacating. For the reasons herein given, and those assigned in the opinion this day handed down in the cause No. 13,618 on the docket of this court, bearing the same title and between the same parties, on a similar charge against this defendant (29 South. 721), it is ordered that the appeal herein be dismissed, at the costs of the appellant.

PEOPLE *ex rel.* KRAUSE *v.* HARRISON, Mayor, *et al.*

(*Supreme Court of Illinois, June 19, 1901.*)

[61 N. E. Rep. 99.]

Intoxicating Liquors—Regulation by Village Ordinance—Annexation of Village to City—Effect on Ordinances.

Annexation Act 1889, § 18, provides that when one municipality is annexed to another the ordinances of the annexed municipality regarding licensing dramshops shall continue until repealed by popular vote. The ordinances of Hyde Park in force at the time of its annexation to Chicago regulated the whole liquor traffic, including the sale by wholesale quantities in single packages: *held*, that there were preserved to Hyde Park all the liquor ordinances in force at the time of its annexation for all time, except as they were changed therein, and hence a wholesale malt dealer could not be licensed under a subsequent Chicago ordinance, which conflicted with those of Hyde Park.

Statutes—General Provisions to Be Construed Together and According to Intent.

Under 2 Starr & C. Ann. St. c. 131, § 1, providing that all general provisions, terms, and phrases in statutes shall be liberally construed, the general provisions of a statute are to be construed together in the light of the general objects and purposes of its enactment, and so as to give effect to the main intent, although particular provisions are thus construed not according to their literal reading.

Annexation—Effect on Liquor Ordinance—Mandamus.

Mandamus is the proper remedy to test the question whether, on annexation of one municipality to another, the ordinances of the former in regard to licensing the sale of liquor continue in force, under Annexation Act 1889, § 18.

Liquor Ordinance—Validity.

An ordinance prohibiting the granting of licenses for the sale of liquor in quantities less than four gallons in a single package, except at a regularly licensed saloon or dramshop, is not void because of unjust discrimination.

Magruder, J., dissenting.

Appeal from appellate court, First district.

Petition for mandamus by the people of the state of Illinois, on the relation of Felix F. Krause, against Carter H. Harrison, mayor of the city of Chicago, and others. From a judgment of the appellate court (92 Ill. App. 643) reversing a judgment granting the writ, relator appeals. Affirmed.

Moran, Mayer & Meyer, for appellant.

Charles M. Walker, Corp. Counsel, and Roswell B. Mason, Asst. Corp. Counsel (Walker & Payne and Edwin Burritt Smith, of counsel), for appellees.

BAILEY *v.* COMMONWEALTH.

(*Court of Appeals of Kentucky, Nov. 8, 1901.*)

[64 S. W. Rep. 995.]

Criminal Law—Submission of Law and Facts to Court—Effect.

A submission of the law and facts to the court is not equivalent to a plea of guilty, but is merely a waiver of a jury trial.

Police Court—Agreement of Parties Cannot Give Jurisdiction.

An agreement cannot give a police court jurisdiction of a matter within the exclusive jurisdiction of the circuit court.

Mullins *v.* City of Lancaster

Same—Jurisdiction—Provisions of Local Law Repealed by General Law.

The general law governing towns of the sixth class, and regulating the jurisdiction of the police court, repealed inconsistent provisions of a local liquor law as to the jurisdiction of the police court.

Intoxicating Liquors—Penalty—Provisions of Local Law Repealed by General Law.

The provisions of the general local option law as to the penalty imposed took the place of corresponding provisions of special prohibition laws.

General Law Not Repealed by Ordinance.

A town ordinance cannot effect the repeal of a general law with which it is in conflict.

Intoxicating Liquors—Special Act Regulating Sale, Not Repealed by Subsequent Act Incorporating Town.

Act of 1884, declaring it to be unlawful for distillers or other persons to sell liquor "in the town of Jackson or within two miles of its corporate limits," was not repealed by Act March, 1890, incorporating the town of Jackson, and declaring it to be unlawful to sell liquor "within two miles of the town limits."

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

John A. Bailey was convicted of the offense of selling liquor, and he appeals. Reversed.

Marcum & Pollard, for appellant.

C. T. Byrd and Robt. J. Breckinridge, for the Commonwealth.

MULLINS *v.* CITY OF LANCASTER *et al.*

(*Court of Appeals of Kentucky, May 29, 1901.*)

[63 S. W. Rep. 475.]

Intoxicating Liquors—Local Law Regulating, Modified by Subsequent General Act.

Local laws prohibiting the sale of liquor, which were in force at the time the constitution was adopted, were not repealed by section 61 of that instrument, but were modified by the general local option law as to procedure, amount of liquor permitted to be sold, and the penalty for selling.

Same—Validity of Ordinance Prohibiting Sale.

Where there is no local law in force prohibiting the sale of liquor in a city, and the general local option law has not been voted into operation therein, the general law (Ky. St. § 1304), prescribing the penalty for selling liquor without a license, applies, and therefore an ordinance of the city, which prohibits the sale of liquor therein, and fixes the penalty for selling at a fine which is not less than that imposed by the general law for selling without license, is valid.

Appeal from circuit court, Garrard county.

"Not to be officially reported."

Action by Carey Mullins against the city of Lancaster and another for a writ of prohibition. Judgment for defendants, and plaintiff appeals. Affirmed.

R. H. Tomilson, for appellant.

W. I. Williams, for appellees.

VILLAGE OF FAIRMONT *v.* MEYER.

(*Supreme Court of Minnesota, June 14, 1901.*)

[86 N. W. Rep. 457.]

Violation of Ordinance—Complaint—Sufficiency.

In a complaint charging the violation of a certain village ordinance, such ordinance was described by its title and date of passage: *held* sufficient.

Drunkenness—Penal Ordinance—Authority to Enact.*

By Gen. St. 1894, § 1224, village councils are authorized "to ordain and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce and the promotion of health, not inconsistent with the constitution and laws of the United States or of this state, as they shall deem expedient": *held* that, under this general welfare clause, councils are authorized and empowered to enact ordinances to punish open and notorious drunkenness. This case distinguished from that of State *v.* Hammond, 41 N. W. 243, 40 Minn. 43.

(Syllabus by the Court.)

Appeal from district court, Martin county; James H. Quinn, Judge.

John H. Meyer was convicted of violating an ordinance of the village of Fairmont, and appeals. Affirmed.

T. F. Knappen (Cross, Hicks, Carleton & Cross, of counsel), for appellant.

De Forest Ward, for respondent.

COLLINS, J. The plaintiff village in this action was incorporated and organized under title 3 of chapter 10 of the General Statutes of 1894, the same being sections 1196 and 1275, inclusive, and among its ordinances is one entitled "An ordinance to prevent and punish disturbances of the peace, vagrancy, riots, drunkenness, interference with public officers, and other offenses," open and notorious drunkenness being expressly prohibited. Defendant Meyer was arrested upon a warrant issued on a complaint duly made, subscribed, and sworn to, charging him with a violation of this ordinance, in that "he did at the time specified become and was intoxicated, by then and there voluntarily drinking intoxicating liquors, and was then and there found in a state of open and notorious drunkenness and intoxication, contrary to an ordinance of the said village of Fairmont entitled 'An ordinance to prevent and punish disturbances of the peace, vagrancy, riots, drunkenness, interference with public officers, and other offenses,' adopted on the 23d day of April, 1895, and the amendments thereto, and against the form of the statute in such case made and provided." He entered a plea of not guilty, but upon trial was convicted, and ordered to pay a fine of $10 and costs of prosecution, a total of $47.85, or, in default

*See City Council of Abbeville *v.* Leopard, 6 Mun. Corp. Cas. 853.

thereof, to be committed to the county jail for a term of 10 days. He thereupon took an appeal, upon questions of law alone, to the district court, and entered into a recognizance, with one surety, in the sum of $100; the conditions being that he would prosecute his appeal with effect, abide the order of the court, pay all costs and damages which might be awarded against him, and also that, if the judgment was affirmed, he and his surety would pay the same. The district court affirmed the order of the court below, and thereupon a judgment was entered in the manner hereinafter stated by the clerk of said court. The present appeal is from that judgment.

1. The defendant's counsel has raised the question of the sufficiency of the facts as stated in the complaint to constitute a violation of the ordinance. There is absolutely nothing in this point. Gen. St. § 1252, provides that it shall be a sufficient pleading of an ordinance of any village of this class, with 3,000 inhabitants, to refer to the chapter and section thereof, and, further, that, when passed, such ordinance shall have the force and effect of general laws, within the jurisdiction of the village. In the complaint the ordinance was described by its title and date of passage. Setting out the title, with date of approval, was ample and sufficient. It directed the attention of the defendant to the ordinance he was charged with violating, and nothing more was necessary. If the statute in question was mandatory, this would be true; but it is not, for it does not require that the allegation be in this form. At most, it is simply permissive. Further, under this statute, the ordinance had all the force of a general law, within the jurisdiction of the village, and it was not even necessary to read or to give it in evidence. In fact, the great weight of authority holds that it is sufficient to refer to an ordinance by its date and purpose, or by its title and the number of the section violated, or by its substance, or, in a general way, with a degree of precision sufficiently direct to identify it. 15 Enc. Pl. & Prac. 426, authorities being cited in support of the text.

2. It is contended by defendant's counsel that the ordinance itself is void, for the reason that the village council had no authority to pass or adopt an ordinance punishing a person for open and notorious drunkenness. The statute (Gen. St. § 1224) authorized the council "to ordain and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce and the promotion of health, not inconsistent with the constitution and laws of the United States or of this state, as they shall deem expedient." This is a general welfare clause, and it is the only one in the statute under which plaintiff was incorporated which authorizes the passage of ordinances of the character of that

now before us. This general clause is certainly broad enough to authorize the council to punish open and notorious drunkenness, an offense conspicuously opposed to the proper government and good order of any municipality. The case of State v. Hammond, 40 Minn. 43, 41 N. W. 243, relied upon by defendant's counsel, is not in point. The power granted to the municipal corporation, which passed the ordinance there in question, was to enact such ordinances for the government and good order of the city as should be deemed expedient, and that "for this purpose" the said city council should have authority to enact, among other ordinances, one "to prevent open and notorious drunkenness and obscenity on the streets and public places of said city." The precise and definite specifications of what the council might do to accomplish the general purpose mentioned was set forth in the statute, there being 24 heads or subdivisions thereof, each referring to some special subject of legislation. It was held that the power of the council was limited to what was particularly specified. In other words, that the general grant or grounds of power was limited by precise and definite specifications, and that the ordinance in question exceeded that power, because it went further than was specifically authorized. Such is not the present case. The general welfare clause was not limited by any precise definite specifications as to what acts the village council was authorized to prohibit by ordinance, and it was therefore empowered to enact any which, in purpose and effect, might come within the terms of the general welfare clause.

3. The judgment entered by the clerk was a money judgment against Meyer and his surety for the amount of the fine imposed below, with costs and disbursements there and on appeal. Evidently it was entered by the clerk under the provisions of section 5116. It is unnecessary for us to determine whether or not it was correct; for, if it was unauthorized and improper, it was first incumbent upon the judgment debtors to move to set it aside in the court below. Its validity could not be questioned on appeal, until application has been made in the district court to have it corrected. Levine v. Insurance Co., 66 Minn. 138, 68 N. W. 855. Judgment affirmed.

AMERICAN LIGHTING CO. OF BALTIMORE CITY *v.* MCCUEN, Superintendent, *et al.*

(*Court of Appeals of Maryland, Feb. 20, 1901.*)

[48 Atl. Rep. 352.]

Lighting Contract—Advertising for Bids*—When Contract Complete.

Where the superintendent of lamps regularly advertised for bids for lighting the streets of Baltimore, and set forth the specifications for

*See note at end of case.

the work, and a company made a written bid for the work, and was awarded the contract by the city board of awards, there was a complete contract between the city and the company; and Baltimore City Charter, § 15, providing that the successful bidder for city work shall promptly execute a formal contract, to be approved, as to its form, terms, and conditions, by the city solicitor, did not warrant the insertion of any terms and conditions not consonant with the contract already completed.

Same—Authority of Superintendent of Lamps to Appoint and Discharge Contractor's Workmen.

Baltimore City Charter, § 28, providing that heads of departments shall have the sole power of appointment and removal at pleasure of all deputies, assistants, clerks, and subordinate employees employed by them, does not empower the superintendent of lamps to appoint and discharge workmen in the employ of a contractor engaged in lighting the city under a contract.

Same—Same.

Baltimore City Charter, § 204, providing that the superintendent of lamps shall have under his charge and supervision the lighting of the city, does not authorize him to appoint and discharge workmen in the employ of a contractor engaged in lighting the city under a contract, since the contractor's doing the work is no interference with the superintendent's supervision and control of it.

Appeal from circuit court No. 2 of Baltimore city.

Bill for mandatory injunction by the American Lighting Company of Baltimore City against Robert McCuen, superintendent of lamps, etc., and others. From a decree dismissing the bill, complainant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Thos. R. Clendinen, Bernard Carter, and Wm. S. Bryan, Jr., for appellant.

Wm. Pinkney Whyte and Olin Bryan, for appellees.

FOWLER, J. The American Lighting Company, being a corporation incorporated under the laws of this state, filed a bill in circuit court No. 2 of Baltimore city for a mandatory injunction. The bill alleges that the superintendent of lamps and lighting, in the exercise of authority conferred upon him by the charter of that city, advertised in November last, according to the provisions of sections 14 and 15 of the charter (Acts 1898, c. 123), for sealed proposals for lighting the streets for the period of three years from March 1, 1901, and that he at the same time prepared specifications for the work for which proposals were invited; that the plaintiff made a written bid for said work, and, as required by the terms of the charter, filed it with the city register and the said superintendent of lamps; and that the contract for doing said work was duly awarded to the plaintiff by the board of awards. Section 15 of the city charter provides that "the successful bidder for city work shall promptly execute a formal contract, to be approved, as to its form, terms and conditions by the city solicitor." In accordance with this section a contract

was prepared and submitted to the plaintiff to be executed, but it refused to do so upon the ground that the city solicitor had introduced in the contract the following paragraph: "Second. That the said American Lighting Company of Baltimore City does upon its part agree that all the employees necessary to carry out and perform the requirements of said specifications shall be appointed by the superintendent of lamps and lighting, who shall have reserved unto him the right and power to remove at any time any of the said employees, as well, also, as the power to appoint all of said employees for the purpose of the proper performance of this contract." This right to appoint and discharge the employees of the contractor is based upon the provisions of sections 28 and 204 of the charter. The superintendent of lamps and the mayor having refused to execute a contract without incorporating therein the objectionable provision above quoted, the plaintiff filed this bill, so alleging, and praying that a mandatory injunction be issued, commanding the superintendent to execute and deliver a contract with the plaintiff in the form to be approved by the law department of the city of Baltimore, without containing the above clause. The superintendent of lamps and the city answered, and, without stating in detail the allegations of the answer, it is sufficient to say that they base their claim to appoint and discharge the employees of the plaintiff upon the provisions of sections 28 and 204, above referred to, and upon the contention that there was no valid, binding, and subsisting contract between the plaintiff and defendants when the contract was awarded to the former by the board of awards, but that it was necessary for the completion and consummation of the proposed contract that the "formal contract," provided for in section 15 of the charter should first be actually executed by the plaintiff. A pro forma decree was passed dismissing the bill, and the plaintiff has appealed.

1. We think there can be no serious contention that the advertisement, specifications, the bid of the plaintiff, and "the award of the contract" to it by the board of estimates, taken together, constitute a valid and complete contract. The city needed certain materials furnished and labor to be done in connection with the lighting of the city, and the officer under whose charge and supervision this lighting is placed by the charter, and in pursuance of its provisions, advertised for sealed proposals for furnishing the materials and doing the work in accordance with specifications filed in his office. Every fact necessary to constitute a contract will be found in one or the other of these written papers; and when the board of awards, composed of the mayor, the president of the second branch of the city council, the city register, the city comptroller, and the city solicitor, actually awarded the contract to the plaintiff to light the streets, etc., for a period of three years at their bid, the contract was as complete and legally

binding as if the more formal contract provided for by section 15 of the charter had been executed. The negotiation was ended. The minds of the parties met, and nothing remained to be done but to prepare and execute the more formal contract as provided by the charter. Such being the situation, it is well settled, both upon general principle and authority, that the contract is complete. Cheney v. Transportation Line, 59 Md. 557; Wills v. Carpenter, 75 Md. 80, 25 Atl. 415; Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, and note. It does not seem to us that the fifteenth section of the charter, relied on by the defendants to sustain their contention on this branch of the case, has any force; for while it does provide that the formal contract to be executed is to be approved, "as to its form, terms, and conditions, by the city solicitor," yet it could not be seriously contended that by virtue of this provision he could insert any terms and conditions not warranted by one or the other of the papers forming the contract that was awarded, or not authorized by the charter. Until the formal contract was prepared for execution, there was not only nothing in the negotiation nor in the written evidence of the contract to show that the plaintiff contemplated surrendering the right to employ and discharge his own workmen, but the specifications prepared by the defendants in terms provide that the plaintiff "must employ such number of men as is necessary to give the city the best service possible, who must be registered voters of the city of Baltimore, except those having in charge the management of said work and service."

2. But, as we have seen, the contention of the defendants is that the charter of the city, properly construed, does in fact confer upon the superintendent of lamps the power to appoint and discharge the workmen the plaintiff must have in his employ to do the work required by the contract. Such a claim is so unreasonable on its face that we would not only not expect, but we would be surprised, to find it sustained by an examination of the charter. The sections relied on are 28 and 204. The former provides that "heads of departments, heads of sub-departments, municipal officers not embraced in a department, and all special commissions and boards shall have the sole power of appointment and removal at pleasure of all deputies, assistants, clerks, and subordinate employees employed by them, unless otherwise provided in this article." There is nothing in this language which throws any light upon the question we are considering, which is whether the municipal official designated as the "Superintendent of Lights" has the power to appoint and discharge certain workmen in the employ of a contractor. This section gives to the heads of departments, etc., the sole power of appointment and removal of all subordinate employees employed by them, respectively, instead of leaving such appointments in the hands of the

mayor, as under the former charter. But before they can exercise this power the persons who are the subjects of such appointment or removal must be "employed by them." So that, while section 28 does clearly provide that certain officers and heads of departments shall have power to appoint and remove their own employees, yet there is nothing therein which enables us to decide who is or who is not such an employee. And, after all, that is what we have to decide here; for, if the men employed or in the employ of the contractor are employees of the superintendent of lighting, then, and only then, would he, under the terms of this section, have the power of appointment and removal thereby conferred. Nor do we think section 204 sustains the contention of the defendants. That section provides "that there shall be a superintendent of lamps and lighting, who shall be appointed by the mayor in the manner prescribed in section 25. He shall have under his charge and supervision the lighting of the city of Baltimore, and shall perform the duties now performed by the general superintendent of lamps and inspector and sealer of gas meters, and such other duties as may be prescribed by ordinances not inconsistent with this charter." Under this section the duties of the superintendent of lamps are prescribed, and he is to have charge and supervision of the lighting of the city. It is plain that he can have this charge and exercise this supervision as well whether the actual work is done under a contract with an independent contractor as when it is done by men employed by him. Thus under the former charter the city commissioner had charge of the grading and paving of streets (Code 1893, § 69), and it was always conceded that he could have the work done either by a contractor or by men directly employed by him; and under the same charter the general superintendent of lamps and inspector and sealer of gas meters, whose duties are by the new charter conferred upon the defendant the superintendent of lamps and lighting was authorized to make contracts for furnishing lamps and lamp pillars, and, indeed, for everything relating to lamps and lighting, except, perhaps, the actual lighting and cleaning of the lamps and the extinguishing of the lights. Section 3, art. 28, sections 95, 104, art. 48, and section 16, art. 28, of the Code of 1893. But, in addition to this, we are of opinion that the broad power conferred upon the superintendent by section 204, to have "under his charge and supervision" the lighting of the city, clearly carries with it the power, without an enabling ordinance, to make such a contract as the one here in question. No such power as this was given by the old charter to any officer recognized by it. We think it clear, therefore, that there is not only nothing in section 204 which denies to the superintendent of lamps the power to contract; but it appears to recognize that the necessary lighting may be done either in that manner, or by persons employed by the superintendent of lamps. The

Note

city solicitor concedes in his brief that "it would be greatly to the advantage of the city for contracts such as that proposed in this case to be made by the head of the department under whose supervision the work is to be done." "This would result," he says, "in a very great saving of money to the city, and be the means of getting much better returns for the money expended than could possibly be accomplished by the lighting being done in the usual way, by numerous employees of the city, without an independent contractor, who will have special supervision over them."

In our opinion, without further elaboration of a question which appears to be clear, we are of opinion that there is nothing in the sections referred to which sustains the contentions of the defendants, and we therefore hold: First, that the defendant the superintendent of lamps and lighting has power under the charter to make the contract in question with the plaintiff, subject, of course, to the ratification and award thereof by the board of awards; second, that the superintendent of lamps and lighting is not authorized by the charter to appoint and remove the workmen employed by the plaintiff in accomplishing the work contemplated by the contract. Decree reversed, with costs, and cause remanded.

NOTE.

Municipal Contracts—Advertising for Bids.

As a general rule the constitutional and statutory requirements concerning the advertisement for bids and the letting to the lowest bidder must be met by a strict compliance. Thus in Fones Bros. Hardware Co. *v.* Erb et al., 54 Ark. 645, a statute authorizing the county commissioners to advertise for plans, specifications, and bids, and to adopt one of the offered plans and accept the accompanying bid, was held invalid under a constitutional provision directing that the contract should be given to the lowest bidder. To the same effect, see Mazet *v.* City of Pittsburgh, 137 Pa. 548, 20 Atl. Rep. 693; People, Ream Pavement Co. *v.* Board of Improvement, 43 N. Y. 227.

A case somewhat similar to the principal case is that of Farman *v.* Com'rs of Drake County, 21 Ohio St. 311. There the statute required that the contract should be given to the lowest bidder furnishing sufficient security. And, as in the principal case, there was a requirement that the contract should be submitted to the county solicitor, and be found by him to be in accord with the terms of the act. The plaintiff made the lowest bid, and tendered as security a bond signed by nonresidents of the state. It was not contended that the security was not ample, but the commissioners demanded that the plaintiff should tender a bond signed by resident citizens, and upon his refusal to do so, awarded the contract to another. According to the principal case, the contract should have been declared complete upon the plaintiff's compliance with the terms of the statute; but it was held that the words, "sufficient security," vested the commissioners with ample discretion to require a bond signed by resident sureties.

The ruling in the principal case is in accord with the doctrine that where the parties have definitely settled upon all the terms of the contract, and there remains nothing but the embodying of those terms in a formal instrument, the contract is then and there complete. The doctrine is well understood, but the application is frequently of great difficulty. In an English case it is held that if in a public

advertisement for bids there is a statement that the successful bidder will have to sign a contract, the mere acceptance of the bid does not make a binding agreement. Kingston-upon-Hull Guardians of Poor *v.* Petch, 10 Exch. 610, 24 L. J. Exch. 23. If there is any doubt as to the exact understanding of the parties, it should be resolved against the existence of the contract. Weitz *v.* Des Moines Independent Dist., 79 Iowa 423, 44 N. W. Rep. 696.

TOWNSEND GAS & ELECTRIC CO. *v.* HILL, Mayor, *et al.*

(*Supreme Court of Washington, April 6, 1901.*)

[64 Pac. Rep. 778.]

Appeal—Statement of Facts—Record.

A statement of facts on which a case was tried will not be stricken out on appeal because not certified by the judge, where it is identified by the findings of the judge and by the accompanying record.

Appeal—Appeal Bonds—Not to Be Given Where Exempt City Is Real Party in Interest.

Where a city which is exempted from giving appeal bonds is the real party in interest in an action brought by public officers in its behalf, such officers are not required to give an appeal bond.

Judgment against City—Payable Out of What Fund—Erroneous Finding—Harmless Error.

On an issue as to whether plaintiff's judgment against a city was payable from the "indebtedness fund" or from the current expense fund, a finding that the indebtedness fund could not raise a revenue fund greater than about $5,000, when in fact the revenue was about $9,000, was harmless error; it appearing that the annual interest charge against such fund was more than $9,000.

Street Lighting—Special and General Funds—Impairment of Obligation of Contracts—Constitutional Law.

A city having authority to raise a light fund by special taxation created such fund, but executed a contract with plaintiff for lighting, creating a general liability, and not specifying the fund from which it was payable. Subsequently the power to continue the light fund was taken away, and by Laws 1897, p. 222, the city was required to maintain a "current expense" fund and an "indebtedness" fund; and section 5 declared payable out of the indebtedness fund "all warrants, certificates and all other obligations and indebtedness." Pending litigation of plaintiff's claim, for which he secured judgment, the lien of other debts attached to the indebtedness fund, heavily incumbering it: *held* that, as plaintiff's remedy under the contract was for payment out of the general fund, a construction of the statute sending plaintiff to the indebtedness fund would so lessen his remedy as to impair the contract, and that another construction, though not the most obvious, would be preferred to one rendering the act unconstitutional.

Same—Contractor Payable Out of What Fund—Construing Statute—Ejusdem Generis.

Particular words in a statute followed by general words limit the general words; hence, in the provision that warrants, certificates, and all other obligations were payable out of the indebtedness fund, the words "all other obligations" were limited to the same class as those represented by "warrants," and, as plaintiff's claim was not fixed at the institution of the indebtedness fund, it was not payable out of such fund.

Appeal from superior court, Jefferson county; Frank T. Reid, Judge.

Townsend Gas & Electric Co. *v.* Hill

Action by the Townsend Gas & Electric Company against D. H. Hill, as mayor, and August Duddenhausen, as clerk, of the city of Port Townsend. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

A. W. Buddress, for appellants.
Harry Ballinger, for respondent.

PER CURIAM. This action was begun by the respondent in the superior court of Jefferson county, for the purpose of procuring a writ of mandate against the appellants, as the mayor and clerk, respectively, of the city of Port Townsend, requiring them to issue to the respondent warrants drawn upon the current expense fund of said city to pay the balance due respondent from the city on a judgment, and also a claim subsequently allowed by the city council, all of which was for street lights furnished under a contract between respondent and said city. The court granted a peremptory writ of mandamus, and from such judgment the defendants have appealed to this court.

The case was heard below upon an agreed statement of facts, and without the introduction of any evidence other than that shown in such agreed statement. Respondent has moved to strike such statement on the ground that it is not certified by the judge who tried the cause, but we think it is sufficiently identified by the court's findings and by the accompanying record to warrant us in denying the motion.

Respondent's motion to dismiss the appeal for want of an appeal bond is also denied, as we believe the better reason lies in favor of the rule that public officers appealing in behalf of political corporations exempted by law need not furnish an appeal bond. The action is brought against the appellants as officers of the city, and not in their individual capacity. We think it is clear that the city is the real party in interest, and therefore the same exemption applies here that would have applied had the city itself been the appellant. In support of this view, see citations in 1 Enc. Pl. & Prac, pp. 968, 969; also Lamberson v. Jefferds, 116 Cal. 492, 48 Pac. 485.

This case has been exhaustively argued upon the merits in the briefs of the respective counsel, and numerous suggestions and citations of authorities have been made by each. A comprehensive review of them all would require more space than we deem necessary for the determination of the case. From the facts as found, the court found, as a conclusion of law, that respondent was entitled to a peremptory writ of mandate commanding appellants to issue warrants upon the current expense fund of said city for the amount of respondent's claims, and judgment was entered accordingly. Appellants except to the court's twenty-second finding of fact, which is "that, aside from said delinquent taxes, said indebtedness fund cannot raise a revenue by taxation greater than about the sum of $5,000. Based upon the agreed statement of facts, the

amount found is doubtless an error, as the sum would probably be about $9,000. But, since the last-named sum is less than the annual interest charge against said fund, we do not think the error materially affects the merits of this controversy. We do not deem it necessary to discuss the other exceptions specifically, since we believe the remaining findings challenged are substantially in accord with the agreed statement of facts.

The remaining question is, did the court err in its conclusion of law? In Townsend Gas & Electric Co. v. City of Port Townsend, 19 Wash. 407, 53 Pac. 551, this court held that the charter provision in the law of 1881 under which the city of Port Townsend was incorporated, and which authorized the creation of a light fund by special taxation, is simply permissive, and is not restrictive of the power to contract for general liability. This contract was general in its terms, and undoubtedly created a general liability, as held in the last-named case. The power to continue the special light fund was lost by the city when it reincorporated in 1896. Appellants' contention that these claims should be paid from such light fund cannot prevail, because neither is such fund in existence, nor can it be created. Since the act of 1897 (Laws 1897, p. 222), cities of the class of Port Townsend are required to maintain a "current expense fund" and an "indebtedness fund." Appellants contend that, if respondent's claims are not to be paid from a special light fund, they must be paid from the indebtedness fund, because the obligation was incurred prior to February 1, 1898, when the indebtedness fund was established, on the theory that all obligations incurred before said date can only be paid from said fund. If the law of 1897 required the payment of these claims from the indebtedness fund, we believe it would be void, as to this particular contract, as impairing its obligations. The court's findings, as well as the agreed statement of facts, show the indebtedness fund of the city to be incumbered by about $90,000 of outstanding warrants which were not chargeable to any general fund of the city prior to the performance of the services by respondent under its contract. Respondent's remedy under its contract was for payment from the general fund, and if it should now be sent to the indebtedness fund for payment, after the city resisted and litigated its claims, as shown by the record, pending which resistance this large judgment incumbrance attached, it would seem to us not only unconscionable and inequitable, but would so greatly lessen the value of respondent's remedy as to clearly impair its contract. Any construction, even though not the most obvious, which will sustain a law, will be preferred to a construction which will render it unconstitutional. Cooley, Const. Lim. (5th Ed.) 220. The indebtedness chargeable against the indebtedness fund as provided by section 5 of the act of 1897 embraces "all warrants, certificates and all other obligations

and indebtedness of the city, with the interest thereon, for the payment of which no provision is made by law, by the levy of a special tax," etc. Applying the rule of construction that particular words in a statute followed by general words limit the general to the same class as the particular, the words "all other obligations," etc., would be limited to obligations and indebtedness of the same class as those represented by warrants and certificates, viz. liquidated and ascertained obligations,—indebtedness not requiring any act to fix the liability of the city; and such obligations should be fixed and ascertained at the time of the institution of the fund. We think it our duty to so construe the statute. Respondent's claims were not finally fixed and ascertained at the time of the institution of the fund, but were still in dispute, and a large portion thereof in litigation. We therefore conclude that respondent is entitled to have its claims paid in warrants upon the current expense fund, and that the peremptory writ of mandate was properly issued. The judgment is affirmed.

MEALEY *et al. v.* MAYOR, ETC., OF CITY OF HAGERSTOWN *et al.*

(*Court of Appeals of Maryland, Feb. 21, 1901.*)

[48 Atl. Rep. 746.]

Municipal Lighting Plant—Authority to Establish—Conflict of Statutes—Constitutional Law.

Laws 1900, c. 75, entitled "An act to provide for the establishment of an electric light plant in Hagerstown, Maryland," authorized the corporation of Hagerstown to establish a municipal plant. Const. art. 3, § 33, declares that the general assembly shall pass no special law for any place for which provision has been made by an existing general law; and article 23, § 30, class 17, in force in 1900, authorized the formation of gaslight and electric light companies in the county in which Hagerstown was situated: *held* that, the title of the act of 1900 having been passed at a time when the legislature had no power to incorporate a private corporation for the purpose of establishing an electric light plant in Hagerstown, and the title not using language that could properly cause one to conclude that it was to be established by private enterprise, it would be presumed that the establishment of a plant authorized by the statute was to be by the municipality, and hence the act was not invalid as in conflict with Const. art. 3, § 29, requiring that every law shall embrace but one subject, which will be described in its title.

Same—Contract to Supply Lights for Term of Years—Option to Renew—Impairment of Obligation—Ultra Vires.

Code Pub. Local Laws, art. 22, § 191, as amended by chapter 85, Laws 1892, gives the board of street commissioners of Hagerstown control of the town lighting, with power to provide necessary labor and appliances therefor, and to contract for lighting: *held* that, where the board contracted for lighting for five years, which contract was to be renewed at the expiration of five years at the option of the contractor, if in the meantime he should have established a central station for the production of electric power for operating machinery in the city, the act of 1900, authorizing the city of Hagerstown to

construct a municipal plant, and forbidding its purchasing electricity, was not invalid as impairing the obligation of the renewal portion of the contract, since, the consideration for the right to renew having been the supplying of power to individuals, rather than the city, such portion of the contract was ultra vires.

Ultra Vires Lighting Contract*—City Not Estopped to Plead Invalidity of.

The expenditure of money on the faith of a contract made with a municipal corporation does not estop the corporation from pleading that the contract is ultra vires.

Appeal from circuit court, Washington county, in equity; Edward Stake, Judge.

"To be officially reported."

Suit by Edward W. Mealey and others against the mayor and council of Hagerstown and others. From a decree sustaining a demurrer to the complaint, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and PAGE, PEARCE, FOWLER, BOYD, JONES, BRISCOE, and SCHMUCKER, JJ.

I. Clarence Lane, Alex. Neill, and Edgar H. Gans, for appellants.

Buchanan Schley and I. A. Mason, for appellees.

BOYD, J. This appeal brings before us for review the pro forma decree of the court below sustaining a demurrer to the amended bill of complaint filed by the appellants against the appellees. The appellants are taxpayers of Hagerstown, and seek to enjoin the defendants from contracting for the construction of an electric light plant, from the purchase or lease of any land or property for that purpose, from issuing or selling any bonds for the purpose of raising money to pay for such electric light plant, land, or other equipments, and from levying or collecting any taxes for the payment of the interest or principal of any such bonds. The defendants are the mayor and council of Hagerstown, the board of street commissioners, and the tax collector. A contract was made in November, 1895, between the board of street commissioners of Hagerstown and Powell Evans for lighting the streets, avenues, and highways of that city with electric light for the period of five years from January 1, 1896, with a provision for renewal for another five years, which we will have occasion to consider. The Hagerstown Railway Company of Washington County,

*Upon the general subject of ultra vires light and water contracts, see City Council of Dawson v. Dawson Waterworks Co., 2 Mun. Corp. Cas. 73, and note; note appended to Thompson v. Town of Elton, 5 Mun. Corp. Cas. 732; Gaslight & Coke Co. v. City of New Albany, 6 Mun. Corp. Cas. 911; State v. City of Pullman, 6 Mun. Corp. Cas. 299; Roberts v. City of Fargo, 6 Mun. Corp. Cas. 698. As to the power of the municipality to revoke the franchise of a gaslight company, see City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 4 Mun. Corp. Cas. 274; St. Paul Gaslight Co. v. City of St. Paul, ante, p. 154.

Md., is alleged to be the assignee of that contract, and is one of the complainants. It is averred in the bill that the company has done all that was necessary to entitle it to a renewal of the contract for five years from January 1, 1901, and that it had applied for such renewal to the board of street commissioners, who has declined and refused to renew it. An act was passed in 1898, being chapter 381 of the Laws of that year, giving the corporation power to issue bonds "for the purpose of establishing or assisting in establishing a plant in Hagerstown to be used for the purpose of generating electric power to supply light and power, or either of them, to the citizens of Hagerstown"; and then chapter 75 of the Laws of 1900 was passed, authorizing the corporation of Hagerstown to establish a municipal plant. The latter law is alleged by the appellants to be invalid on several grounds. The first of these which we will consider is its title, which is "An act to provide for the establishment of an electric light plant in Hagerstown, Maryland." The provision of article 3, § 29, of the constitution, that "every law enacted by the general assembly shall embrace but one subject and that shall be described in its title," has been before this court as frequently as any in that instrument. In Davis v. State, 7 Md. 151, in which a similar provision in the constitution of 1851 was before the court, its object was said to be to prevent "ingrafting upon subjects of great public benefit and importance, for local or selfish purposes, foreign, and often pernicious, matters" and to enable the members of the legislature to know from the title the character of the legislation proposed. In State v. Norris, 70 Md. 91, 16 Atl. 445, it was said: "The objects designed to be obtained by the constitutional provision are twofold: The first is to prevent the combination in one act of several distinct and incongruous subjects, and the second is that the legislature and the people of the state may be fairly advised of the real nature of pending legislation." In the case first cited the title was "An act regulating inspections in the city of Baltimore," and in the latter "An act to add a new section to article 30, of the Code of Public General Laws, title 'Crimes and Punishments,' sub-title 'Rivers,' to come in after section one hundred and seventy-one." In each instance the title was held to be a sufficient compliance with the constitutional provision, although the subject of the act before the court in the last case was the prevention of dredging, taking, and carrying away of sand and gravel from the bed of the Potomac river, and prescribing the punishment for its violation. Judge Alvey, in delivering the opinion, said: "Many acts are passed, and often of great importance, the titles of which are exceedingly deficient in definite and clear description of the subject-matter of the act. But this court has ever been reluctant to defeat the will of the legislature by declaring such legislation void, if by any construction it could possibly be maintained." So, in State v. Fox, 51 Md. 412, a

title which read, "An act to add an additional article to the Code of Public Local Laws, to be entitled 'Garrett County' "; and in Mayor, etc., of City of Baltimore v. Keeley Inst., 81 Md. 106, 31 Atl. 437, one reading "An act to provide for the treatment and cure of habitual drunkards,"—were sustained. In the former, among other things, the act declaring it to be a felony to knowingly enter upon the lands of another, and cut down, without his permission, timber of certain sizes, with intent to appropriate it to the use of the party so entering; and in the latter case the act imposed the expenses of the treatment of the habitual drunkards on the city or counties, under the order of court. Many other instances could be furnished from the reported cases in this state of titles that have been upheld which are as indefinite and meager as those we have already mentioned. As a rule, those which have been held to be contrary to this provision were misleading, and calculated to lead the legislature and others to believe that one kind of legislation was proposed, while another was attempted to be enacted, which was not germane to the subject mentioned in the title. No one could read this title without knowing that it was proposed to authorize the establishment of an electric light plant in Hagerstown. But it is argued on the part of the appellants that it does not show that it was to be established by the municipality, as the provisions of the act contemplate. It cannot be doubted that the title could have been made more definite, and less liable to be questioned, by slight changes. If it had said "a municipal electric light plant," or, as seems to be conceded by the appellants, if it had read "by Hagerstown," instead of "in Hagerstown," it would have been sufficient. But there is nothing in the title to lead any one to believe that it was to be established by some private corporation, and not by the municipality. The worst that can be said of it is that it does not say by whom it was to be established. It certainly does not suggest any attempt to create a private corporation for that purpose, or to amend the charter of one already incorporated. In the first place, that is not the way that corporations are created or charters are amended, and, besides, there was in 1900 a general law, in force in Washington county, for the incorporation of electric light companies. Section 30, class 17, of article 23 provides "for the formation of gas light or electric light companies," and section 111 of that article, as amended by Act 1894, c. 308, gives corporations formed under that article "full power to manufacture and sell and furnish such quantities of electric light or electric power as may be required or desired in any city or town of Kent, Talbot, Somerset, Carroll, Montgomery or Washington counties, of this state, in which or adjoining which the same may be located, for lighting the streets, roads, public or private buildings, or for motive power or for other purposes." Section 33 of article 3 of the constitution provides that "the general assembly shall pass no

special law for any case for which provision has been made by an existing general law," and section 48 of same article provides that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and except in cases where no general law exists, providing for the creation of corporations of the same general character as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void." The legislature, therefore, had no right to create in 1900, by special act, a corporation in Washington county to establish an electric light plant, but it did unquestionably have the authority to authorize the municipality of Hagerstown to do so. When, then, it did have before it "An act to provide for the establishment of an electric light plant in Hagerstown, Maryland," was it not a fair presumption that it was proposed to give the authority to the municipality? Would any one, with the knowledge of the existing law (and the members of the legislature and others are presumed to have knowledge of it), be misled into the belief by the wording of that title that it was not the municipality that the authority was to be given to? Even if it be conceded that it was possible to give some other corporation or some individual the power to establish an electric light plant there under such a title, would it not be notice to the legislators and the public that an act was pending, which presumably was intended to confer upon the municipality the right to establish an electric light plant, and to call upon them to inquire into it if they thought proper to do so? If it be a sufficient compliance with this requirement that an act be entitled "An act to amend article 95 of the Code of Public General Laws by adding an additional section thereto," as was decided in Association v. Newman, 50 Md. 62, or "An act to add an additional section to article 93 of the Code of Public General Laws of Maryland, to come in after section 326, and to be known as section 326 A," as was determined in Garrison v. Hill, 81 Md. 551, 32 Atl. 191, why should this act be declared invalid on the ground that its title does not show who was to establish the plant? No one, from reading those titles, could have known what amendments to those articles were proposed, but they did know that some amendments were contemplated, and those interested in ascertaining what they were were called upon to examine the acts. No taxpayer in the city of Baltimore or in the counties was informed by the title of "An act to provide for the treatment and cure of habitual drunkards" that it was proposed to treat them at the expense of the public, but the title was held sufficient. The courts are not authorized to declare legislation invalid merely because the title has not disclosed how an act is to be carried out. Nor is it necessary to state the details of the act. All that can reasonably be expected or required is that the title shall give such notice of the legislation as would attract the attention of the ordinary

reader, and not be misleading as to the object of the statute. This act provided for its submission to the qualified voters at Hagerstown before it was to take effect. It was passed at a time, as we have seen, when the legislature had no power to incorporate a private corporation for such purposes. The title did not use language that could properly cause any one to conclude that the plant was to be established by private enterprise, and not by the municipality; and the presumption was, under the circumstances, that the establishment of a plant of this character "in Hagerstown" was to be "by Hagerstown." It was said at the argument that municipal ownership of lighting plants was unusual in this state. There is nothing in the record on that subject, but we know that, at the time this law was passed, in Cumberland and Frederick, the county seats of counties adjoining Washington, they were owned by the municipalities, and therefore we cannot assume that any one was or could have been misled for that reason. We are of the opinion that the act was not invalid by reason of the title, and, without discussing the various sections of the act, we do not find anything in them that is not germane to the subject-matter.

We will next consider the effect of the provision of the act which prohibits lighting at municipal expense of the streets, etc., after this plant is put in operation and completed. In doing that we are called upon to construe the contract made by the board of street commissioners of Hagerstown with Powell Evans on November 11, 1895, as the appellants contend this act impairs the obligation of that contract, and is void for that reason, as the legislature would not have authorized the municipality to build its own plant and prohibit the payment for municipal lighting to any other party, if it had known of this contract; and therefore this whole act must fall. It provides that the party of the second part (who was Evans) "shall have the contract for lighting the streets, avenues, and highways of Hagerstown with the Schuyler or any other equally as good system for a period of five years after this contract is in force, beginning on or before January 1, 1896." Then, after some provisions which do not affect this controversy, there follows the clause which is specially involved in this case, and which is as follows: "And said party of the second part shall have the like contract for a further period of five years, or ten years in all, provided, before the termination of the five years said party of the second part or his assigns shall have developed, or caused to be developed, one of the sites known as dam Nos. 4 or 5 on the Potomac river, or any other site on the Potomac river, or any other sort of central station of like capacity to the one on the Potomac river, to supply electric power for operating machinery in Hagerstown, in accordance with the provisions of the ordinance granted Powell Evans or his assigns for that purpose by the mayor and council of Hagerstown." The contract authorized

Evans to assign it, and the bill alleges that it was assigned to the Hagerstown Railway Company of Washington County, Md., which is "entitled to the exercise of all the rights given under said contract or under the ordinances aforesaid." The charter of the railway company is not filed with the bill, and we have nothing before us as to its power to make a contract for furnishing light to Hagerstown, excepting the general allegations above. If it is only incorporated as a railway company, and has not had the power of an electric light company conferred on it, it might well be questioned whether it could make such a contract as the one before us; but under the allegations in the bill we will assume, in passing on the demurrer, that it has such power. Section 191 of article 22 of Code of Public Local Laws, as amended by chapter 65 of Laws of 1892, provides that: "The said board of street commissioners shall have control of the lighting of the town, with power to provide the material, employ lighters and other necessary labor, and to make all needful provisions therefor, and to make such changes or alterations as from time to time they may deem proper or necessary, with the power to contract with any person, corporation or association for such lighting: provided that the cost under any such contract for lighting shall not exceed the sum of six thousand dollars for any one year, nor shall such contract be made for a period exceeding ten years." The mayor and council are then authorized and required to provide for the cost of lighting, etc. The street commissioners, by the contract above set out, contracted for five years, beginning on or before January 1, 1896, and undertook to give Evans or his assigns the right to contract for five more years, provided he or his assigns developed or caused to be developed one of the sites on the Potomac river, "or any other sort of central station of like capacity to the one on the Potomac river, to supply electric power for operating machinery in Hagerstown." The bill alleges that the railway company, the assignee of Evans, has performed all the conditions required by the contract, and had erected a central station of like capacity to the site on the Potomac river, and is now able and ready to supply electric power for operating machinery in Hagerstown. The question, therefore, to be considered by us is whether the board of street commissioners had the power to provide for a renewal on such conditions.

Section 191 of the charter, above cited, gave them the power to make a contract for lighting the town for a period not exceeding ten years; but they did not make the contract for that period, but only for five years. They undertook to bind the city for an additional term of five years, provided Evans complied with the conditions named; but did not bind him to furnish the lights for that period. He was therefore in the position that if, at the end of the first five years, he thought the contract price was a desirable one, he could con-

tinue it by complying with the conditions; but, if it was not to his advantage, he could simply decline to do so. It is therefore not as if the contract had been made originally for ten years, and both parties were bound by it. Keeping that in view, let us see what the consideration was to be to entitle Evans or his assigns to the renewal. The contract itself determines that, as it provides he could have it if he developed one of the sites on the Potomac river, or a central station of like capacity, "to supply electric power for operating machinery in Hagerstown, in accordance with the provisions of the ordinance granted Powell Evans or his assigns, for that purpose by the mayor and council of Hagerstown." The ordinance which had been passed the previous May authorized him, his heirs and assigns, to erect poles and string wires for the purpose of supplying electric current within the corporate limits, "provided that an electric current for motive power for machinery shall be supplied in the city of Hagerstown as a necessary condition of the use of the powers conferred in this ordinance." The street commissioners have nothing to do with supplying electric power for operating machinery. Their powers were limited, by the terms of the charter, to the discharge of the duties therein enumerated, and such other matters as are incident to them. It is true that anything they might incidentally do for the benefit of the citizens of the town in connection with their duties would not necessarily invalidate what they were authorized to do, if it did not involve the expenditures of public moneys, for the benefit of private parties; and hence it was held by the circuit court for Washington county in the case of Mayor, etc., of Hagerstown, against Board of Street Commissioners et al., referred to at the argument, that paragraph 7 of this contract, requiring Evans to furnish and maintain an incandescent lighting system, did not render the contract for five years invalid, as the evidence showed that it in no wise affected the price paid for the lights, but this clause presents another question. The consideration for the renewal is set forth on the face of the contract, and, that not being for the benefit of the municipality, for which the commissioners could act, but for the benefit of such parties as may have occasion to use electric power for operating machinery, they had no authority to bind the successors to enter into a contract to pay the price named for another term of five years, in order to aid those engaged in operating machinery. The case being before us on the demurrer to the bill, there is, of course, no evidence on the subject: but when we see the one party demanding the fulfillment of the contract and the other refusing to carry it out, we cannot fail to reach the conclusion that it is because the one believes it to be beneficial to it, and the other thinks it not advantageous to it. Nor can we be unmindful of the fact that the uses of electric currents have rapidly developed during the last five years, and were being developed, improved,

and made less expensive when this contract was made. If the street commissioners had thought it desirable for the city to renew the contract on the terms provided for during the first five years without any further requirements of Evans, presumably they would not have inserted a condition of this character, but would have contracted for the ten years, if Evans was willing, or would at least have given him the option without this condition. But the inducement for the renewal is shown by the terms of the contract itself to be the advantage that is to accrue to parties other than those the commissioners represented. Evans or his assigns might have expended large sums of money to enable him to perform the contract for the first five years, but that would not have given him a right to a renewal, and, therefore, was not the consideration for it. It was only in the event that he performed the conditions of which we have been speaking that he was to have "the like contract for a further period of five years," and we cannot escape the conclusion that it was for that consideration alone the commissioners undertook to bind themselves or their successors to enter into a contract five years afterwards, which at best might or might not be a desirable one for the city to make then. That they were not authorized to do, and, having agreed to renew the contract on condition that Evans would do what would benefit private enterprises, but not the municipality, for which they could alone act, their agreement is not binding on it.

Many cases might be cited which have held that even the mayor and council cannot use the public funds or involve the credit of a municipality to accomplish ends that will only benefit the few, and not the public at large,—at least without express authority from the legislature; and there is no reason why a board of limited powers, such as this, should be permitted to do so. It is true, as we have seen, that they could have made a contract for ten years; but when they undertook to make an arrangement by which Evans was only bound for five years, but their successors would be for another five years, if Evans or his assigns desired to so bind them, on the sole condition that he should do something for the advantage of private parties (and even a limited class of them), which would not benefit the municipality which they represented, the moving cause for the renewal is clearly shown to be one that the court cannot sanction, or hold to be within their powers. This is not such a case as that of Bear Creek Fertilizer Co. v. City of Baltimore, 87 Md. 84, 39 Atl. 530. There the contract was for two years, "with the privilege of renewal," which the mayor and two other officers were authorized to make by virtue of an ordinance duly passed. The ordinance was still in force, and this court held that those three officers could not decline to renew the contract; and, if the city desired to get rid of it, the legislative body, the city council, would have to repeal it. But, independent of that distinction, that

was merely a contract for the term of two years, with a privilege of renewal, not dependent upon conditions not in the original contract. The Bear Creek Fertilizer Company or its assigns was entitled to a renewal at the end of the two years unconditionally, excepting, of course, it must have performed its contract for the original period. But here, as we have seen, although Evans or his assignee may have performed his contract to the very letter, and may have expended large sums of money to enable him to do so, he could not, for those reasons, demand a renewal; nor could he, for any reason other than the one stated above, make such demand. The original contract gave the municipality all it could possibly want or require, if the price was satisfactory. Evans had contracted to supply and maintain in Hagerstown an electric arc plant "sufficient to light the streets, avenues, and highways of said town with electric arc lights as required by this contract." The power of the lights, and many other details, were stated, and he was even required to furnish an incandescent lighting system of not less than 1,200 lights of 16 candle power at prices therein named. But, notwithstanding all that, his right to a renewal was dependent solely and exclusively upon his supplying electric power for operating machinery by developing a site or central station such as we have mentioned; thus clearly showing that that, and not the terms of the original contract, was the inducement to bind the city for another term of five years, even if it paid too much for its lights, or did not have enough of them to properly light the streets, etc. Nor can the fact, if that be conceded, that Evans or his assigns has, on the faith of the agreement, expended money to perform his part of the new contract, estop the municipality, or in any way prevent it, from setting up this defense. Every one dealing with the officers and agents of a municipal corporation is charged with knowledge of the nature of their duties and extent of their powers; and hence a municipal corporation may set up a plea of ultra vires, or its own want of power under its charter or constituent statute to enter into a given contract, or to do a given act in excess of its corporate powers and authority. 15 Am. & Eng. Enc. Law, 1100, 1101, where many authorities are cited, including Mayor, etc., v. Eschbach, 18 Md. 276; Hown v. Mayor, etc., 30 Md. 218, and Mayor, etc., v. Musgrave, 48 Md. 272.

The board of street commissioners having no power to thus bind their successors to renew the contract, it of course follows that the objections urged to the act of 1900 that it impairs the obligation of a contract cannot be sustained, and we are relieved of the discussion of some other questions suggested. It becomes unimportant to determine how far a municipality can give the exclusive right to one company to supply electric current, etc., within its corporate limits. The ordinance only undertook to give it "for the length of time said Evans or assigns now have the contract for lighting the

streets of Hagerstown." Having determined that he did not have it beyond the five years, it would be useless to discuss the effect of that provision. Nor is it necessary to determine, under the allegations in this bill, how far the municipality can furnish electric power to its citizens. It is certainly authorized to provide for lighting the streets and other public places within the corporate limits. We do not understand it to be seriously questioned that it can furnish light to its citizens if the act of 1900 is valid. There are many cases which establish the right of a municipality owning its plant for lighting to provide light to its citizens just as it may supply them with water, if the legislature so authorizes. Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla. 229, 18 South. 677, 30 L. R. A. 540; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487. See, also, cases collected in 10 Am. & Eng. Enc. Law (2d Ed.) 865. The pro forma decree sustaining the demurrer and dismissing the amended bill of complaint will be affirmed. Decree affirmed; costs to be paid by the appellants.

CITY OF EAU CLAIRE *v.* PAYSON *et al.**

(Circuit Court of Appeals, Seventh Circuit, April 9, 1901.)

[107 Fed. Rep. 552.]

Jurisdiction of Federal Courts—Citizenship of Parties—Suit by Assignee.

A trustee in a mortgage executed by a water company, claiming the right by virtue of the provisions of such a mortgage to collect rentals due the company, cannot maintain an action against a city to recover an amount alleged to be due the company as rentals in a federal court, where the company and city are corporations of the same state; his sole right to maintain such an action being as assignee of the contract between the city and company.

Equity Jurisdiction—Action on Contract—Enforcement of Legal Liability.

A right of action against a city to recover rentals alleged to be due it under a contract with a water company is at law, and the fact that the company has made an equitable assignment of the contract by way of mortgage does not give the assignee the right to sue thereon in equity, merely because his own interest is equitable, and he cannot, by joining the city as defendant, have its rights determined in a suit to foreclose the mortgage. The city is entitled to have its rights and obligations under such contract determined by a trial in a court of law.

Same—Requiring Partial Payment on Unadjudicated Claim.

A court of equity, in a suit to foreclose a mortgage on the property of a water company, in which it has appointed a receiver, has no power to require a city to pay to such receiver a sum on account of alleged indebtedness to the mortgagor for water rentals, which is denied by the city and has not been adjudicated.

---

*For opinion on rehearing, see next case.

City of Eau Claire *v.* Payson

Appeal—Appealable Order.

An order made by a court requiring a city to pay a sum to a receiver on account of a disputed claim against the city, which makes no provision for the return of the money in any case, is appealable as a final decree, although it leaves the question of the city's ultimate liability for future determination.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This suit was brought by the trustee in a deed of trust executed by the Eau Claire Waterworks Company to secure a series of bonds, and by holders of the bonds, for the purpose of obtaining a decree of foreclosure. Besides the water company, the city of Eau Claire was made a defendant, and relief asked against it on the ground that by the ordinance under which the waterworks were constructed the city became bound to levy a special annual tax for the payment of hydrant rentals, the proceeds of the tax to be set apart as a "fire hydrant fund," applicable exclusively, as provided in the ordinance and in the trust deed, to the payment of interest upon the bonds. The bill alleges that "hydrant rentals, amounting to twenty-four thousand and fifty-four dollars" (three semiannual installments), "have heretofore been collected by the defendant city, by special tax therefor, and are now on hand in the treasury of the defendant city as a special fund for the payment of said interest," and prays that the trust deed may be declared a lien thereon, that the city be decreed to pay the same to the trustee, and further asks the appointment of a receiver, with the usual power over all the property, rights, and franchises of the water company, and of the moneys which are or shall become owing by the city for hydrant rentals or otherwise. A copy of the ordinance referred to is set out, and the following provisions thereof have been emphasized in the briefs and oral argument:

"Sec. 6. * * * And a sufficient tax shall be levied and collected annually upon all the taxable property on the assessment roll of the city of Eau Claire, to meet the payments under this ordinance when and as they will respectively mature during the existence of any contract for hydrant rentals, which tax shall be irrepealable; and in case the city of Eau Claire shall be authorized [and such authority was given by the act of February 18, 1885] to levy a special tax for such purchase [purpose], such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund, known as 'Fire Hydrant Fund,' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed. * * *"

The ordinance also contained provisions imposing obligations upon the water company in respect to the character, construction, capacity, maintenance, and extension of its plant, requiring it, among other things, to supply the city and its inhabitants with "good and wholesome water, suitable for

domestic, manufacture and fire purposes," and to have a filtering apparatus "so constructed, operated and maintained as to furnish at all times suitable water for domestic use." Upon the filing of the bill and service of process, the waterworks company at once appeared and answered, and thereupon the court appointed the appellee W. H. Willard receiver, and directed him to take immediate possession of all the property of the company, to conduct the company's business, to continue the operations of the plant, to institute and prosecute all suits, actions, and proceedings necessary in his judgment for the protection of the property and the trust vested in him, to defend suits and actions, and out of the money coming into his hands "in the operation of said properties" to pay, in their order, current expenses, taxes, and assessments, sums due employees, officers, or attorneys for services rendered during the past six months, and for supplies furnished during that period, and, with the sanction of the court, amounts necessary to protect the property from sale under leases, pledges, mortgages, or contracts; "and the money belonging to said company, not used as hereinbefore provided, shall be held by said receiver until he is authorized to dispose of the same under the order or decree of this court."

This appointment was made on July 2, 1900. On the ensuing 23d, upon the verified petition of the receiver,—not filed, apparently, until two days later,—the court ordered the city of Eau Claire to show cause, if any it had, on or before August 3, 1900, why an order should not be made in accordance with the prayer of the petition, and that the city serve upon the solicitor of the petitioner, five days before the day of the hearing, "any and all papers or documents of every kind and description" which the city desired to use at the hearing. The petition of the receiver, in substance, reiterated the averments of the bill, and prayed an order requiring the city and its treasurer to attorn to the petitioner, and forthwith pay to him the rentals due to the amount of $24,054, and a further sum of $400 alleged to be due. On the day appointed for the hearing the city entered a written appearance by its solicitor "for the purpose of objecting to the relief prayed for in the order to show cause," and submitted "affidavits for such purpose only, and to show that the relief prayed for should not be granted, and not for the purpose of submitting on this motion, or in this action, for determination, the question of what amount, if any, is due from the city of Eau Claire to the Eau Claire Waterworks Company, the trustee or receiver, the said city objecting that said question cannot be determined on this motion or in this action, and it does not desire in any manner to waive its said objection."

The affidavits of the city clerk and other officers, read at the hearing on behalf of the city, besides denying performance of the contract by the waterworks company, show that whatever taxes had been levied and collected for the payment of water

rental had been included in a general levy for city purposes, and "that no special tax was levied or assessed by said city of Eau Claire for the year 1898, the year 1899, or the year 1900, or at any other time, to deponent's knowledge, as a special or separate tax for the payment of hydrant rentals, either under the name of the 'Fire Hydrant Fund,' or under any other name whatever; that there is no fund in the hands of the city treasurer of said city known as the 'Fire Hydrant Fund'; there is no separate fund in his hands collected or kept for the purpose of paying hydrant rentals; that all moneys heretofore paid to the Eau Claire Waterworks Company, for hydrant rentals, while deponent has been city clerk of said city, and prior to that time, as far as deponent knows or can ascertain, have been paid out of the general fund of said city on verified claims of said Eau Claire Waterworks Company, presented to the common council of said city from time to time, and allowed by the council in the manner that other claims are presented against, and allowed by, said city."

The court having heard the affidavits and the arguments of counsel, and, as the entry reads, "it satisfactorily appearing to the court that there is now in the treasury of the defendant city of Eau Claire funds collected by said defendant city, by taxation, for the purpose of paying hydrant rentals contracted to be paid for by said defendant city of Eau Claire to the defendant Eau Claire Waterworks Company, in and by the ordinance contract under which said waterworks company constructed said waterworks plant at Eau Claire, and it appearing to the satisfaction of the court that said complainants have a lien in equity upon said funds so collected by the said city of Eau Claire, now in the treasury thereof, for the payment of hydrant rentals, and the court being sufficiently advised," on motion of the solicitor for the receiver, "ordered that said defendant city of Eau Claire do, within ten days after the service of a copy of this order upon the mayor, city clerk, and city treasurer of the defendant city of Eau Claire, pay over to said W. H. Willard, receiver herein, a portion of said funds so collected by said city of Eau Claire, for the payment of hydrant rentals, to wit, the sum of sixteen thousand and thirty-six dollars, and that said city may retain the residue of said funds so collected for the payment of hydrant rentals claimed by the complainants to be due, until the further order of the court, it not being intended by this order to determine what amount, if any, is due from the defendant city for hydrant rentals, but said question will be determined by the decision of the issue hereinafter directed to be made up and referred to H. M. Lewis, special master. On like motion, it is ordered that the petition herein of the said receiver filed with the clerk of this court on July 25, 1900, stand as a bill of complaint, and that the city of Eau Claire have leave to file its answer thereto on or before the first Monday in September, 1900, and that said receiver have leave to reply to said

answer within twenty days thereafter. On like motion, it is ordered that the issues of fact and law raised by said pleadings be, and the same are, referred to H. M. Lewis, of the city of Madison, Dane county, Wisconsin, as special master in chancery, to take proofs, and report his findings of fact and conclusions of law thereon to the court, with all convenient speed."

The appeal is from that order, and it is alleged to be erroneous (1) because the court never had jurisdiction of the suit or parties; (2) because the court had no jurisdiction to order the city to pay the sum mentioned without a trial to determine the amount due; (3) because neither the waterworks company nor the receiver ever had any interest in, or lien upon, the money ordered to be paid; (4) because the order was made summarily, without trial, and without opportunity to the city to defend, and before the time when the city was required or permitted to appear, demur, plead, or answer; (5) because the money was ordered to be paid to the receiver absolutely, without provision or security for its return, and without limitation upon the right of the receiver to use or spend it. The appellees have moved to dismiss the appeal on the ground that the order was not final, and therefore not appealable.

James Wickman and B. W. Jones, for appellant.

John M. Olin and Harry L. Butler, for appellees trustee and bondholders.

Wm. Ruger, for appellee receiver.

F. M. Miner, for appellee Eau Claire Waterworks Co.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The objections to the jurisdiction of the court below over the city of Eau Claire as a defendant seem to be insuperable. The demand against the city is a purely legal one, upon the contract made with the water company. The trustee in the deed of trust has no title to that contract, or right to sue for money due upon it, except as assignee of the waterworks company; the assignment being by force of the trust deed, which in terms conveyed and assigned to the trustee "rents, revenues, income" then owing, or thereafter to be acquired, "and all rights" of the water company "to collect all tolls, rents, and water rates." The water company, being a corporation of Wisconsin, could not have sued the city upon the contract in a federal court, and the assignee can therefore have no better right to sue in that court. Besides, if the jurisdiction were otherwise unquestioned, there was no necessity for a resort to equity. The assignee of a chose in action, or any cestui que trust, cannot sue in equity merely because his interest is equitable. If it be conceded that the trustee in

this case acquired the legal title, and had a right in his own name to sue the city upon the contract, it was a right to sue at law, and not in equity. It is true that the bill asks to have declared a lien upon the fund, but, under the circumstances, that is not a matter of substance. It is not alleged that the right of the trustee to whatever should be found due from the city for water rentals had been or was disputed. The contrary is apparent. There was in fact no fund subject to the alleged lien, and it is not to be permitted that a right of action at law can be made cognizable in equity by praying equitable relief, which is not essential to the ultimate remedy sought. The opinion in New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484, is in point upon both phases of the question. The objection there made that the assignee of the water company could not sue in the circuit court, that company being a citizen of Tennessee, was declared conclusive if the jurisdiction depended on citizenship alone; and in respect to the jurisdiction in equity, which was recognized as maintainable against "the waterworks themselves, and all the property comprised in the mortgage which is susceptible of actual possession," the court said:

"But the claim against the city does not lie in possession, but in contract alone. The contract itself may be subject to sale as part of the mortgage assets; but the proceeds of the contract, the money alleged to be due from the city to the water company under it, has never been reduced to possession, and the city of Memphis denies its liability to pay it. In order to reduce to possession the money claimed to be due, and subject it to the control of the court, the ordinary mode of enforcing the contract must be resorted to. It may be that the circuit court has the power to direct such a proceeding to be had as ancillary to its administration of the mortgage fund; but it must be a proper proceeding, adapted to the nature of the demand. If a promissory note were included in the mortgage fund, and the parties liable upon it should refuse to pay it, the circuit court might probably order the trustees of the mortgage to bring an action on the note; but a bill in equity would hardly be considered a proper proceeding for enforcing its collection. * * * Whether the contract is or is not a valid one, and, if valid, what are the obligations of the city under it, and the damages for the breach thereof, are pure questions of law, which the city cannot, under ordinary circumstances, be compelled to litigate with any other party than the water company or its legal assigns. If the parties having the legal interest refuse to sue, those having the beneficial interest will be authorized to use their names on giving them proper indemnity against costs. The city has a right to be confronted with those who have the legal interest in the contract, unless they absolutely refuse the use of their names, or special circumstances exist which would prevent or greatly embarrass the prosecution of the suit. It does not lose its

right to a trial at law by any pledges or assignments which the water company may make of its interest in the contract. Such pledges or assignments may create equitable rights in regard to that interest, as between the water company and the assignees; but the contract, so far as the city is concerned, remains a matter of legal cognizance. If a merchant should pledge his bills receivable as security for a loan, any equitable rights which arise between him and his pledgee may be adjudged in equity, but the makers and acceptors must be sued thereon at law. And so here, while the equities between the water company as mortgagor and the mortgagees, or those claiming under them (such as the right of redemption, etc.), may be determined by a court of equity, the legal demand against the city on the contract is cognizable at law, and should be prosecuted in the ordinary courts of law, as was done in the action brought in the name of the water company against the city. * * * We have lately decided, after a full consideration of the authorities, that an assignee of a chose in action, on which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of his demand. Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. He must bring an action at law, in the name of the assignor, to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of cestuis que trustent."

It follows from all this that the court ought not to have undertaken to determine, before a proper action had been brought, whether there was due from the city any sum which ought to be paid over upon the contract. The necessary meaning of the order is that in the opinion of the court it was safe, without determining definitely what was due, to require that two-thirds of the sum demanded be paid at once to the receiver, who by virtue of his appointment represented the trustee and the bondholders. Even in a proper case, without question of the jurisdiction of the court over the party, there could be no warrant for such a proceeding before issue joined and a trial of the rights involved. No fund had been set apart as a trust fund, and, even if there had been, the receiver could claim of it only so much as should be found due upon the contract, and, in the absence of averment of danger to the fund by reason of the insolvency of the city or for other cause, there could be no justification for an order requiring partial payment before it had been regularly determined whether anything was due.

That the order was appealable there should be no serious doubt. To the extent of the payment required, it was essentially a final decree. It was made without jurisdiction over the party affected, compelled the immediate surrender of a large sum of money, and made no provision for its safe-keeping or return in case a return should be found necessary. It

was not ordered into the hands of the receiver to be held for future disposition. If that had been intended, the registry of the court would have been the appropriate depositary. There was no necessity for the order except to supply the receiver with money to be used in the performance of his trust, and that he might so use it seems to have been the purpose of the petition in seeking, and of the court in entering, the order. If mere custody of the money was intended, it should have been explicitly so stated. The supreme court has not placed upon the words "final decree," respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction. Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; 4 Notes U. S. Rep. 628. See, also, Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; Trustee. v. Greenough, 105 U. S. 527, 531, 26 L. Ed. 1157; Williams v. Morgan, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559s In re Farmers' Loan & Trust Co., 129 U. S. 206, 9 Sup. Ct; 265, 32 L. Ed. 656; Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036.

The order is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

CITY OF EAU CLAIRE *v.* PAYSON *et al.**

(Circuit Court of Appeals, Seventh Circuit, June 25, 1901.)

[109 Fed. Rep. 676.]

Jurisdiction of Federal Courts—Citizenship of Parties—Suit by Assignee.

A city in Wisconsin granted a waterworks franchise to citizens of another state, and contracted with the grantees for the rental of fire hydrants. The grantees at once assigned their rights under the ordinance and contract to a Wisconsin corporation, which constructed waterworks and furnished the hydrants required by the contract. The company also made a trust deed to a citizen of another state to secure bonds by which it pledged the rentals to become due from the city for the payment of interest on the bonds: *held*, that the fact that the contract was originally made between the city and a citizen of another state did not give a federal court jurisdiction of a suit by the trustee in the mortgage against the city to collect rentals due the water company arising out of such contract, the cause of action being one which never existed in favor of the original grantees, but which accrued in the first instance in favor of the company, in whose right alone the action was maintainable.

Equity Jurisdiction—Enforcement of Legal Liability—Suit by Equitable Assignee.

A right of action in favor of the trustee in a mortgage given by a water company against a city, to enforce payment of rentals due the mortgagor under a contract, can only exist by reason of some lien upon or equity in such rentals given by the mortgage, either by express pledge or by operation of law; and in either case neither the trustee nor a receiver appointed at its instance in a foreclosure suit against the company can maintain a suit in equity against the city, where the company's right of action is at law, since the holding of

*For former opinion, see preceding case.

an equitable title to a legal right of action does not entitle the holder to sue in equity.

Same.

The fact that a city has failed to levy and collect a specific tax to create a special fund for the payment of water rentals, as required by its contract and authorized by statute, while it may authorize a suit in equity to compel the levy and collection of such tax in the future, does not give equity jurisdiction of a suit to collect rentals previously accrued.

On Petition for Rehearing. For former opinion, see 107 Fed. 552.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge. The first point decided on this appeal was that, the city of Eau Claire and the water company both being corporations of Wisconsin, the assignee of one of them could not sue the other upon the contract between them in a federal court. To this two objections are now urged. The first is that the contract of the city was not with the water company, but with Fairbanks, Morse & Co., described in the ordinance as "of the city of Chicago, state of Illinois." Does the fact affect the relations of the parties to this suit? It is shown both by the bill and by the petition of the receiver that, upon the acceptance of the ordinance, Fairbanks, Morse & Co. assigned their rights thereunder to the water company, and that that company thereupon proceeded to build a system of waterworks within the city, pursuant to the terms and conditions of the contract. It follows that Fairbanks, Morse & Co. neither constructed, owned, nor operated the waterworks, and could have had no claim under the contract against the city for rentals or for other cause arising out of the operation of the plant. Whatever liability there is on the part of the city for rentals accrued directly to the water company. It never existed in favor of and was never assigned by Fairbanks, Morse & Co. to the water company. When a franchise is thus conferred upon a nominal grantee, for whom forthwith a local company is substituted by assignment, who proceeds to construct and operate the contemplated system of works, is to be said that for the life of the charter—30 or 60 years—all causes of action in favor of the company, if assigned to a citizen and resident of another state, will be cognizable in the federal court merely because the company came into possession of the franchise by assignment from the nominal nonresident holder, instead of by direct grant from the city. It is not to be believed that congress contemplated such result, nor is it clear that the language of the statute compels it. Morgan v. Gay, 19 Wall. 81, 22 L. Ed. 100; Metcalf v. City of Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543. See, also, Adams v. Shirk, 44 C. C. A. 653, 105 Fed. 659; Smith v. Packard, 39 C. C. A. 294, 98 Fed. 793. It is to be observed, too, that a large percentage of the

amount alleged to be due from the city is for the rent of 119 hydrants not required by the ordinance, and to that extent certainly the cause of action does not arise out of the contract evidenced by that ordinance. The whole question, however, is unimportant, because the record does not show that the members of the firm of Fairbanks, Morse & Co. (not alleged to be a corporation) were not resident citizens of Wisconsin when the suit was brought. The description in the ordinance, if otherwise sufficient, as it clearly is not, to show the citizenship of the members of the firm, or of the corporation if it be one, relates only to the date of the passage of the ordinance.

The second objection is that "the complainants, through the receiver," are not "seeking to enforce against the city any right of action which has by the trust deed been assigned to the complainants"; that "under the laws of Wisconsin the trust deed did not operate to assign anything, and the complainants could not have sued on the theory that they had acquired title to any legal or equitable interest in the contract, or to any rights of action of the water company thereunder"; and that, upon the appointment of the receiver, "per force of law the complainants became entitled to the rights incident to lawful possession, and were thus subrogated to the rights of the water company respecting rents and profits, without assignment and regardless thereof, if any [assignment] had been made." This is a distinct departure from the theory of the bill and of the original briefs and the argument at the hearing. "The bill charges," says the original brief for the appellees, "that under said ordinance certain hydrant rentals therein provided for were charged with the payment of interest on any bonds which might be issued for the construction of the waterworks plant;" and, besides other expressions of like significance, the supplemental brief for the receiver says: "The receiver represents all interest and property to which the lien of the mortgage extends. It extends to the hydrant rentals, and the moneys raised to pay the same constitute a trust fund upon which the bondholders have a specific lien and primary claim to so much thereof as may be necessary to discharge interest on their bonds." The general doctrine is that the lien of a mortgage, even when it in terms embraces the income of the property mortgaged, will attach only to income that accrues after the bringing of a suit to foreclose (Dow v. Railroad Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565; Sage v. Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694, and cases cited); but if the express assignment stipulated in this deed of trust be ignored, and the appellees be allowed to assume the attitude of claiming such equitable interest in the accrued and unpaid rentals as results from the appointment of a receiver under the doctrine of Gaynor v. Blewett, 82 Wis. 313, 52 N. W. 313, and authorities there cited, it was nevertheless an interest acquired

by force of the mortgage, operating, in effect, as an assignment of a chose in action, payment of which may be enforced only by an appropriate procedure. It affords no ground for distinguishing this from the case of New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484, cited in our opinion, that in Wisconsin a mortgage does not transfer title, and that in Tennessee it does (if that be so), since in both cases the subject of the transfer was a chose in action arising out of an ordinance of which no delivery could have been made or intended, and the assignment of necessity carried only an equitable interest. It results, therefore, as we first held, that for the purpose of compelling payment of the accrued rentals the city was not a proper party to the suit. There was in fact no special fund arising from a special tax levied and collected as contemplated by the ordinance of the city and the statute of the state. Out of the general levy, though intended to include provision for the payment of water rentals, no amount had been set aside as a hydrant fund. But no sufficient reason is shown for invoking the doctrine that equity will treat as done what ought to have been done. That doctrine can reasonably be invoked only when adequate relief at law is impracticable. The ultimate relief sought in this instance is a judgment for the payment of money according to promise, and it would add nothing to the remedy to obtain a decree in equity that the defendant has or ought to have in its possession a fund of its own production or creation with which to pay the debt, and subject to a lien for that purpose. The petition does not seem to adhere consistently to the assertion that "the complainants could not have sued on the theory that they had acquired title to any legal or equitable interest in the contract or to any right of action of the water company thereunder." In the discussion of the question of jurisdiction in equity, after reaffirmation of that proposition on the authority of decisions referred to, it is insisted that, "upon the facts appearing, other decisions show that the contract, in connection with the trust deed to which the city has by its contract made itself a party, does operate to give the complainant trustee a lien upon the fund in possession of the city, and that such fund is pro tanto impressed with a trust requiring that it be applied to the payment of interest on the bonds."

It is urged further that the water company has the right to have a specific fund raised for the payment of hydrant rentals, and that the complainants have additional reasons for invoking equitable relief, in that "they have no title to the rights of the water company as against the city, but merely an equitable lien thereon, which equity only can enforce by giving the complainants possession, and thus subrogating them to the water company's rights incident to rightful possession." This is but a repetition of the attempt to evade the effect of the trust deed as an assignment or pledge of the hydrant rentals.

Subrogation, like other equitable doctrines, is invoked when conscience requires it, to effect the purpose of an assignment when none in fact had been executed, or to supply an essential defect in an assignment made; but what precedent can be found for invoking subrogation in lieu of an actual assignment in no respect defective? The only present purpose or effect would seem to be to make cognizable in equity a dispute which otherwise must be determined at law. By force of the express assignment in this instance, it is true, the trustee in the deed of trust acquired only an equity in the rentals due from the city, but the right was in no sense dependent on possession of the waterworks plant or upon the doctrine of subrogation. The water company could have sued at law to recover any sum due, and so could the trustee, in the name of the water company, for the uses of the trust, and so now may the receiver sue at law for the recovery of the sums in question. It is, perhaps, true that the water company, by a suit in equity, might have compelled the annual levy and collection of the specific tax stipulated, and the setting apart of the proceeds as a special fund to be used only in the manner stipulated, and it may be that, if that relief had been sought in the present bill, the making of the city a defendant would have been proper and necessary; but all that is aside from the question, by what form of action or proceeding may the city be compelled to pay rentals due, for which, in violation of the contract, there had been a failure to levy and collect, and to set aside the proceeds of the special tax contemplated? It is conceded in the petition "that the holding of an equitable title to a legal right of action does not entitle the holder to sue in equity, and that a right of action cannot be made cognizable in equity by praying equitable relief not essential to the legal relief prayed"; and, that much conceded, there is nothing left of this dispute in its present aspect. To paraphrase the language of the opinion of the supreme court in the Memphis Case, it may be that the court below has power to direct the receiver to prosecute a proceeding against the city, as ancillary to its administration of the mortgage fund, to compel payment of the sum due, "but it must be a proper proceeding adapted to the nature of the demand." See White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Krippendorf v. Hyde, 110 U. S. 276, 287, 4 Sup. Ct. 27, 28 L. Ed. 145. "The form of the proceeding," it was said in the last case, "must be determined by the circumstances of the case." In this instance, following the opinion in the Memphis Case, it would seem that the proceeding should be conformed to an action at law, with a right of trial by jury if insisted upon; but the point which we decide now, as before, is that without a regular and formal trial and determination of the fact and amount of liability on the part of the city the court erred in requiring, as it did, a part of the sum demanded to be paid to the receiver. The petition is denied.

CITY OF CLEVELAND, TENN., *et al.* *v.* UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit, October 8, 1901.)

[111 Fed. Rep. 341.]

Mandamus—Municipal Corporations—Compelling Levy of Tax.

A mandamus cannot be awarded to compel the officers of a municipal corporation to levy a tax unless the duty to make such levy is imposed, either expressly or by implication, by some statute of the state from which the corporation derives its powers.

Municipal Corporations—Power of Taxation—Implication from Authority to Create Debt.

Authority to a municipal corporation to levy a tax to pay debts whose creation is authorized by law may be implied when no mode for their payment is prescribed, and there is no limitation upon the power of taxation which repels such an inference, and where the debt is for an extraordinary purpose, requiring special authority for its creation, a general limitation upon the power of taxation for ordinary municipal purposes will not exclude such inference; but if the act conferring the power to create the debt, or any other law in force at the time, contains provisions for a tax to meet such obligations, no extraordinary power of taxation can be implied therefrom.

Same—Debts for Ordinary Expenses—Water and Lights.

Current debts incurred by a municipal corporation for water furnished for public uses and for the lighting of public streets are for ordinary expenses, which may be incurred without special legislative authority; and the fact that the power to contract for water and lighting is among those specially enumerated in the city's charter does not imply any special and additional power of taxation to meet such expense, beyond the limitation imposed by the charter upon taxation for general municipal purposes.

Same—Charter Limitation of Power of Taxation—Mandamus to Compel Payment of Judgment.

The charter of the city of Cleveland, Tenn. (Acts 1893, c. 184, § 23), provided that the board of mayor and aldermen should have power "to levy taxes for town and school purposes upon all taxable property * * * not exceeding in the total levy for all general purposes in any year seventy-five cents on one hundred dollars of the total assessment of said property for town and school purposes of that year." Among the other provisions of the charter was one expressly authorizing it to contract for water and lights for public purposes: *held*, that the latter provision carried no implication of power to levy a special tax to pay for water and lights, which were an ordinary municipal expense, to be paid from the taxes authorized to be levied for "general purposes," the amount of which was expressly limited, and that the officers of the city could not be compelled by mandamus to levy a tax in excess of such limitation to pay a debt contracted for water and lights, or a judgment rendered thereon, in the absence of statutory authority to lay a special tax for the payment of judgments.

Same.

Where the charter of a city places a limitation upon the total levy of taxes for all general purposes in any one year, the fact that in past years it has not made the full levy does not authorize it to make a levy in excess of the limitation in a subsequent year.

Mandamus—Sufficiency of Return.

The return made by a city to an alternative writ of mandamus to compel the levy of a tax to pay a judgment in favor of relator, which alleges that taxes have been levied for the current year to the full limit permitted by its charter, and that the entire proceeds of said levy will not be sufficient to pay current expenses, and no part of it can be devoted to the payment of relator's judgment without seriously

impairing the efficacy of the city government, cannot be held insufficient on demurrer, when no motion was made to compel it to be made more specific, because it does not show in detail the purposes to which the levy has been apportioned, nor show the details of the city's expenses and liabilities.

Same—Municipal Corporations—Control of Discretion of City Officers.

A court in a proceeding for a writ of mandamus to compel a city to pay a judgment in favor of relator has no power to control the discretion of the city authorities in making appropriations from the taxes collected for current municipal expenses, although it may compel the application of any surplus remaining after the payment of such expenses upon relator's judgment, rather than upon other debts previously contracted.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

In 1895 the plaintiff in error contracted for a supply of water for public uses, and for the lighting of its streets by electricity. The tax budget for that year included a tax of 22 cents on each $100 of assessable values for the purpose of paying for the water supply so to be provided, and of 18 cents to meet the expenses of public lighting. This tax was collected, and a part applied on the current contracts, but the remainder has never been so used, but remains in the city treasury or unaccounted for. Subsequently the power of the city to so contract was denied, and the liability repudiated. Suit was thereupon brought to recover upon the contract so far as executed, which resulted in a judgment against the city for $9,852.12 and costs. The questions upon which the city resisted payment, and the grounds upon which it was held liable, appear in the opinion of this court, reported under the style of Cunningham v. City of Cleveland, 98 Fed. 657, 661, 39 C. C. A. 311. Judgment final was rendered in 1899. Execution issued, which was returned nulla bona. Thereupon a petition for a writ of mandamus was dulv filed in the court below. To the alternative writ a return was made in substance insisting that the city had exhausted its power of taxation for the current year by assessing a tax of 75 cents on the $100, and that the whole of this tax was essential to the maintenance of its governmental functions, and that no surplus would remain after providing for municipal necessities. A demurrer to the return was sustained. The court below was of opinion that the power to create a debt for water and light implied the power to levy a special tax to pay the judgment rendered upon the debt thus created, and that the limit placed upon the city's power of taxation was inapplicable to a judgment upon a debt so made. It was also held that the return was insufficient in not setting out the several purposes for which the city had levied a general tax. From this judgment the city has sued out this writ of error.

W. L. Parmenter and D. J. Cable, for plaintiffs in error, Henry W. Seney, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

What are the limitations upon the taxing powers of the plaintiff in error? The return shows that a tax aggregating 75 cents had been laid and was in process of collection when the alternative writ issued. The insistence of the city was and is that no authority exists for the levy of any greater rate of tax, and none for any special tax to pay judgments upon claims of the character of that represented by relator. The question as to whether the whole or any part of the fund arising from the tax so already assessed can be appropriated to the payment of the relator's judgment may be postponed, for the first and most important question is whether the limitation set up by the return is applicable in the circumstances of this case. The relator's debt was incurred in 1895, and is for rent of water hydrants and for public street lighting. At that time the city was controlled by the provisions of a special charter granted by the Tennessee legislature April 7, 1893, being an "Act to amend the charter of Cleveland, Tennessee," etc. Chapter 184, Acts 1893. The subsequent amendments of that act are of no importance, since they do not enlarge the taxing powers of the corporation, and could not effectually deprive the relator of any remedy which he had under the law existing at the date of the contract. Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. Legislation which lessens the efficacy of the means for enforcing the obligation of a contract in existence when the obligation was incurred would conflict with the provision of the constitution prohibiting the impairment of the obligation of contracts. Louisiana v. City of New Orleans, 102 U. S. 203, 26 L. Ed. 132; City of Memphis v. Bethel, 3 Tenn. Cas. 205.

It must, at the outset, be conceded that a mandamus cannot be awarded to compel the mayor and council of the plaintiff in error to levy any tax which they were not authorized to levy by the law of the state from which they derive their powers. The office of such a writ is not to create new duties, but to compel the discharge of those already imposed by the municipal law of the state. In other words, the power to levy the tax which the relator seeks to compel must exist in some legislation, or be plainly implied from some local statute or charter. Carroll Co. Sup'rs v. U. S., 18 Wall. 71, 77, 21 L. Ed. 771; U. S. v. Macon Co., 99 U. S. 582, 591, 25 L. Ed. 331. The limitation set up by the city upon its taxing power is found in section 23 of the charter. That section reads as follows:

"That the board of mayor and aldermen shall have power and authority to levy taxes for town and school purposes upon all taxable property, real, personal and mixed, within

the limits of the town, not exceeding in the total levy for all general purposes in any year seventy-five cents on one hundred dollars of the total assessment of said property for town and school purposes of that year."

It is difficult to misread this provision. It is a plain limitation whereby the taxing power for "town and school purposes," is limited to a "total levy for all general purposes in any year" to "seventy-five cents on one hundred dollars of the total assessment" of city property. By the twenty-eighth section of the same act power is granted to levy and collect taxes upon all property and privileges within the limits of the town, and which are taxable by the state. By the fourteenth section of the act the recorder is constituted the assessing officer, and it is made his duty to assess taxes and deliver to the city "a tax list" which shall be the authority of the city for collecting the taxes of this city. This "tax list" is the document referred to in the last two lines of section 23, above set out, as the "total assessment of said property for town and school purposes of that year." Section 27 is supposed to confer an additional power of taxation. It is as follows:

"That the board of mayor and aldermen may levy a tax, not exceeding fifteen cents on the hundred, upon all property subject to state taxation, and a street tax of two dollars on all male persons between the ages of eighteen and forty-five years of age within the corporate limits of said city for streets, alleys and sidewalks, and a tax not exceeding twenty-five cents on the hundred upon all property subject to state taxation, and a poll tax not exceeding the state or county poll tax on all male persons between the ages of twenty-one and forty-five years of age within said corporation limits, exclusively for common school purposes."

It will be observed that no language is used indicating that this street and school tax shall be in addition to the "total levy" authorized by section 23. Schools and streets are within the "general purposes" covered by section 23, and "town and school purposes" are specifically mentioned as purposes provided for by the "total levy" authorized by section 23. We can but conclude that the power conferred by section 27 must be construed as subject to the general limitations of the twenty-third section. Weber v. Traubel, 95 Ill. 427; People v. Lake Erie & W. R. Co., 167 Ill. 283, 47 N. E. 518. The cases of Nashville, C. & St. L. R. Co. v. Franklin Co., 5 Lea, 707, and Same v. Hodges, 7 Lea, 663, turned upon the particular terms of the two acts construed. The question is one of legislative intention, and we find no difficulty in reaching the conclusion that the street and school tax authorized by section 27 was not intended as a tax in addition to the "total levy" authorized by section 23, but as subject to the general limitation of that section.

But it is insisted that express power was given to the city to contract for water and lights for public purposes, and that

therefore the city has the power by implication to levy a tax to meet such contract. Authority to levy a tax to pay debts whose creation is authorized by law may be implied when no mode for their payment is prescribed, and there is no limitation upon the power of taxation which repels the presumption. This rule was thus stated in Citizens' Savings & Loan Ass'n v. City of Topeka, 20 Wall. 660, 22 L. Ed. 460:

"It is to be inferred, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

In U. S. v. City of New Orleans, 98 U. S. 381, 393, 25 L. Ed. 225, 226, it was held that authority to issue bonds to pay for stock subscribed in a railroad implied power to levy a tax to pay the interest and principal of the bonds so authorized. Said the court in the case cited:

"The authorization without providing the means for such expenditures would be an idle and futile proceeding." "Their authorization therefore implies and carries with it the power to adopt the ordinary means employed by such bodies to raise money for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose."

The principle is an old and familiar one, and has been applied in a variety of instances. Thus, where a thing is granted, such as an estate or franchise, there passes by necessary implication a right to those incidents which are essential to the enjoyment of the principal subject of the grant. In constitutional law it is a familiar principle that the grant of a power, when the mode of its exercise is not defined, implies authority to exercise it in the mode and manner reasonably necessary for its enjoyment. Upon this general principle limitations upon the taxing power of counties and towns have often been held to apply only to debts and expenses for ordinary municipal purposes, and not to those extraordinary debts, such as subscriptions to railroads, which can be incurred only by special legislative authority. Ralls Co. Ct. v. U. S., 105 U. S. 733, 26 L. Ed. 1220; City of Quincy v. Jackson, 113 U. S. 332, 5 Sup. Ct. 544, 28 L. Ed. 1001. "It is now well settled," said the supreme court in Ralls Co. Ct. v. U. S., cited above, "that, when authority is granted by the legislative branch of the government to a municipality or a subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligation to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary

legislative intention." But although the debt incurred be of an extraordinary character, requiring special authority, any implication of power to levy a tax to meet the extraordinary burden will be repelled if the act conferring the power, or any other law in force at the time, contains a provision providing for a tax to meet such obligations. This is well illustrated in U. S. v. Macon Co., 99 U. S. 582, 590, 25 L. Ed. 331, 333, where it was sought to compel the levy of a special tax for the purpose of meeting the interest upon bonds issued to pay for stock in a railroad. By the laws of Missouri, county taxation for general purposes was limited to one-half of 1 per cent. on the taxable value of the property in the county. By a special act, counties were authorized to subscribe for stock in a particular railroad, and to issue bonds to meet such subscription. If there had been nothing more in this latter act, it might have been presumed that it was the intention of the legislature to grant full power to levy the tax necessary to meet this extraordinary debt. "This implication," said the supreme court, "is, however, repelled by the special provision for the tax of one-twentieth of one per cent., and the case is thus brought directly within the maxim, 'Expressio unius est exclusio alterius.'" Continuing, the court said:

"Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act and such other taxes applicable to the subject as there were, or might thereafter by general or special acts be, permitted."

Applying the principle of these cases to the case in hand, we are met at once by the manifest proposition that current bills for rent of hydrants and for street lighting are not extraordinary expenses, in any sense. Expenses incurred for water furnished for public uses and for the lighting of public streets are ordinary expenses, and debts incurred for current water or lighting purposes are debts contracted within the scope of ordinary municipal purposes, and no special legislative authority is necessary to justify expenditures for such purposes. Dill. Mun. Corp. (4th Ed.) §§ 146, 443, and notes; City of Memphis v. Memphis Water Co., 5 Heisk. 495; Stewart v. Town Co., 50 Kan. 553, 32 Pac. 121; Grant v. City of Davenport, 36 Iowa, 396. That the procurement of water for public purposes and the lighting of the city streets are specially mentioned as among the powers of the city of Cleveland is of no significance. Obligations incurred for those purposes would not be extraordinary debts, justifying a presumption of a special and additional power of taxation. The power to maintain a police force, to abate nuisances, to provide for a quarantine, to establish markets, and a score of other ordinary municipal purposes are likewise specifically authorized in the same section authorizing the rental of water hydrants and the lighting of streets. If the special mention

of a power to incur an obligation for water and light justify presumption of a power to levy a special and additional tax to that authorized for all town and school purposes by the twenty-third section, a like presumption would arise in respect of every other expenditure authorized in terms, and the limitation upon the power of taxation to a total levy of 75 cents would have nothing to operate upon. The case of U. S. v. Town of Cicero (C. C.) 41 Fed. 83, 85, is particularly applicable to this line of argument. Power to issue bonds for the purpose of erecting public buildings, erecting gas works or an electric light plant, and to take stock in any new railroad is conferred by another section upon condition that the ordinance is submitted to a popular vote. But the same section provides for an additional limited tax to meet the extraordinary debts so incurred. No bonds or negotiable securities were issued under the contract with relator, and none were contemplated. The city contracted to pay an annual rental for so many hydrants and so many electric street lights. The debt was not in any sense an extraordinary one, but an ordinary municipal expense, such as might well be met out of the total levy authorized for all general purposes. No implication of power to levy a special tax to meet a debt of this character arises, in view of the express power to levy and collect a tax not exceeding three-fourths of 1 per cent. upon the assessed value of property subject to city taxation. The fact that the debt of the city has been reduced to a judgment does not help the relator. We have been referred to no legislative power authorizing the imposition of a special tax to meet a judgment against the plaintiff in error. The only power to assess and collect a tax is that found in the provisions of the city charter already discussed.

We have been referred to the case of Butz v. City of Muscatine, 8 Wall. 575, 19 L. Ed. 490. The case has no bearing, inasmuch as we find no statute of the state of Tennessee requiring cities or towns to levy a tax to pay judgments. Such a provision does exist in relation to counties, but it has never been extended to cities, so far as we have been able to find. The case of Mayor, etc., of Town of Bristol v. Dixon, 8 Heisk. 864, was referred to as justifying the levy of a tax to pay a judgment upon a debt incurred by authority of the city charter. The case is not in point. There was no limitation upon the taxing power of Bristol for general purposes. The limitations supposed to apply were those found in Chapter 50, Acts 1870–71, being section 491c of Thompson & Stegers' Tennessee Code, and section 1361 of same Code. The first limited the amount of taxes leviable to meet the extraordinary class of debts described in the act of 1870–71, and the last applied only to taxes levied for educational purposes. The ruling in Fulgum v. Mayor, etc., of City of Nashville, 8 Lea, 635, was to the same effect in respect to Nashville. There is, as we have seen, an express limitation upon the taxing power of

the city of Cleveland for general purposes. The debt for which the relator has recovered his judgment, being an ordinary and not an extraordinary debt, must be paid out of the proceeds of the taxes leviable for general purposes.

It is next insisted that the judgment should be affirmed because the return is insufficient, in that it "makes no statement of fact showing to what purposes the levy as made has been apportioned," and because said return shows "no facts or account of the city's revenues and liabilities from which the court can determine whether or not an additional levy may be made for the payment of relator's judgment, or whether or not a portion of the assessment as already levied may not be devoted to its payment." The sixth paragraph of the return, in substance, states that prior to the filing of said petition the defendant had made a levy of 75 cents on the $100 on all property subject to taxation, and also upon all privilege, poll, and other taxes which it has power by law to levy and collect for the current year, and was diligently proceeding to collect same. The same section of the return further states, in substance, that the entire proceeds of said levy and assessment will not be sufficient to pay current expenses, and that "it will be impossible, without serious impairment of the efficiency of the city government, to devote any part of the tax levies for the present year to payment of petitioner's said judgment." The relator specially demurred to this part of the return:

"First, because it does not show that taxes have been levied to the full extent authorized by the charter and general law of the state; second, because said section contains no statement of fact showing to what purposes the levy as made has been apportioned; third, because said section contains no statement of facts or account of the city's revenues and liabilities from which the court can determine whether or not an additional levy may be made for the payment of relator's judgment, or whether or not a portion of the assessment as already levied may not be devoted to its payment; fourth, because it does not appear from said section or any part of respondent's return what taxes were levied for the years 1896, 1897, 1898, and 1899, during which time suit was pending in which said judgment was rendered."

The first ground of demurrer is bad. We have already determined that the city had no power under its charter or any law of the state to levy any higher rate of tax than that which the return shows has been levied. The taxing power of the city for the current year was therefore exhausted, and no power exists in this court to compel the levy of a tax in addition to that already levied for the purpose of paying the relator's judgment. The fourth ground of demurrer is also bad. The failure of the city to levy the full tax it might have levied for past years does not enlarge its power in subsequent years. The limitation is to a "total levy for all gen-

eral purposes in any year" of 75 cents on $100 of the assessed values of that year. The remedy afforded by the writ of mandamus is prospective, and the failure of the city in past years to exert its entire taxing power will not justify a levy in any year in excess of the charter limitation.

The second and third grounds of demurrer go to the sufficiency of the return, in that it does not show in detail the purposes to which the levy made has been apportioned, and does not show the details of the city expenses and liabilities. It is clear that no additional levy can be compelled, whether this part of the return be good or bad. It may be that, after providing for the ordinary annual expenses of the city government out of the tax levy already made, a surplus may remain, which should be applied to the payment of the relator's judgment. But the mere fact that the purposes to which the levy made has been apportioned are not specifically stated, and that no itemized statement of the city expenses and income is given, would not justify the court in compelling the levy of a tax additional to that already levied, when it is clearly shown that the total levy already made for general purposes is the maximum tax which the city can levy for any one year. But is this part of the return so insufficient, as matter of law, as to authorize the court to ignore the averment that no part of the tax levied can be applied to the payment of relator's judgment without impairing "the efficiency of the city government"? No motion was made to compel a more detailed or specific answer in this respect. The return is, in substance, identical with the return in Clay Co. v. U. S., 115 U. S. 616, 618, 6 Sup. Ct. 199, 200, 29 L. Ed. 482. The return in the case cited was:

"That the maximum levy for said purposes for the year 1882 will not be sufficient to pay the ordinary current expenses of said county, and that no part thereof can be applied for the payment of said judgment without seriously impairing the efficiency of said county government."

To this answer the relator demurred, and upon the hearing the court below ordered a definite proportion of the tax so levied paid over on the relator's judgment, and that a like proportion should be levied and collected each year until relator's judgment should be paid. The supreme court, conceding that such part of the full lawful levy as was not required to defray the current expenses chargeable upon the ordinary revenue should be applied to the payment of the relator's debt, said:

"But here the answer shows affirmatively that the whole of the six-mill levy of 1882 will not be sufficient to pay the ordinary current expenses of the county. No effort was made to have the answer more specific and certain, so as to show what the whole amount of the tax would be, and in what way it was to be expended, but the relators were content to go to a hearing upon a general demurrer to the answer as it stood. We must

therefore assume the fact to be that a special tax cannot be levied to pay the judgment without embarrassing the county in the administration of its current affairs. It was held in City of East St. Louis v. U. S., 110 U. S. 321, 4 Sup. Ct. 21, 28 L. Ed. 162, decided since the judgment in this case below, that 'the question what expenditures are proper and necessary for the municipal administration is not judicial. It is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion; much less, to usurp and supersede it. To do so in a single year would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service. To do it for a series of years, and in advance, is to attempt to foresee every exigency, and to provide against every contingency that may arise to affect the public necessities.' ''

The proper judgment is this: (1) That the defendant below be required to pay over the sum of $402.20, which the answer shows was levied and collected in 1895 for the specific purpose of complying with this contract, and which has been since held as a water and light fund. (2) That the defendant below be required to diligently proceed to the collection of any uncollected tax so assessed in 1895 for water and lighting purposes, and to pay over such taxes, as collected, upon the judgment of relator. (3) That the defendant below be directed to pay over any surplus which may remain from the proceeds of the total levy made for all purposes in 1900, after defraying the current expenses chargeable upon the ordinary revenue of the city, and that it make a further return showing the amount of the tax so collected, and how same has been applied. (4) That the defendants below be commanded to levy for each year succeeding the entry of this judgment the full tax of 75 cents on the $100 of assessable city property, and the full poll and privilege taxes permitted by the charter of 1893, until the judgment of relator, with interest and costs, shall be fully paid; and, after defraying all ordinary expenses payable out of the revenue so raised each year, it will pay over to the relator any surplus remaining each year, until his judgment shall be paid; and that it make all such other returns as shall be required by the court below, showing how it has obeyed this judgment.

The administrative discretion in respect to expenditure for current municipal expenses will not permit the payment from current revenue of claims for past expenditure in preference to the judgment of relator. The surplus applicable to this claim is that which remains after providing for those current expenses proper for the maintenance of the city government, and chargeable against current revenue. The situation of the present case will not permit of a more definite order. That the city cannot reduce its surplus by preferring other debts to that of the relator is plain. Current revenue not properly

used for current municipal expenses will constitute a surplus applicable to the relator's judgment. When the return shall be made as to income and expenditure for 1899, it will be the duty of the court below to ascertain the surplus properly applicable to this judgment, and order same paid thereon. In the present situation of this petition, we can make no more definite judgment.

The judgment below is reversed, and the cause remanded, with direction to enter a judgment in accordance with this direction.

BELDING LAND & IMPROVEMENT CO. *v.* CITY OF BELDING *et al.*

(*Supreme Court of Michigan, July 19, 1901.*)

[87 N. W. Rep. 113.]

Lighting Streets—What Cities Included in Statute Authorizing.

Act No. 186, Laws 1891 (Comp. Laws 1897, § 3437), authorizing cities to provide for lighting their streets by constructing works or contracting for furnishing them, applies to a city whose charter does not provide the manner for letting contracts for public lighting.

Same—Statute Authorizing Not Affected by Act Taking Effect at Later Date.

Act No. 186, Laws 1891 (Comp. Laws 1897, § 3437), authorizing cities to provide for lighting their streets, was not affected by Act No. 115 of 1891, relating to the same subject, which was passed earlier, though it took effect later.

Same—Statute Authorizing—Applicable to What Cities.

Act No. 186, Laws 1891 (Comp. Laws 1897, § 3437), authorizing cities to provide for lighting their streets, is applicable to a city operating under special charter passed two years after its enactment.

Same—Construction of Statute—Consent of Electors*—When Not Necessary.

Act No. 186, Laws 1891 (Comp. Laws 1897, § 3437 et seq.), authorizing cities to supply lights for their streets, enacts that whenever the council shall by resolution declare that it is expedient for the city to acquire by purchase or construct works for lighting, or shall deem it expedient to contract for lighting, it may take action to accomplish the purpose, providing all contracts for lighting shall be entered into as prescribed by the charter, and, if the council declares it expedient to acquire by purchase or construct works, it shall submit to the electors the question of purchasing or constructing such works: *held*, that the council can contract for lighting without a resolution of expediency or submission of the question to popular vote.

Same—Statute Authorizing Contracts for Street Lights Not Repealed by Subsequent Local Act.

Loc. Acts 1893, No. 313, c. 29, § 14, providing that after the passage of the annual appropriation bills no further liability shall be incurred, for any purpose, to be paid from the general fund during the fiscal years for which the appropriation was made, etc., does not forbid a city from contracting for lighting under Act No. 186, Laws 1891, authorizing cities to provide for lighting their streets.

Appeal from circuit court, Ionia county, in chancery; Sherman B. Daboll, Judge.

---

*See note at end of case.

Belding Land & Imp. Co. *v.* City of Belding

Bill by the Belding Land & Improvement Company against the city of Belding and others to enjoin the carrying out of a certain contract. From a decree in favor of defendants, plaintiff appeals. Affirmed.

George E. & M. A. Nichols and I. L. Hubbell (John W. Champlin of counsel), for appellant.

Morse & Locke, for defendant city of Belding.

Dwight C. Sheldon and Myron H. Walker, for defendant Citizens' Light Co.

HOOKER, J. The complainant is a resident of Belding, in this state, and some of its larger stockholders are interested as stockholders in a concern, presumably a corporation, known as the Spencer Electric Company, which was engaged in the business of commercial lighting in the city. In the year 1898 the village advertised for bids for street lighting, and the Spencer Electric Company made a proposition, which it afterwards withdrew, when another offer was accepted, and a conditional contract was made with some citizens to form a corporation, erect a plant, and furnish street lights for a stipulated price. The bill in this cause was filed to enjoin the carrying out of the contract, and was dismissed upon the hearing. The complainant has appealed.

The grounds upon which complainant asks relief are (1) that the council has not authority to make the contract, under the law; (2) that it has not complied with the law; and (3) that there was collusion between the council or its members and the persons with whom they sought to contract, to prevent competitive bidding.

There are two sources from which Belding might derive authority to make its contract—First, its charter; second, Act No. 186, Laws 1891 (Comp. Laws, § 3437 et seq.). Either is sufficient, if authority can be found in it. Act No. 186 is an independent act, and is held to apply to all cities of the prescribed class which were in existence when it was passed, or have been created since. It is contended that it cannot apply to a city whose charter does not provide the manner for letting contracts for public lighting, which it is said the charter of Belding does not. This seems to us a forced construction; a more reasonable one being that it applies to all cities, but requires conformity to charter requirements when they exist. The letting of a contract for a period of 10 years is not so complicated a transaction as to require specific provisions for so doing. In the absence of charter provisions, the council may make a contract with any one whom it chooses.

It is also contended that this act is unconstitutional, because, by providing that cities may do commercial lighting when they erect municipal plants, it is made broader than the title. We think that commercial lighting may be essential to make a municipal plant self-sustaining, and that a provision

for it might, perhaps, be within a reasonable construction of such a title. But we find it unnecessary to decide this question, for the reason that such provision might be eliminated, and leave a valid act. It has no importance, therefore, in this case, because the city has not attempted to build a plant. We are of the opinion that it is not affected by Act No. 115 of the same session, which was passed earlier, though it took effect later. Counsel cite no authority for the claim that an act given immediate effect is repealed by one passed earlier, but not given immediate effect. We doubt if such authority can be found.

It is claimed that Act No. 186 cannot apply to Belding, which has a special charter passed two years after the enactment of Act No. 186. See Act No. 313, Loc. Acts 1893. We see no difference in this respect between a city specially chartered and one organized under the provisions of the general statute. As said of the waterworks statute, to which this is analogous, in the case of Menominee Water Co. v. City of Menominee (Mich.) 83 N. W. 130, the act "is a substantive and independent enactment, etc. The city having availed itself of its provisions, the act stands as part of its charter, as a separate chapter, dealing with the specific subject. * * * When so read, the case comes directly within the principles laid down in Water Co. v. Heath, 115 Mich. 277, 73 N. W. 234." We think these cases conclusive of the question of power under the act, if the steps taken entitled the council to act under it. It is complainant's claim that before it could do so it was necessary to submit the question whether or not the electors would avail themselves of the provisions of the act, and that this could only be done upon a petition of 100 freeholders, and a resolution which gave the electors the opportunity to determine whether they would have a contract or a municipal plant. Section 2 of Act No. 186 should be reasonably construed. It adopts Act No. 5 of the Session Laws of 1870, but as that act nowhere alludes to contracts, and was designed only to provide for the erection of municipal plants, it should not and cannot be held to prescribe a method for contracting. Moreover, said section 2 provides that the council may have power to take action under Act No. 186 whenever it shall by resolution declare it to be expedient to acquire or construct, or whenever it shall deem it expedient to contract. This it may do by virtue of section 1, which makes it lawful for any city to construct or purchase or contract at such times and on such terms as the common council shall direct. But section 2 puts some limitations on this power, and an important one is that, if the council contracts, it must be in a method that conforms to its charter, and for not less than three nor more than ten years. Having thus provided for contracts, a restriction is placed upon the power to purchase or construct a plant, by providing that the council shall, after having by resolution

declared the expediency, submit the question of purchase or construction to a vote of the electors. What was the object of section 3? Obviously, to impose a duty upon the council when the others gave power, and to compel action whenever 100 freeholders should petition for it. This act does not require a resolution of expediency, nor is a vote of the people necessary, before a contract may be made. The council may lawfully make a contract whenever it deems it expedient, and the making of the contract would be a sufficient declaration of expediency. It is unnecessary to discuss the questions based alone on the authority of the charter itself, including limitations on the power to contract liabilities. So far as applicable to the case, those questions are covered by our previous rulings in cases cited in the briefs of counsel. Counsel attempt to distinguish this case from those of Water Co. v. Heath, 115 Mich. 277, 73 N. W. 234, and Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558, upon the ground that in those cases the charter only prohibited excessive indebtedness, whereas in this the word "liability" is used. An examination of section 14, c. 29, No. 313, Loc. Acts 1893, will show a limitation on the prohibition. It is confined to the fiscal year, and is as follows: "After the passage of the annual appropriation bill no further sums shall be used, raised or appropriated; nor shall any further liability be incurred for any purposes, to be paid from the general fund or street district fund, during the fiscal year for which the appropriation was made, unless the proposition to make the appropriation shall be sanctioned by a majority vote of the electors voting upon the proposition at the next annual city election, or at a special election to be called therefor by the council." We are of the opinion that this provision does not forbid a contract for lighting under Act No. 186. Menominee Water Co. v. City of Menominee, supra. If it is true, as claimed, that the fiscal year ends in May, and that the council has appropriated all of its funds for that year, and could not appropriate more after making the annual appropriation, the council might not be authorized to pay bills for lighting incurred before May 1, 1899, which was probably as early as a plant could have been put in operation. However that may be, it would be a matter between the contracting parties. If no payment was made before that time, the owners of the plant only would be injured, and they are not here complaining. The council might lawfully contract with private persons who should agree to furnish the light through a corporation to be thereafter organized. We need not concern ourselves with the questions that might arise between the city and corporation. Its contract was with the promoters, if counsel chooses to call them such. It knew no other party, and need not unless it should choose to do so, unless the proposed corporation should ratify the action of its promoters, and bind itself as contemplated by the contract. We discover

nothing in Act No. 186 which requires a competitive bid. Substantially, however, there was one, if the complainant's proposition was a bid; for the bid accepted was, as we understand it, a lower one than complainant's, and competition was only prevented by its withdrawal.

The remaining question relates to the question of fraud and collusion between the council and the successful bidders. We are unable to find any evidence of a corrupt bargain, and agree with the learned circuit judge, who saw the witnesses, that the contract should not be held void upon that ground. The decree is affirmed, with costs. The other justices concurred.

NOTE.

Municipal Contract—Consent of Electors.

In Seward *v.* Town of Liberty, 142 Ind. 551, 42 N. E. Rep. 39, it was alleged that the municipality was about to contract for gas to light the streets for four years, for which the town would be required to pay a specified sum, for the payment of which it had no adequate funds; and it was further alleged that no petition had ever been presented to the board of trustees as required by statute forbidding the town to incur indebtedness in the absence of such petition. It was held that the contract did not create an indebtedness within the statute, and hence no vote or petition was necessary. See also, Crowder *v.* Town of Sullivan, 128 Ind. 486, 28 N. E. Rep. 94; Foland *v.* Town of Frankton, 41 N. E. Rep. 1031; Town of Gosport *v.* Pritchard, ante, p. 149; City of Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. Rep. 587; Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 721, and note, 730, 732.

CITY OF HARRODSBURG *v.* HARRODSBURG WATER CO.

(Court of Appeals of Kentucky, Oct. 8, 1901.)

[64 S. W. Rep. 658.]

Water Company—Action on Contract—Petition Should Show Compliance with Charter Requirements.

Where the charter of a water company created to supply a city with water required any contract made by the company with the city to be ratified by the voters of the city at an election held for that purpose, in an action by the water company to enforce such a contract it was incumbent on plaintiff to show by its petition that the contract was submitted to and ratified by the voters substantially as required by law.

Same—Contract with City—Failure to Designate City by Its Proper Legal Name—Effect.

Where the corporate name of a town, as fixed by its charter, was the "board of trustees" of the town, and in that name the town was authorized to make contracts, and thereafter, by an amendment to the charter, the town became a city, and the corporate name was changed to the "board of councilmen" of the city, and in that name the city was authorized to make contracts, the fact that a contract subsequently entered into on behalf of the city, which the original charter authorized the board of trustees to make, was not made in the name of the "board of councilmen" of the city, did not invalidate it if in fact it was made by the officers exercising the powers theretofore vested in the trustees.

City of Harrodsburg *v.* Harrodsburg Water Co

Same—Same—Ratification by Popular Election—Validity of Election.

Where a statute providing for the ratification of a contract by the voters of a city required the election for that purpose to be held in the four wards of the city at a voting place in each ward, the fact that the election was held at only two voting places did not invalidate it, provided the election was held there upon due notice, and the voters generally participated therein.

Appeal from circuit court, Mercer county.

"Not to be officially reported."

Action by Harrodsburg Water Company against the city of Harrodsburg to enforce a contract. Judgment for plaintiff, and defendant appeals. Reversed.

Robt. Harding and T. C. Bell, for appellant.

Gaither & Vanarsdall, for appellee.

GUFFY, J. It seems to us that appellee's right to recover the sum sued for depends on the fact of a substantial compliance with the terms of the contract, a copy of which seems to have been filed in this suit. It is expressly denied that plaintiff had complied with the contract. It will, however, be seen that, before the appellant could enter into the contract so as to bind the taxpayers of the city, the proposition so to do must be first ratified by the voters of the city; and it seems to us that the answer sufficiently denies that any such ratification was had by the voters. In fact, it is the duty of the plaintiff to show by its petition that the question was submitted to and ratified by the voters substantially as required by law. We do not think that it is material whether the contract was made with the trustees of Harrodsburg or the city council, if in fact the name of the city authorities had been changed by law. In such a case the officers of the city exercising the power theretofore vested in the trustees did in fact enter into the contract after the same had been ratified by the voters. Nor do we think that the mere fact that the vote was taken at the hotel and court house invalidated the election, provided there was, in effect, any law authorizing an election to be held at those places at that time, and provided the election was in fact held there upon due notice, and the voters of the city generally participated therein. It is true that the council should have entered on its records all the facts essential to make a valid contract, and that, as a rule, it can only act and speak through its official records and duly-qualified officers. But we do not now decide that the omission to make the proper entries, if in fact it can be shown that such entries or contract were in fact made, could have the effect to defeat or nullify the contract.

Our conclusion is that under the pleadings and exhibits filed the court was not authorized to render the judgment appealed from. The judgment is therefore reversed, and cause remanded for proceedings consistent herewith.

PAINTER *v.* CITY OF NORFOLK *et al.*

(*Supreme Court of Nebraska, June 19, 1901.*)

[87 N. W. Rep. 31.]

Water Contract—Bonds of Water Company—Guaranty of Interest by City—Validity.

A city by ordinance contracted with a corporation that, in consideration that the latter should construct and maintain within the city a system of waterworks, the city would pay to it hydrant rentals to the amount of $3,000 per annum, and that, in case the company should issue mortgage bonds upon its works, the city clerk should indorse upon each bond a certificate to the effect that, in lieu of such rentals, the city would pay to the trustee or trustees named in the instruments annual interest upon said bonds to the amount aforesaid. The company issued 75 such bonds, for $1,000 each, payable 25 years after date, with semiannual interest at the rate of 6 per cent. per annum, evidenced by interest coupons attached; and the clerk indorsed upon each of said bonds a certificate that the city would pay the interest thereon as it should mature: *held*, that the certificate was in excess of the authority purported by the ordinance to be conferred upon the clerk, and was void.

Municipal Purchase of Waterworks—Unlawful Assumption of Bonded Debt.

In the case above stated, the city reserved the right to purchase the works, and agreed, in such case, to assume whatever outstanding bonded debt should at the time of the purchase exist thereon, and shortly after the completion of the works did in fact purchase them. The statute provided that no bonded debt should be incurred by the city for the construction or purchase of a system of waterworks unless the same should first be authorized by a popular vote. No such vote was taken, and the guaranty contemplated by the ordinance would, if valid, have bound the city for the payment of a fixed sum annually for hydrant rentals, irrespective of a statute which limited such expenditures to the proceeds of a specified annual levy on the taxable property of the city as disclosed by the public assessment records: *held*, that the provisions of the ordinance with respect to the assumption of the bonded debt and the guaranty of interest payments thereon were in violation of the statute and void.

(Syllabus by the Court.)

Error to district court, Madison county; Robinson, Judge.

Action by Mary H. Painter against the city of Norfolk and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Powers & Hays, for plaintiff in error.

Burt Mapes, for defendants in error.

MAYOR, ETC., OF CITY OF KNOXVILLE *v.* KNOXVILLE WATER CO. *et al.*

(*Supreme Court of Tennessee, Nov. 2, 1901.*)

[64 S. W. Rep. 1075.]

Ordinances—Passage—Special Meeting—Notice to Councilmen.*

Knoxville city ordinance of March 30, 1901, regulating water rates,

*See London, etc., Land Co. *v.* City of Jellico, 2 Mun. Corp. Cas. 704.

was read, pursuant to charter, on March 9th, March 15th, and March 30th. The first and last of these readings were at special meetings, the calls for which were made about 12 hours before they were held. On March 9th one alderman was absent from the city and state, and his exact whereabouts unknown. On March 30th he was likewise absent, and about 300 miles from Knoxville. His residence was within the city: *held*, that a finding that the ordinance was invalid because, though legally practicable, no notice of the special meetings was given the absent alderman, was erroneous, as the evidence disclosed that such notice was not legally practicable.

Same—Same—Publication in Sunday Paper.

Knoxville city charter (Acts 1885, Sp. Sess. c. 8, § 28) provides that city ordinances, "when printed and published by the authority of this corporation," shall be received in evidence, etc. Ordinance of March 30, 1901, regulating water rates, was published in the Sunday edition of a daily newspaper, which, it appeared, was the best advertising medium which could have been chosen: *held*, that the ordinance was not invalid because published on Sunday.

Water Rates—Fixed by Contract—Subsequent Reduction by Ordinance—Police Power—Impairment of Obligation by Ordinance.*

Knoxville city charter (Acts 1885, Sp. Sess. c. 8, § 18, subsec. 7) authorizes the city to provide waterworks. Acts 1877, c. 104, amendatory of Act 1875, c. 142, under which the defendant waterworks company was organized, provided (section 2) that the act should not interfere with the police or general powers of the municipality, and that the municipal authorities should have power by ordinance "to regulate" water rates. By contracts between the city and company, certain water rates were stipulated for, and were enacted into ordinances. Afterwards, by ordinance of March 30, 1901, the city reduced the water rates: *held*, that as, in the absence of express legislative authorization, the city could not bind itself to a fixed rate in derogation of its police power, the ordinance of March 30th was not invalid as impairing the obligation of contracts.

Same—Regulation by City—Contract Fixing Rate Does Not Preclude Further Regulation by Ordinance.

Under the act of 1877 the right of the city to regulate water rates was a continuing right, and the fact that it had once exercised it in making the contracts with the company did not preclude a further exercise of such power by the passage of the ordinance of March 30, 1901.

Same—Police Power.

The police power of a city extends to the regulation of water rates.

Same—Power of City to Regulate When It Is Itself a Consumer.

It is no objection to according a city the right to regulate water rates that the city is itself a consumer, so long as the reasonableness of the rates is subject to judicial review.

Appeal from circuit court, Knox county; Jos. W. Sneed, Judge.

Action to enforce reduced water rates by the mayor and aldermen of the city of Knoxville against the Knoxville Water Company and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Pickle & Turner and Reuben L. Cates, for appellant.
Chas. T. Cates, Jr., for appellees.

WILKES, J. This suit arises out of an effort upon the part of the city of Knoxville to enforce an ordinance which affects

*See notes at end of case.

the defendant water company, and, as it claims, seriously interferes with its operations, and unlawfully encroaches upon its franchises and vested rights. The water company has a valuable plant at Knoxville, which it has erected and operated under contracts and ordinances made by the city of Knoxville, and it has valuable franchises in the furnishing of water to the city and people. The relative rights of the city and water company, and their obligations one to the other, appear to have been drawn into sharp controversy, when the city, on the 30th of March, 1901, passed and approved the ordinance in controversy in this suit, specifying a maximum rate to be charged to consumers by any firm or corporation in the city of Knoxville, and providing a high penalty for a violation of its terms and provisions, as set forth in its third section, to wit: "Sec. 3. Be it further ordained, that it shall be unlawful for any person, company, firm or corporation or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville to charge, demand or collect for water so supplied, more than the rates hereinbefore set forth in section 1 of this ordinance; and it shall also be unlawful for any such person, company, firm or corporation or their officers, agents, servants, or employees to cut off or otherwise interfere with the supply or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders in lawful money, the charge for such water at the rates aforesaid, and any violation of the provisions of this section of this ordinance, shall be a misdemeanor, and upon a conviction thereof before the recorder, the offender shall be punished by a fine of not less than $10.00 nor more than $50.00 for each offense." The defendant company continued to charge the rates provided in a contract and previous ordinance of October 20, 1899, which (with the exception of some rates in the Lonsdale-Beaumont ordinance) were slightly in excess of the rates and charges provided in said ordinance of March 30, 1901, and thereupon this suit was instituted, and the defendant was charged with unlawfully charging, demanding, and collecting of W. K. McClure, for water furnished and to be furnished him in the city of Knoxville, more than the rates fixed therefor by the ordinance of March 30, 1901. McClure was the agent for J. S. Gratz, who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville, and outside of the Tenth ward. In 1896 the defendant company made a contract with Gratz to supply water to the premises owned by him, which contract is as follows: "Knoxville Water Company. Service No. 2,850. Knoxville, Tennessee, Sept. 17, 1896. The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 706 High street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only; and I hereby agree to use and pay for the same in accordance with the rates, rules, and regulations of the Knox-

ville Water Company as now or hereafter in force, and which are made a part of this contract; and I further agree that said company may enter upon any land owned by me, and in which I may have such right, and place therein, upon the terms provided therefor, all the pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require." This contract was signed by J. S. Gratz, by his agent, W. K. McClure. The water in controversy was furnished to tenants living in the property owned by Gratz, for whom McClure was agent, and who, as such agent, represented the owner, Gratz, in renting the property; and the bills were rendered to W. K. McClure as agent, and paid by him in that capacity, but actually paid out of funds belonging to the owner, J. S. Gratz; and the bills so rendered for said water were in accordance with the rates prescribed by said contract and ordinance of October 20, 1899. The difference between the rates charged by defendant and paid by Gratz, through McClure, for the three premises to which the water in controversy was furnished, and what would have been paid under the ordinance of March 30, 1901, was $1.15; that is, 50 cents, 42 cents, and 23 cents, respectively.

The first question presented is as to the validity of the ordinance of March 30, 1901, because of the manner of its passage by the city council. The charter of the city of Knoxville provides that no ordinance shall become a law without first having been read and passed at three several meetings; that is, at three several regular meetings of the board, or at three several regular meetings or valid "call" or "special" meetings, which the mayor, by said charter, is authorized to call. The regular meetings of the board of mayor and aldermen of the city of Knoxville are on the first and third Friday nights of each month. The ordinance of March 30, 1901, was passed on its first reading at a special meeting on March 9, 1901, on its second reading at a regular meeting on March 15, 1901, and on its third and final reading at a special meeting on March 30, 1901. The mayor and 11 aldermen—that is, one alderman for each ward—constitute the board of mayor and aldermen of the city of Knoxville. At the special meeting of March 30, 1901, Alderman Cleage, representing the Sixth ward, and Alderman Trigg, representing the Fifth ward, were not present, and were not notified, and no effort was made to notify them, nor did they have any notice or knowledge of said meeting. Alderman Trigg had removed from the city, and notice to him, it is conceded, was not necessary. Alderman Cleage was not present at the meeting of March 30, 1901, was not notified of that meeting, and had no knowledge thereof. When Alderman Cleage was elected an alderman for the Sixth ward of the city of Knoxville, he was then, as he was in March, 1901, residing with his mother on Broad street, in the Sixth ward of the city of Knoxville, but he was in the

employ of the Southern Railway, with headquarters principally at Asheville. He was active in the discharge of his duties as an alderman, attended nearly all of the regular meetings, and such special meeting as he had notice of, and was usually informed by telegram of special meetings; and had attended as many as three special meetings in one week, coming more than 100 miles to do so. No effort was made to notify Alderman Cleage of either of these special meetings. On request for a finding of facts, the trial judge found that it was practicable to have given Alderman Cleage notice of these special meetings, and that it was practicable for him to have attended the meeting of March 9, 1901, and that no emergency existed for the passage of the ordinance in question at these special meetings.

The first assignment of error we consider is that the trial judge erred in holding that the mayor was bound to give Alderman Cleage notice of the special meetings of March 9 and March 30, 1901, these being the dates when the ordinance in question was passed on its first and third readings, and for failure to give such notice the ordinance is void. The contention is that said Cleage was out of the city and state, and not within summoning distance, and no personal notice to him of said meetings was practicable, and therefore the action of the council, without notice to him was not thereby invalidated. In support of this assignment authorities are cited. The fact that Alderman Cleage was not notified of the meeting, and that no attempt was made to notify him, fully appears, and is not controverted. The general rule is that every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can be lawfully done by such meeting unless such notice has been given, or unless the members not notified actually attend, and participate in the business of the meeting. Land Co. v. Jellico, 103 Tenn. 321, 52 S. W. 995. It is said that the rule is quite rigidly stated in that case, but that, conceding it to lay down the general doctrine, still there are exceptions to such general rule, and that one of these exceptions excuses notice when it is not practicable to give it; and for this proposition are cited in the printed brief: 1 Dill. Mun. Corp. (4th Ed.) § 286; 1 Beach, Pub. Corp. § 271; 15 Am. & Eng. Enc. Law (1st Ed.) pp. 1034, 1035. Other authorities are cited as applicable to cases of private corporations and inferior municipal and school boards, which we think we need not consider. As bearing upon the main question, it is suggested that it has never been the custom in Knoxville to give notice to each and every one of the board of special meetings; that Cleage had virtually removed himself from the state, so that service upon him was impracticable; that in the case of Land Co. v. Jellico, 103 Tenn. 320, 52 S. W. 995, it appeared that the alderman who was not notified was in the building where the meeting was held, and the inference might

be that he was purposely omitted from the notice, as he was hostile to the ordinance that was considered, and the meeting was at the instance of the persons interested in the passage of the ordinance; while in this instance, as afterwards developed, Alderman Cleage was in favor of the ordinance, and would have voted for it, if he had been present at the meeting. We pass over these and minor exceptions, and proceed to consider the merits of the first assignment. In 1 Dill. Mun. Corp. (4th Ed.) § 286, it is said: "If the meeting of the council be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote." In section 263 it is said: "A notice, when necessary, must, if practicable, be given to every member who has a right to vote, when the act is one to be done by a body consisting of a definite class or classes, and it must be given by or issued by some one who has the authority to convene a corporate meeting. But notice may be altogether dispensed with, or its necessity waived, by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house, or last place of abode. An order to serve all is not sufficient; all, if practicable, must be served. But, if the party entitled to notice has entirely quit the municipality, and has no family or home within its limits, notice is not necessary." In section 264 it is said, among other things: "Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may, if every one consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice; but the unanimity of consent should clearly appear from their recorded declarations, acts, or conduct. * * * If the charter imperatively requires a special notice, it cannot be waived, even by the consent of all. In 1 Beach, Pub. Corp. § 265, it is said: "When a meeting is assembled for a special purpose, every member who has a right to vote is entitled to notice unless she has quit the municipality without retaining a home or leaving his family within its limits. * * * It must be personally served upon him, but in case of his temporary absence it may be left with his family or at his last place of abode." Again, section 27: "Every member entitled to be present at a special meeting is entitled to notice of the time and place thereof, which must served upon him personally, if practicable, or unless some other mode of notice is prescribed by the statute or charter." For all these propositions, authorities are liberally cited. In 15 Am. & Eng. Enc. Law (1st Ed.) p. 1035, it is said: "A

meeting held at any other time than that fixed for a regular meeting under a resolution of the council or a special meeting under the call of the mayor, is a legal meeting, if all its members actually attend, and participate in its proceedings, and it is otherwise regular." In Lord v. City of Anoka, 36 Minn. 176, 30 N. W. 550, it was held that under the charter of the defendant a special meeting of the city council is not valid unless called by the mayor by written notice to each member of the council, delivered to him personally, or left at his usual place of abode, or unless all the members—at least all who are not notified—are present at the meeting." And in Beaver Creek v. Hastings, 52 Mich. 528, 18 N. W. 250, it is said notice may be dispensed with or waived by the presence of every one entitled to it. In Paola & F. R. Ry. Co. v. Anderson Co. Com'rs, 16 Kan. 302, holding that the acts of a board of county commissioners at a special meeting were invalid because all members were not notified, Mr. Justice Brewer said: "The statute providing for the sessions of the county board is found in section 13, p. 256, of the General Statutes. That section, after providing for the meeting of the board in regular session, adds: 'And any special session on the call of the chairman at the request of two members of the board, and as often as the interest of the county may demand.' This is the only statutory provision on the subject. It does not specify whether the call shall be verbal or in writing, how long prior to the meeting it shall be made, or require a record to be preserved of it. And the same is true as to the request. But still it requires a 'call'; and the call of the meeting, in the legal sense of the term, is a summons to the parties to meet,—directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by the statute or by-law. It is sometimes provided that it shall be by publication in a newspaper, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal service. But in some way or other notice must be given; and, if there be no regulation as to the manner of notice, it must be personal notice. This is no new question. It has arisen in respect to the sessions of common councils of cities, boards of directors or trustees of private corporations, the town meetings of New England, the meetings of most of corporations, boards of directors, etc. And there is but one uniform rule running through the authorities. In the case of Rex v. Mayor, etc., of Shrewsbury, Lee t. Hardw. 151, it was said by the court that, 'when the acts are to be done by a selected board, notice must be given of the time of special meetings.' It was a saying of Lord Kenyon's that 'special notice must be given to every member who has a right to vote.'" In regard to county boards it is said a

special session of the board has no power to transact business unless it has been called in the manner provided by law, and notice of the meeting is in all cases essential. 7 Am. & Eng. Enc. Law (2d Ed.) 979, note 2, citing among other cases Pike Co. v. Rowland, 94 Pa. 238, which holds that, if the meeting be special, notice is necessary, and it must be personally served, if practicable, upon every member entitled to be present. In People v. Batchelor, 22 N. Y. 129, it was held that the election of the clerk of the First district court was void because five absent aldermen had no notice of the convention. Mr. Justice Selden, for the court, said: "It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body." The case of State v. Kirk, 46 Conn. 397, is somewhat obscurely reported, but, as we read it, it appears that Wm. Kirk was elected street commissioner of the city of Bridgeport on the 8th of April, 1878. It appears that he had been previously elected to the same office, but the exact date does not appear. He insisted that he was legally elected on the 8th of April, but, if that contention was not correct, he was rightfully in office as a holdover from his former election. It appears that at the first election one member of the board was not notified. The court held that a good reason was shown why actual notice was not given. The member absent was not only gone from the state, but his whereabouts appear not to have been known until afterwards. Notice in writing was left at the store of his son, where he was in the habit of visiting every day when in town. The court said no other notice could well have been given, and the law never required impossibilities. But in the same case it appeared that by the charter the mayor was ex officio a member of the board, and its chairman, and entitled to preside. He was not notified of the meeting, and it was held that the meeting was illegal, although he had no vote except in case of a tie, and it appeared that in the particular instance he would have had no vote. The report of the case, as furnished us, is not satisfactory, but it clearly appears that the mayor might have been notified, and was not, and the meeting was adjudged illegal. While in the other case the member could not be found, and hence was not notified, though all was done that could have been done, and it was impossible to do more.

The finding of the trial judge which was asked for by the plaintiff as to Alderman Cleage contains, among other statements, not important in this connection, the following: "At the time of his election as an alderman of the city of Knoxville, and on March 9, 1901, and March 30, 1901, he was in the employ of the Southern Railway Company as law agent, with his headquarters at Asheville, in the state of North Carolina, and transacted his business principally in the states of North and South Carolina, and outside the limit of the state; his

territory including about 500 miles of railroad. His duties require him to go in person over his territory investigating, reporting, and adjusting claims for damages against said railroad company. That during the months of February, March, and April he was more than usually busy in the discharge of his duties, but retained his home in the Sixth ward of the city of Knoxville, and was active in the discharge of his duties as an alderman. That he attended nearly all the regular meetings of the council, and nearly all the special meetings of which he had notice. That it was impracticable for him to have been present on March 30, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting. That it was not impracticable to have given him notice of the meeting of March 9, 1901, but it does not appear that it was impracticable for him to have attended that meeting. That there was no emergency for this ordinance to be considered at special meetings of March 9 and March 30, 1901, and as a public servant and official he had a right to have notice of these meetings; but notice was not given him, and therefore this ordinance of March 30th is invalid." There are various exceptions to the finding of the trial judge, but we think we need notice only one or two of them. In the tenth subdivision of the third assignment of errors it is said: "He [the trial judge] erroneously found that it was practicable to have given Cleage notice of the special meetings of March 9 and March 30, 1901, and that it does not appear to have been impracticable for him to have attended the meeting of March 9th. There was no evidence to support this finding. It was contrary to all the evidence on the subject. Cleage was beyond the limit of the city and state. His exact whereabouts were unknown to the officials of the city, and the facts and circumstances, as shown by Cleage, as well as his direct testimony to the fact, all show to the contrary of the court's finding on this question." This assignment that there is no evidence to support the finding of the trial judge requires us to go behind that finding, and look into the record, and see whether there is any evidence on which to base it. In this connection it may be remarked that the question whether notice was or was not practicable is one of mixed fact and law. It appears from the testimony in the record that each call for a special meeting on the 9th and 30th of March, 1901, was for a meeting to be held on the night of the same day the call was made; that is, on the night of March 9th and March 30th, respectively. It clearly appears from the evidence of Alderman Cleage that on both of these days he was beyond the limits of the state. He cannot identify particularly the exact place where he was on the 9th, but he was at some point on his territory, all of which was outside the limits of the state. He is very positive and definite that on the 30th of March, 1901, he was in North Carolina, at the extreme end of his territory, about 300 miles

from Knoxville. We are of opinion that when a member of the council removes from the state, or is continuously absent from the state, and when he is shown to have been absent from the state and beyond reach on the occasion and at the time of the call, as appears in this case, it is not legally practicable to give him notice of called meetings. As to the necessity and urgency of such called meeting, the mayor must be the judge. In this case it appears that action was desired at the time in order to put the new ordinance in force before the beginning of another quarter, when current bills for water would be payable in advance. As to the sufficiency of this urgency it is not incumbent on us to determine. The charter provision is that the mayor may call special meetings whenever, in his judgment, the good of the city requires it. Tested by these rules, which makes the question as to whether or not notice was practicably one of mixed law and fact, we think the evidence is that notice of these special or called meetings was not legally practicable to have been given to Alderman Cleage. Moreover, it appears that, if he had been notified of the call of March 30th as soon as possible after it was made, it would not have been practicable for him to have attended the meeting of that day, as he was about 300 miles from the city of Knoxville. This, however, we consider of no practical importance. The ordinance not being invalid because of the manner of its passage, we proceed to consider the other questions presented in the record.

It is further objected to this ordinance that it is invalid, and inadmissible in evidence, because it was published in a Sunday newspaper. It appears that the ordinance, by authority of the city, was published in the Sunday issue of the Journal and Tribune, a morning daily paper of the city of Knoxville, on March 31, 1901. It further appears that since 1866 Sunday editions of the daily paper have been published in this city, and that these editions are the largest and most important, have the largest circulation, and are the best advertising mediums of any of the daily issues of the papers. By the charter of the city of Knoxville (Acts 1885, Sp. Sess., c. 8, § 28) it is provided: "This act is declared to be a public act and may be read in evidence in all courts of law and equity, and all ordinances, resolutions, and proceedings of the board of mayor and aldermen may be proved by the seal of the corporation, attested by the recorder, and when printed and published by the authority of this corporation, the same shall be received in evidence in all courts and places, without further proof, when certified to by the recorder." This is the only requirement as to the publication of ordinances. We have been cited to quite a diversity and collection of authorities bearing more or less upon this feature of the case. It has been held in Tennessee that the acknowledgment of a deed by a married woman with her privy examination is valid, though made on Sunday. Lucas v. Larkin, 85 Tenn. 355, 3 S. W.

647. It is said contracts in Tennessee made on Sunday have never been held by our supreme court to be void. It is held by the federal courts, construing Tennessee statutes, that they are valid. Swann v. Swann (C. C.) 21 Fed. 299, citing Amis v. Kyle, 2 Yerg. 31, 24 Am. Dec. 463. Also, notes to Shannon's Code, § 3029. As applied to newspaper publications which may be regarded as process they are held void, just as any other judicial proceedings on Sunday are invalid, under the rule, both at common law and by statute above stated, that Sunday is "dies non juridicus." 17 Enc. Pl. & Prac. p. 102. The leading case cited in support of this text is Schwed v. Hartwitz, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221. This holds that the publication of a notice of a tax sale is in the nature of service of process, and, if it takes place in a Sunday edition of a newspaper, it is void. The same holding, upon the same ground, is made in the case of Sawyer v. Cargile, 72 Ga. 290, which is another tax sale case. See note 2 to 24 Am. & Eng. Enc. Law (1st Ed.) p. 577. But no other notice or publication made on Sunday, unless specially prohibited by statute, is void. In Hastings v. Columbus, 42 Ohio St. 585, it is held that "the publication of a preliminary and other ordinances of street improvement, which were required to be made in a newspaper of general circulation, may be made in a paper published only on Sunday." This case is directly in point. "Where there is a stipulation between private parties that notice shall be given by publication of ten days, publications on Sunday may be counted." Kingsbury v. Buckner, 70 Ill. 514, cited in note 1 to 24 Am. & Eng. Enc. Law (1st Ed.) p. 577. "In South Carolina it is held that notice of escheat is not a process, such as is meant that Sunday is dies non, nor, when published in a newspaper on that day, is it served on that day. The statute forbidding the service of civil process on Sunday does not make such process void." Eason v. Wilcofskey, 29 S. C. 239, 7 S. E. 291, cited in note to 24 Am. & Eng. Enc. Law (1st Ed.) p. 575. "Notice to a consignee, given on Sunday, of the arrival of a cargo, is valid." Lake v. Hurd, 38 Conn. 540. "And notice to quit is not invalid because given on Sunday." Sangster v. Noy, 16 Law T. (N. S.) 157; 24 Am. & Eng. Enc. Law (1st Ed.) p. 579. "So, too, an enlistment made on Sunday is valid." Wolton v. Gavin, 16 Q. B. 48. The statute laws of the different states are so variant that we can derive but little aid from their holdings. It is further said the validity or invalidity of an act done upon Sunday does not rest upon religious or moral grounds, or upon public policy, but solely upon the question as to whether it violates the provisions of the law, either statutory or common. Swann v. Swann (C. C.) 21 Fed. 299; Moseley v. Vanhooser, 6 Lea, 286, 40 Am. Rep. 37. It is the purpose of the publication of an ordinance like that in question to bring it to the attention of the public, and it appears that the publication in a Sunday

newspaper is the most effective notice that could be given in the city of Knoxville. If it accomplished the very purpose intended by the requirement,—to publish the act,—and there is neither public policy nor forbidding statute to be contravened by the act of publication, it seems that no ground could be suggested why this publication is not good. We think this is the correct view, notwithstanding the very able and ingenious argument made by counsel, and backed up by many authorities of high respectability, among which may be cited Ormsby v. City of Louisville, 79 Ky. 197, 4 Am. & Eng. Corp. Cas. 342; Dumars v. City of Denver (Colo. App.) 65 Pac. 580; Sewall v. City of St. Paul, 20 Minn. 511 (Gil. 459); Scammon v. City of Chicago, 40 Ill. 146; Schwed v. Hartwitz, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221. Many of these cases could be dstinguished, but, after all, there is a conflict of authority, arising largely from a difference in the Sunday laws of the several states. We are content with the conclusion we have reached as being the most practical, and at the same time free from any valid legal objection.

In order to properly appreciate the very serious questions presented on the merits, it is necessary to give a short resume of facts bearing upon the history of the waterworks company, and its connection with and relation to the city of Knoxville. A condensed statement of these facts, as given by counsel, and which we find substantially correct, is as follows: By the charter of the city of Knoxville, as compiled from former acts, and as embodied in the acts of 1885 (Sp. Sess., c. 8, § 18, subsec. 7), the board of mayor and aldermen is authorized by ordinance "to provide the city with water by waterworks, within or beyond the boundaries of the city, or provide for supplying the city with water otherwise." The Knoxville Water Company was chartered and organized under Act 1877, c. 104, amendatory of Act 1875, c. 142. Section 2 of that act provides that "such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village, in which it is proposed to operate such waterworks, and such leave shall be certified by the mayor or recorder upon the application, and registered with it, but this act is in no way to interfere with the police or general powers of the corporate authorities of such city, village or town, and such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company." It is insisted, and, as we think, correctly, that it has been settled that the state, by direct enactment of its legislature, or by authority delegated by the legislature to counties or municipalities, may regulate public utilities, and the rates to be charged for public service by corporations or individuals rendering any service to the public. This doctrine has been applied to elevators, telephones, gas companies, water companies, and other public or quasi public servants. The lead-

ing case on this subject is that of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. See, also, Road Co. v. Croxton (Ky.) 33 L. R. A. 177, and extensive note thereto, reviewing the various cases on the subject (s. c. 34 S. W. 518); Railroad Commission Cases, 116 U. S. 307, 347, 352, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 631; San Diego Water Co. v. City of San Diego (Cal.) 62 Am. St. Rep. 261, and extensive note thereto, reviewing many cases on the subject, page 289 (s. c. 50 Pac. 633, 38 L. R. A. 460); Danville v. Danville Water Co. (Ill.) 53 N. E. 118, 69 Am. St. Rep. 304; Water Co. v. Fergus (Ill.) 69 Am. St. Rep. 315, note (s. c. 53 N. E. 363); Crumbley v. Water Co., 99 Tenn. 420, 41 S. W. 1058; Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; Water Co. v. Wolfe, 99 Tenn. 430, 41 S. W. 1060, 63 Am. St. Rep. 841; City of Rushville v. Rushville Natural Gas. Co. (Ind. Sup.) 15 L. R. A. 321, and note (s. c. 28 N. E. 853). That such power may be delegated to a municipality, see San Diego Water Co. v. City of San Diego, supra; 15 Am. & Eng. Enc. Law (1st Ed.) p. 1167. On the 1st of July, 1882, an agreement was entered into between the city and the water company in regard to the erection by the latter of waterworks, and the supplying for a period of 30 years the city and its inhabitants with water, in which, among other things, it is stipulated by section 7 "said company will supply private consumers with water at a rate not to exceed 5c. per hundred gallons." This contract provides as follows: "(2) The city further obligates itself not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water, for the full period of thirty years from the 1st of August, A. D. 1883."

A further statement of facts is as follows: On April 18, 1891, an ordinance was enacted by North Knoxville constituting an agreement between it and Wheeler & Parks for the latter to supply said town and its inhabitants with water until June 3, 1913; and by section 9 of that ordinance it was provided that water to be furnished private consumers shall be charged for at "not exceeding the rates contained in the following schedules," and then sets out said schedule of rates. That contract was subsequently assigned to the Knoxville Water Company by Wheeler & Parks, and the town of North Knoxville became consolidated with and incorporated into the city of Knoxville. On September 17, 1892, an ordinance was enacted by the city of West Knoxville constituting an agreement between it and the Lonsdale-Beaumont Water Company for the supplying of water to said town and its inhabitants by said company for a period of 20 years, in which it was provided, among other things, by section 9, that said company shall not charge consumers, during the continuance

of the franchise granted by said ordinance, "exceeding the following maximum annual rates," etc., and then sets out the schedule of such rates. Said contract was subsequently assigned by said Lonsdale-Beaumont Water Company to the Knoxville Water Company, and the town of West Knoxville became consolidated with and incorporated into the city of Knoxville. On October 20, 1899, an ordinance was passed by the city of Knoxville, then embracing the territory of North and West Knoxville, authorizing said Knoxville Water Company to take the assignment of said contract of the Lonsdale-Beaumont Water Company to supply water to the inhabitants of the territory of West Knoxville upon certain conditions, among which was that they should furnish to the inhabitants of such territory water at a maximum "rate not exceeding that fixed in the ordinance and contract of September 17, 1892," and further that they should supply to the inhabitants of the balance of the city of Knoxville water, "at a maximum rate, not exceeding that fixed by the contract of July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company." On May 17, 1895, the city passed an ordinance regulating the supplying of water by meter, and fixed the rates and charges therefor to private consumers, and these rates were incorporated into the schedule of rates of the defendant in force on October 20, 1899. On July 27, 1900, the city passed another ordinance regulating and fixing the rates generally to be charged to consumers of water at a lower rate than that fixed by the schedule in force on October 20, 1899, and repealed all former ordinances in conflict therewith. Again, on March 30, 1901, the city re-enacted this ordinance of July 27, 1900, with slight amendments, fixing the same schedule of water rates as those set out in the ordinance of July 27, 1900. The present suit arises under the last ordinance. The question of whether the rates fixed by the ordinance in question are reasonable has been pretermitted in the proof, and not considered in this case.

It is insisted that it has been held that, when the power to regulate rates for public service of a public corporation is delegated to a city, the city becomes invested with such power as a public trust, and cannot devest itself thereof by contract. Huron Waterworks Co. v. City of Huron, 8 S. D. 169, 65 Pac. 816, 30 L. R. A. 848; City of Ogden City v. Bear Lake & River Waterworks & Irrigation Co. (Utah) 52 Pac. 697, 41 L. R. A. 305. Again, the state (and, of course, a city) cannot contract away its police power, or limit its exercise by contract, and this is conceded. Bowman v. Railroad Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115

U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Mugler v. Kansas, 123 U. S. 624, 8 Sup. Ct. 273, 31 L. Ed. 205; Mayor, etc., v. Miln, 11 Pet. 139, 8 L. Ed. 887. But it is denied that such a case is presented in the one at bar.

The matter of controversy in this case will first be treated from the standpoint of a contract, outside of the operation of the police powers of the municipality. Treating the regulation of rates as a matter of contract, it has been held that a "charter specification of rates which it shall be lawful for a turnpike company to charge, subject to certain increase or decrease, if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the state and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of legislative power to change the rates." Road Co. v. Croxton (Ky.) 34 S. W. 518, 33 L. R. A. 177. See notes to this case for a general discussion. In the case of City of Danville v. Danville Water Co. (Ill.) 53 N. E. 1118, 69 Am. St. Rep. 304, the court held: "The legislature has the power to regulate the rates at which water shall be supplied to the public by a water company, especially where such right is reserved by the statute under which said company was incorporated. Municipal corporations can exercise only such powers as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act. The statute empowering a city to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not to exceed 30 years, gave no power to the city to bind itself by fixing a rate at which it must pay for such supply for such entire period, and an ordinance fixing the rate for the entire 30 years is void. Although a city has been empowered by statute to authorize a private corporation to construct waterworks and to contract for a supply of water not to exceed 30 years, a subsequent statute empowering any city in which a private corporation has been or may be authorized to supply water for public use to fix reasonable water rates is constitutional; and an ordinance passed under the later statute reducing existing water rates, and fixing them at a reasonable price, is valid, although the city enacting it has, under the earlier statute, attempted by ordinance to fix water rates at a certain figure for the entire unexpired period of 30 years." City of Danville v. Danville Water Co. (Ill.) 53 N. E. 118, 69 Am. St. Rep. 304. To the same effect, see the decision in the case of Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363, cited in note to the foregoing case at page 315, 69 Am. St. Rep. It is there held that an ordinance fixing the rates for the full period is merely a declaration that such rates are reasonable at the time when the ordinance was enacted, and that the city is not bound to recognize such rates as reasonable for the full period, and has power to fix the water rates so as

to make them reasonable at any time, or from time to time, as changed conditions may affect the reasonableness of the water rates formerly established, and that mandamus will lie at the suit of a citizen to compel the water company to furnish him with water at the changed rates, provided they are reasonable. In the case of San Diego Water Co. v. City of San Diego (Cal.) 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, the power to regulate water rates is recognized and enforced, with the like qualification that they must be reasonable. The case of Water Co. v. Fergus, cited above, and of City of Danville v. Danville Water Co., and also the additional case of Freeport Water Co. v. City of Freeport, all from the supreme court of Illinois, were taken by writ of error to the supreme court of the United States, and on March 25, 1901, were affirmed. 21 Sup. Ct. 490, 45 L. Ed. 702; 21 Sup. Ct. 505, 45 L. Ed. 696; 21 Sup. Ct. 493, 45 L. Ed. 679. In these cases the supreme court of the United States held that municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract and to regulate rates, but such power must be conferred in explicit terms, and that a contract concerning governmental functions, as one which affects the right of a city to regulate rates of a water company, must be strictly construed, and such functions cannot be held to have been contracted away by doubtful or ambiguous provisions, and, further, that an ordinance granting an exclusive franchise to the water company, with the right to use the streets, requiring the municipality to pay certain rentals, and binding the company, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of the provision that the grantee "shall charge the following annual rates to consumers during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. It will be seen from an inspection of these cases that the supreme court was divided in opinion, the minority relying upon the cases hereafter cited by the defendant as controlling. This difference, as we understand it, extends not only to the question of the power of the state to authorize an irrevocable contract, but likewise whether the regulation of rates is within the police power.

In a very able and exhaustive argument, counsel for the water company insists that the ordinance of March 30, 1901, impairs the obligations of prior contracts made by the city with the defendant company, and is therefore void, and in support of this contention are cited: Const. U. S. art. 1, § 10; Const. Tenn. art. 1, § 20; Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct, 273, 29 L. Ed. 525; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; St. Tammany

Waterworks Co. v. New Orleans Waterworks Co., 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 570, 20 Sup. Ct. 736, 44 L. Ed. 886; Santa Ana Water Co. v. Town of San Buenaventura (C. C.) 56 Fed. 339; Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518; Old Colony Trust Co. v. City of Atlanta (C. C.) 83 Fed. 42; Los Angeles City Water Co. v. City of Los Angeles (C. C.) 88 Fed. 720; City of Cincinnati v. Cameron, 33 Ohio, 336; Safety Insulated Wire & Cable Co. v. City of Baltimore, 13 C. C. A. 375, 66 Fed. 140; Los Angeles City Water Co. v. City of Los Angeles (C. C.) 103 Fed. 711; Crosby v. City Council, 108 Ala. 498, 18 South. 723; State v. Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789. We do not deem it necessary to comment upon all these authorities, but will notice some of those most relied upon, and most nearly in point. The case of City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 570, 20 Sup. Ct. 736, 44 L. Ed. 886, is much relied on. Attention is called to the fact that Justice McKenna, who delivered the opinion in the Los Angeles Case above cited, delivered the opinions in the Illinois cases, supra, and he rested it upon the ground that express authority had been granted to Los Angeles to enter into a contract limiting its power to regulate water rates. It is said on page 570, 177 U. S., page 740, 20 Sup. Ct., and page 892, 44 L. Ed., that: "It is not denied that a city has the power to regulate rates. The contract of July 22, 1868, with the water company provided that 'the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said party of the second part, or their assignees, provided that they shall not so reduce water rates, or so fix the price thereof, as to be less than those charged by the party of the second part for water.'" On April 2, 1870, the legislature for California passed an act, held in that case to be valid, ratifying and confirming said contract. Pages 561, 571, 177 U. S., pages 737, 741, 20 Sup. Ct., and pages 888, 892, 44 L. Ed. It is therefore held that since the city had entered into this contract by such legislative authority, and that the contract did not grant the power to regulate rates, which power was already existent, but was a contract to limit that right, the city had no power by ordinance to violate it. It will be further observed that this case arose under acts and contracts made before the adoption of the constitution of California of 1879, providing for the regulating of water rates. Page 567, 177 U. S., page 739, 20 Sup. Ct., and page 890, 44 L. Ed. In the case of Old Colony Trust Co. v. City of Atlanta (C. C.) 83 Fed. 39, it is held that the city could not regulate street car fares, because no such power had ever been delegated to the city. The city asserted such power under the

provisions of its own charter, and also those of the charters of the street car companies; but the court, upon construing those charters, held that they granted no such power. The charter of the street car company granted certain franchises and privileges to the company, "provided that the rates and fares on said railroad shall be subject to the approval of the mayor and city council of the city of Atlanta." In the city ordinance granting to this company the use of the streets, etc., it was provided that "the charges for passage on said road shall not exceed 20 cents for any through line, and 10 cents for half lines or short distances." The court declined to express an opinon as to whether this constituted a contract between the city and the company, but said that, if the proviso in the railroad company's charter granted any power to regulate, it was exhausted upon its first exercise. But the court did not determine what effect would be given to a direct gain of power to the city to regulate fares, instead of this mere reservation out of the franchises granted to the railroad company, and further held that the power to approve, such as was reserved in this charter, is not equivalent to the power to regulate and fix rates. See page 42. The case of Santa Ana Water Co. v. Town of San Buenaventura (C. C.) 56 Fed. 339, simply holds that the constitution of California of 1879, requiring annual regulation of water rates, would not avoid a valid contract previously entered into by a city with a water company, authorizing the water company to fix its own rates. The case has no application to the questions involved in the present case. The case of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, is a case somewhat peculiar in its facts. By an act of the territory of Washington incorporating the city of Walla Walla it was enacted that it should have power to provide a supply of water, and to grant the use of the streets for a term not exceeding 25 years, "provided none of the rights and privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others." The city in pursuance of this act passed an ordinance in 1887 granting to the company the right to lay, place, and maintain all necessary water mains, pipes, connections, and fittings in all the highways, streets, and alleys of the city, for the purpose of furnishing water. In 1893 it passed another ordinance to provide a system of waterworks of its own, and one of the questions presented was its power to pass the latter ordinance. The court said: "The case upon its merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract which purports to have been passed in pursuance of the charter declared that until such contract be avoided by a court of competent jurisdiction the city would not erect, maintain, or become interested in any waterworks, except the ones established by the company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of waterworks by the

city, for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict. The latter clearly impaired the obligation of the former. The city contended that the original ordinance was beyond its power to make—First, because it created a monopoly not authorized expressly or impliedly by legislative grant, and was void as being in contravention of public policy; second, that it was an attempt to contract away a part of the governmental powers of the city council, and for other reasons which we need not notice. The court held that as the original contract was limited to 25 years, and was not an exclusive grant, it was not beyond the power of the city council; that, if it had been exclusive, it would have been a monopoly, and objectionable, unless authorized by express sanction of the legislature. The court further held that the contract would be void if it interfered with the police power of the city, and this police power extended to the peace, good order, health, and morals of the inhabitants, and if deleterious to them it might be controlled by the city, or the contract entirely abrogated under the police authority of the city; but the court held that the matter of the contract did not fall within the police power, but the contractual power, of the city. In the case of State v. Laclede Gaslight Co., 102 Mo. 472, 483, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789, the charter of the company granted by the state authorized the company to fix the price of gas manufactured by it, and it was held that such price could not be diminished by subsequent legislative action, state or municipal. It was further held that the regulation of the price of gas by the state or by municipalities created by it is not the exercise of a police power which cannot be abrogated by contract. * * * It may be said that, under the grant from the legislature in the Missouri case, it was intended to remove the company from the exercise of the police power of the state over it, in so far as its rates of charge were concerned. While not assenting to the views expressed in that case, we think this case clearly distinguishable from the present one under consideration, in that the legislature in the Missouri case intended to put the question of rates beyond future control of the state or municipality, and beyond its police regulation, while in the present case, under section 2 of the charter, it was clearly intended to keep the question of rates under control, and to treat them as subject to police supervision.

Under the cases we have cited, and others that might be collated, it is, we think, apparent that the authorities are not agreed as to whether the state can by legislative grant empower a municipality to enter into an irrevocable and perpetual contract with a water company or other private or quasi public corporation for a system of waterworks and a supply of water, and whether such company can by legislative grant be removed from the supervision of the police power

of the municipality, yet we think there is no question but that, in order to do so, the legislative grant must be unquestionable, and admit of no other construction, but must be plain, positive, and unequivocal. If the municipality has no such power under legislative grant, it can make no such contract; nor can it waive its police powers, or refuse to exercise them, when the good of the citizens of the municipality demands. What matters fall within the scope of the police powers of the state or of a municipality has never been definitely determined. A large number of subjects has been embraced, such as the public health, the public morals, the public safety, and the general and comprehensive clause of the public welfare; and, after the enumeration of all the subjects under these and other general heads, the text-books announce that there are also other instances. Different jurisdictions lay down different rules and limits. In Theilan v. Porter, 14 Lea, 626, 52 Am. Rep. 173, the safety and tranquility of the community and the orderly existence of the government are included in the enumeration. As to what may be done under this power, see, generally, Dill. Mun. Corp. p. 95, § 71, note; Id. pp. 141, 142, 244, 314, 752; Id. p. 920, note; 8 Am. & Eng. Enc. Law (1st Ed.) 620, 624; 18 Am. & Eng. Enc. Law (1st Ed.) 752; Harbison v. Iron Co., 103 Tenn. 423, 53 S. W. 955, 76 Am. St. Rep. 682; Leeper v. State, 103 Tenn. 503, 53 S. W. 962, 48 L. R. A. 167; Iron Co. v. Barton, 103 Tenn. 604, 53 S. W. 970; State v. Martin, 2 Tenn. Cas. 555; Railroad Co. v. Burke, 6 Cold. 50. It was said in Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079: "No legislature can bargain away the public health or the public morals." While the rate to be paid for water is not so palpably a regulation within the police supervision of a city as is the purity and supply of the water furnished, yet the rate of charge is a matter which affects the health, welfare, and comfort of the city, since, if rates are unreasonably high, they will prove a restriction upon the use of water which may seriously impair the health and interfere with the comfort and welfare of the people,—especially the poorer classes, who by reason of high prices may be cut off from the benefit of the water partially or altogether. The case of Los Angeles City Water Co. v. City of Los Angeles (C. C.) 88 Fed. 720; City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886,—is relied on to show that a city may waive or renounce its right to regulate water rates; but, as we have before stated, it appears that the express authority was given to that city in its charter to enter into a contract limiting its power to regulate rates; the language of the charter being, in substance, that the city may regulate the rates, "provided they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part [the water company] for water." But the difference in that

case and the present is that by the charter of Los Angeles the city has the express power to make an irrevocable contract, while in this case the city of Knoxville is not by its charter granted such a right, but the proper construction of the charter is, we think, that the city shall have a continuing right to regulate the charges for water, limited only by a condition that such rates shall not be unreasonable and oppressive. As before stated, this question of reasonableness or unreasonableness of rates is not considered in the present case, but seems to have been waived by consent.

It is said that it is unreasonable to give to the city of Knoxville the right to regulate the water rates of the company, when it is itself the principal party to be affected by such rates; and in this connection the language of Mr. Justice Jackson in Cleveland Gaslight & Coke Co. v. City of Cleveland (C. C.) 71 Fed. 614, is cited, as follows: "It would be a fearful proposition—monstrously absurd and outrageous—if the legislature undertook to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing. * * * The thing cannot be done, and ought not to be done." 71 Fed. 614. But the fallacy, as we think, in this argument, lies in the fact that the question of the reasonableness or unreasonableness of the rates is always open to judicial investigation; and while it may safely be said that the legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city to the authorities of the city, which is itself a consumer, either in its municipal capacity or through its inhabitants, without liability to a judicial investigation of the reasonableness of the rates fixed by such authorities, still, if no such provision is made in an ordinance, the law will imply one, and preserve to the company its right to litigate the question upon that ground. We do not think it necessary that the provision be incorporated in the contract or in the ordinance, but it will be implied when not expressly provided for.

It is said in addition that the city has an option to purchase the plant after 1898, and the argument is made that the city authorities, by oppressive legislation and ordinances, may make the plant unproductive and less valuable, in order to secure it at less than it is worth; but in answer to this we think we can safely say the defendants may protect themselves against such action and results by a recourse to the courts, and protection against ordinances which are intended to or do have such results. No such case is before us now, as the question of the income and profits of the water company has not been opened up or considered; the naked question

here being the power to regulate the rates as the city, in its judgment, may deem right and just.

Recurring again to the provision in the second section of the charter (Acts 1877, c. 104), we think that its proper construction is that nothing in it, and no power granted by it to the corporation to contract for and provide water, shall in any way interfere with the police or general powers of the city; and it expressly provides that such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company. It is to be noted that defendant's counsel insist that the proper construction of section 2 of the charter of the city is that, while the city originally had the power to regulate the price of water to be supplied by the company, it is not a continuing right, but that, having once exercised it, its power was exhausted, and, having once made a contract for a certain schedule of rates, it is bound by such contract. The contention is forcibly put as follows: "The city was the master of the situation. If it chose to refrain from making a contract, it might exercise the power of regulation, limited only by what would be unreasonable and oppressive. But if it should exercise the power vested in it, and specially conferred upon defendant company, and enter into a contract with said company for the use of water, and agree upon the price for the use of such water, then it became bound by that provision of the constitution of the United States, which is written into every contract, that it is sacred from alteration, change, or impairment, except with the consent of the other party." And it is said: "If such were not the case, what city could persuade parties to invest their capital in improvements, which, to be profitable, must either be permanent, or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him? A different construction would be disastrous to the interests of the city." In Freeport Water Co. v. City of Freeport, 21 Sup. Ct. 498, 45 L. Ed. 679, it is said: "This power of regulation is a power of government, continuing in its nature; and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power." In the words of Chief Justice Marshall in Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, 955, "its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." In that case the term used was, "at such rates as may be fixed by ordinance." It was said: "The words 'fixed by ordinance' may be construed to mean by ordinance once for all, to endure during the whole period of thirty years, or by ordinance from time to time, as might be deemed necessary. Of the two constructions, that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the

Notes

rates could not be adjusted as justice to both parties might require at a particular time." The language of the city charter in the present case is not that the corporate authorities shall have power by ordinance to fix, but to regulate, the price of water to be supplied by such company, and in the same connection the full police and general powers of the corporation are reserved to it. We are of opinion that the right to regulate rates was not exhausted by an agreement at any particular time upon a schedule of prices, but it is a continuing right, under the terms of the charter, but not to be exercised arbitrarily and unreasonably; and when rates are so reduced as to become oppressive upon the company, and so as not to yield a fair income on the investment, the courts can interfere, upon a proper showing, and restrain such action. As has been very tersely said, a reasonable rate the law assures, even against governmental regulation. Water Co. v. Fergus, 21 Sup. Ct. 490, 45 L. Ed. 702; Freeport Water Co. v. City of Freeport, 21 Sup. Ct. 498, 45 L. Ed. 679. The rates adopted by the ordinance are not shown by the proof to be unreasonable, and the ordinance is not shown to be oppressive, and its violation subjects the defendant to the penalties imposed.

The judgment of the court below is reversed, and judgment will be entered in this court as herein indicated.

NOTES.

Contracts—Impairment of Obligation by Ordinance.

Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the federal constitutional provision forbidding the impairment of the obligation of contracts. Williams *v.* Bruffy, 96 U. S. 176, 183. Hence a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation, as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the federal constitution. New Orleans Waterworks Co. *v.* La. Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607, 8 Sup. Ct. Rep. 741. But the ordinance must have been passed under supposed legislative authority, otherwise it will not be regarded as a law of the state within the meaning of the constitutional provision in question, and a suit to prevent its enforcement will not be considered as arising under the constitution of the United States. Hamilton Gaslight & Coke Co. *v.* City of Hamilton, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90. See also, St. Paul Gaslight Co. *v.* City of St. Paul, ante, p. 154.

The provision against impairing contract obligations is a limitation upon the power to tax as well as upon all other legislation. So where a city creates a debt and issues script, or "stock," therefor, wherein it is agreed that the principal shall be repaid together with a specified rate of interest, it is not competent for the city to afterwards enact an ordinance taxing its debt evidenced by the script, whether held by residents or nonresidents, and to retain the amount of the tax out of the instalments of interest. No municipality of a state can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised

Notes

to its creditors. Murray *v.* City Council of Charleston, 96 U. S. 432, 24 L. Ed. 760.

Contract Must Be Valid.

But the contract, the obligation of which is claimed to have been impaired by the ordinance, must be a contract, and a valid one. Hence, certain ordinances of the city of New Orleans, opening to general competition the right to build slaughter houses, establish stock landings, and engage in the business of butchering in that city under regulations prescribed by those ordinances, were held not to impair the obligation of the contract of a company which, under a legislative charter, had been given the exclusive right of having all stock landed at their stock landing place, and butchered at their slaughter house; the reason being that the slaughtering of cattle is a matter which concerns the public health and morals, and therefore within the police power of the state, which cannot be bargained away by the legislature to the prejudice of the general welfare. Butchers' Union, etc., Co. *v.* Crescent City, etc., Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652, following Boyd *v.* Alabama, 94 U. S. 646; Beer Co. *v.* Massachusetts, 97 U. S. 28; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Stone *v.* Mississippi, 101 U. S. 814.

In the case of Home Ins. Co. *v.* City Council of Augusta, 93 U. S. 116, 23 L. Ed. 825, the company had complied with the requirements of the general statute and procured the requisite authority to transact business for the period of one year, and had thereupon established an office in the city of Augusta. A general statute imposed a tax of one per cent. upon the gross amount of premiums received, and the city, by ordinance, imposed a further tax of one and a quarter per cent. upon such receipts. These taxes were paid by the company without objection. Afterwards the city council, by ordinance, imposed a further license tax of $250 on all insurance companies having an office within the city. This was contested by the company and finally carried to the supreme court of the United States on the ground that it impaired the obligation of its contract. But it was held by that court that the acceptance of the terms of the statutes and ordinances in the first instance did not amount to the making of a contract, and was no guaranty that the state would not impose a further tax, and that if the city council had authority to impose a tax of one and a quarter per cent., it also had authority to impose additional taxes whenever it saw fit, there being not even the semblance of a contract.

In New Orleans Waterworks Co. *v.* La. Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607, 8 Sup. Ct. Rep. 741, the plaintiff company had received a legislative charter granting it the exclusive privilege of supplying the city of New Orleans and its inhabitants with water, but with a proviso that nothing contained in the charter should be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river for his or their own use. It was held that the power thus conferred upon the city council was an administrative and not a legislative one, and that the permission granted to the defendant company, though put in the form of an ordinance, was nothing more than a license; that whether such license was within the authority vested in the city by the proviso contained in the charter of the plaintiff company, depended wholly upon the laws of the state, and not upon any provision of the constitution or laws of the United States. In other words, it was not a question of the impairment of the obligation of a contract, but merely a question of whether the defendant company was contiguous to the river within the meaning of the proviso, and the determination of this question was for the state courts.

Obligation Cannot Be Impaired by Ordinance Passed in Pursuance of Existing Statute

In Lehigh Water Company *v.* Borough of Easton, 121 U. S. 388, 7 Sup. Ct. Rep. 916, the plaintiff company had accepted, and so come

Notes

within, the provisions of an act of 1874 granting to it, and to similar companies each, exclusive rights, franchises, and privileges within the district covered by its charter. Subsequent to this time, the borough took steps looking to the construction of its own waterworks under the authority of an act enacted in 1867. Upon a bill filed to enjoin the borough authorities from proceeding with the undertaking upon the ground that it impaired the obligation of the plaintiff company's contract, it was held that whether the act of 1867 had been repealed by the act of 1874, was a question to be decided by the supreme court of the state, and that court having answered the question in the negative, the plaintiff's contention that the act of 1867 impaired the obligation of the contract created by the acceptance of the terms of the act of 1874, was not maintainable, as the provision prohibiting the impairment of the obligation of contracts refers to laws enacted after the making of contracts, and not to those in existence at the time.

Ordinance Not Invalid Because of Incidental Injuries to Contractor's Interests—City Acting as Private Corporation.

Where a gaslight company has received a legislative charter authorizing it to manufacture and furnish gas to the town in which it is located, and to the inhabitants thereof, such grant will not, in the absence of express words or irresistible implication, be construed to carry with it the exclusive privilege. Hence, a duly authorized ordinance, enacted after the gas company has been in existence for many years, and providing for the erection and maintenance of a municipal plant for the purpose of supplying gas to the city and its inhabitants, is not an impairment of the obligation of the contract contained in the charter of the gaslight company, although it may have the effect of totally destroying the value of such company's works. Hamilton Gaslight & Coke Co. *v.* City of Hamilton, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90.

In City of Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77, the city had entered into a contract whereby it granted to the water company the right to use the streets for the purpose of supplying the inhabitants of the city with water for a period of twenty-five years, and bound itself not to erect or maintain or become interested in the erection or maintenance of waterworks during the life of the contract. It was held, that there was no exclusive privilege which would prevent the city from granting to another company the right to maintain and erect waterworks, but that under the terms of the contract, it could not itself erect such works until after the expiration of the twenty-five years. In this case it was argued in behalf of the city that, in entering into the contract with the water company, it acted only in the capacity of a private corporation, representing the proprietary interests of its citizens, and not in the exercise of a public or judicial function, and hence the question whether such contract had been affected by the subsequent action of the city, did not present one of impairment by the act of the state or its authorized agent, but one of an ordinary breach of contract by a private party, for which the remedy was an action in the state court to recover damages. Mr. Justice Brown, speaking for the court, expressed a doubt as to how far such a distinction could be carried to defeat the application of the contract clause of the federal constitution or the jurisdiction of the federal supreme court, but held it not to apply in the case at bar, for the reason that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes or mains laid in the public streets had long been settled by the rulings of that court to be the grant of a franchise, and to constitute a contract which neither the state nor the municipality might impair by subsequent legislation. New Orleans Gaslight Co. *v.* La. Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252; Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. Rep. 273; St. Tammany Waterworks Co. *v.* New Orleans Waterworks Co., 120 U. S. 64, 7 Sup. Ct. Rep. 405.

OSHKOSH WATERWORKS CO. *v.* CITY OF OSHKOSH.

(*Supreme Court of Wisconsin, Feb. 26, 1901.*)

[85 N. W. Rep. 376.]

Action against Municipality—Change of Remedy—Impairment of Obligation of Contract*—Constitutional Law.

By an amendment to a city charter, no suit on a claim against the city could be brought until the disallowance of the same, after presentment to the council and the service of notice of an appeal on the city clerk, and the giving of a bond to be approved by the city attorney and comptroller was required, it having been previously proper to sue the city as in ordinary cases: *held*, that the requirement of service on the clerk instead of service on the mayor, and the fact that it had been held that all steps prior to suit must be strictly taken without privilege of amendment, did not render the amendment invalid, under Const. art. 1, § 12, as impairing the obligation of a contract made with the city prior to the amendment.

Same—Same—Same—Same.

Where an amendment to a city charter declared that no suit should be brought against the city until the claim had been first presented to the council, and disallowed by them, 60 days without action on the claim after presentment being declared a disallowance, which presentment had not previously been necessary, the fact that the right to sue was suspended pending the action of the council did not render the amendment invalid, as impairing the obligation of a contract with the city prior to the amendment.

Same—Same—Same—Requiring Bond.

An amendment to a city charter, requiring that in a suit against the city a bond for costs should be given which had not been previously required, was not invalid, as impairing the obligation of a contract with the city prior to the amendment.

Same—Same—Same—Same.

A contention that the amendment was unconstitutional, in that the bond required would not be amendable, was not well taken.

Same—Same—Same—Same.

Where a city charter was so amended as to require that in a suit against the city a bond approved by the city attorney and comptroller should be given, there having previously been no such requirement, the amendment was not invalid, under Const. art. 1, § 12, as impairing the obligation of a contract made with the city prior to the amendment, on the ground that the officers might willfully or by neglect exclude the party to the contract from suing on the same, since, if a good bond should be filed, courts might coerce proper action on the part of the officers.

Bardeen, J., dissenting.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by the Oshkosh Waterworks Company against the city of Oshkosh. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an appeal by the plaintiff from judgment dismissing his complaint, entered on sustaining a demurrer thereto. The complaint alleged the making of a contract between the plaintiff and the defendant on June 18, 1883, for payment to the

*The leading principles and cases touching upon this subject are set forth in the opinion.

plaintiff, quarterly, of a certain sum as compensation for supplying the water to hydrants for fire and other city purposes; the construction of waterworks by the plaintiff, in compliance with that contract, on or before October 1, 1884; and the refusal of the city, on demand, to pay the hydrant rental, amounting to $4,085, earned under such contract for the quarter ending October 1, 1898; also the making of a subsequent contract on August 31st for payment of hydrant rentals on certain extensions, the performance thereof by the plaintiff, and refusal by defendant to pay the hydrant rental earned thereunder for the same quarter, amounting to $1,060. The demurrer was on three grounds: First, want of jurisdiction of the person or of the subject of the action; second, that plaintiff has not legal capacity to sue; and, third, that the complaint fails to state facts sufficient to constitute a cause of action.

Hooper & Hooper, for appellant.
John F. Kluwin, for respondent.

DODGE, J. (after stating the facts). The only assignment of error argued by appellant is that the court erred in holding that the charter of the city of Oshkosh (chapter 59, Laws 1891) did not, so far as it relates to the contract of June 18, 1883, impair the obligation of the contract. It is contended that said charter does so impair, and therefore contravenes section 12, art. 1, of the constitution of Wisconsin, which provides: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed." At the time of making the contract of June 18, 1883, the city of Oshkosh existed and operated under a charter known as chapter 183, Laws 1883, the first section of which constituted it "a municipal corporation by the name of the city of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity." That charter (section 1, subc. 7) provided that moneys "shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council"; and by section 10, Id., "any account or demand against the city before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law." Except for these restrictions upon the payment of money, the city of Oshkosh was subject to suits upon contract liability like any other person or corporation. In 1891 was enacted a revised charter (chapter 59, Laws 1891), continuing substantially the provisions formerly existing in the first section, and in sections 1 and 10, subc. 7. That charter, however, contained a subchapter 21. It provided:

"Sec. 4. No action shall be maintained by any person against the city upon claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in

whole or in part: provided, that the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

"Sec. 5. The determination by the common council disallowing in whole or in part any claim shall be final and conclusive and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided."

Section 6 provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of the appeal on the city clerk within 20 days after the disallowance of the claim, and by executing a bond to the city in the sum of $150, with two sureties to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of the appeal and payment of costs; whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the circuit court of the county, where "such case shall be entered, tried, and determined in the same manner as cases originally commenced in said court," costs to be recovered by plaintiff in case of an increase in the recovery.

This amendment of the charter of Oshkosh was but one of many such amendments to city charters occurring at about that time, significant of a marked change of legislative policy with reference to enforcement of money demands against cities. That policy was signified by its adoption in the general city charter promulgated by the legislature of 1889 for cities thereafter to be organized. That policy has been considered by this court in a series of decisions which it is believed have fully recognized and emphasized it. We have held that the preliminary steps are jurisdictional, and that unless complied with the court fails to acquire jurisdiction of the subject-matter; that the various steps are mandatory, and cannot be waived by the officers of the city, nor can jurisdiction be conferred by such officers (Telford v. Ashland, 100 Wis. 238, 75 N. W. 1006; Oshkosh Waterworks Co. v. City of Oshkosh, 106 Wis. 83, 81 N. W. 1040); that the bond cannot be amended nor a new bond given after the expiration of the 20 days (Oshkosh Waterworks Co. v. City of Oshkosh, supra).

It is, of course, obvious that the amendment of the charter does not expressly and directly affect the obligation of any existing contracts. It is a change of the law regulating the remedy, and obviously, too, with only that purpose in view. The question, therefore, which is presented before us, is whether, as to claims which have not been allowed by the council (for there is no allegation that this has been allowed), the change in the methods open to a creditor of the city for the adjudication and recovery of such claim is such that, although acting directly only on the remedy, it necessarily impairs the obligation of the contract itself.

We here enter a field redundant of learned discussion, philos-

ophy, and decision, in which, as remarked by Mr. Justice Shiras, the very frequency of decision would appear to have rendered it difficult to apply the result of the court's deliberations to new cases, differing somewhat in their facts from those previously considered. Barnitz v. Beverly, 163 U. S. 121, 16 Sup. Ct. 1042, 41 L. Ed. 93. Several general propositions are, however, settled so as to require in new cases merely their application. First and most primary among these is that an act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve the one party from any duty by the contract assumed, is repugnant to the constitutional prohibition. This rule applies to "legislation which affects the contract directly, and not incidentally, or only by consequence." Von Hoffman v. Quincy, 4 Wall. 553, 18 L. Ed. 403. Another general rule early established is that over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. For example, it would be intolerable that new laws regulating place or frequency of the sitting of courts could not be enacted and be effective generally, even as to pre-existing rights of individuals, although remotely they affect those rights by adding inconvenience or delay to their enforcement.

It is obvious, however, that rights, whether contractual or other, are so dependent for their value upon the means of enforcing them that for all practical purposes their extinction may be accomplished by laws which, in form, affect only the remedy. It matters little whether it be enacted that certain debts are extinguished or merely that they shall not be enforceable in any form. In either case the legally binding obligation to pay is destroyed. One of the best actual illustrations of such a result is exhibited by Cornell v. Hichens, 11 Wis. 368, where was considered an enactment that in any suit on negotiable bonds and mortgage given to a railway company, although brought by an innocent holder for value, the defendant might answer, alleging misrepresentation in procurement or want of consideration; that such issue should then be tried by a jury; and that, if the jury found such fact to exist, judgment should be entered for the defendant. That law ostensibly regulated the remedy only, the pleadings, and procedure in the course of a suit, but its direct and obvious intention and result was to absolve the defendant from his promise, by law embodied in the negotiable bond, that he would pay the amount to any bona fide holder, even though it had been obtained from him by misrepresentation or without consideration,—a result prohibited by the constitution.

In attempted recognition both of the necessity for freedom of general legislation as to remedies and procedure and of the constitutional inviolability of the obligation of contracts, the courts early sought middle ground on which both rights

might be protected. In Wisconsin, the limits of that middle ground have received definition in a multitude of cases, important among which are the following: Lightfoot v. Cole, 1 Wis. 26, 33; Von Baumbach v. Bade, 9 Wis. 559; Starkweather v. Hawes, 10 Wis. 125; Cornell v. Hichens, 11 Wis. 368; Streubel v. Railway Co., 12 Wis. 67; Oatman v. Bond, 15 Wis. 20; State v. Common Council of City of Madison, Id. 30; Paine v. Woodworth, Id. 298; Hasbrouck v. Shipman, 16 Wis. 296; Selsby v. Redlon, 19 Wis. 17; Nelson v. Rountree, 23 Wis. 367; Sydnor v. Palmer, 32 Wis. 406, 410; Insurance Co. v. Neeves, 46 Wis. 147, 49 N. W. 832; Lee v. Buckheit, 49 Wis. 54, 4 N. W. 1077; Rosenthal v. Wehe, 58 Wis. 621, 17 N. W. 318; Hall v. Banks, 79 Wis. 229, 48 N. W. 385; Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569; Peninsular Lead & Color Works v. Union Oil & Paint Co., 100 Wis. 488, 76 N. W. 359; Bank v. Macauley, 101 Wis. 304, 77 N. W. 176. In Lightfoot v. Cole, 1 Wis. 26, 34, in discussing a statute which abolished the pre-existing common law and equitable suits on claims against insolvent estates, and substituted in lieu a presentation and hearing before commissioners appointed by probate court, this court, by Crawford, J., declared: "It was entirely within the control of the legislature to prescribe and modify the remedies which might be pursued in the courts of the territory, and to provide one particular manner of proceeding, to the exclusion of others, so long as some specific remedy was preserved." The subject received more thorough consideration in Von Baumbach v. Bade, 9 Wis. 559, where was presented a law providing that, in suits to foreclose mortgages, defendant should have six months to answer before default, instead of twenty days, and that notice of sale should be published six months, instead of six weeks, as theretofore required. The rule under consideration was there laid down (page 577), by Dixon, C. J., as follows: "It being determined that the remedy, or laws for enforcement of a contract existing at the time it is made, enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change, or amendment of such remedy, or laws which in any manner delayed or rendered the enforcement of the contract less complete and effectual, would be unconstitutional and void. But such is not the case. All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." The court also adopted the following language from Bronson v. Kenzie, 1 How. 311, 11 L. Ed. 143: "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the

remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the constitution." This subject received renewed careful attention in the recent cases of Bank v. Schranck, supra, and Peninsular Lead & Color Works v. Union Oil & Paint Co., supra, where the rule of Von Baumbach v. Bade was substantially reasserted, it being said in elucidation thereof by Pinney, J.: "Any legislation, though acting merely on the remedy, that substantially impairs or lessens the value of a contract, is forbidden by the constitution, and therefore void." The latest declaration of the rule on this subject by the supreme court of the United States is found in McCullough v. Com., 172 U. S. 102, 124, 19 Sup. Ct. 142, 43 L. Ed. 390, as follows: "It is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if any adequate and efficacious remedy be left."

It is conceived that the various forms of expression adopted are intended to express the same idea, namely, that, if neither party is relieved from performing anything of that which he obliged himself to do, the obligations of the contract are not impaired; but, if he be absolved from performing any of those things, such obligations are impaired, whether the absolution is accomplished directly and expressly, or indirectly, and only as a result of some modification of the legal proceedings for enforcement. As the subject is in every case an important one, and as the attempts of different writers and jurists to express the true rule thereon do not entirely agree, and, at best, seem to be capable of different interpretations, it has seemed to me advisable, even at the expense of considerable space, to bring together the concrete instances of application of that rule by this court and by the supreme court of the United States, which is, of course, the ultimate authority. The following are substantially all of the important cases in this court, and the most typical of those in the United States supreme court, which are valuable illustrations under the rule we are now considering:

A statute cutting off all ordinary and common-law proceedings previously existing for enforcement of claims against executors when the estate was insolvent, and prescribing a special remedy by presentation and proof before commissioners of the probate court, and ratable sharing in the assets, held within the power of the legislature because some specific remedy was preserved. Lightfoot v. Cole, 1 Wis. 26. An act changing the time for answer and default from twenty days to six months in foreclosure actions, and changing notice of sale from six weeks to six months, held not to impair the obligation of pre-existing mortgages. Von Baumbach v.

Bade, 9 Wis. 559. The same act held applicable to sales under pre-existing judgments, and sustained. Starkweather v. Hawes, 10 Wis. 125. A law giving a laborer for railroad contractors right of recovery against the company, amended after performance of work so as to take away that right, held not to impair the contract of indebtedness between the laborer and his employer, but merely to take away one of two remedies, leaving still an adequate remedy against his debtor. On rehearing, it was concluded that the earlier statute created a contract between the laborer and the railroad company, and the obligation of such contract was by the later act impaired because the only remedy was destroyed. Streubel v. Railway Co., 12 Wis. 67. Change of procedure in method of acquiring and enforcing log liens not unconstitutional, as applied to existing claims. Paine v. Woodworth, 15 Wis. 298. Statute validating executions under justice of the peace judgments held constitutional. Selsby v. Redlon, 19 Wis. 17. A statute enacted after a judgment in ejectment, taking away the pre-existing right, of course, to a motion and order for a new trial, held matter of remedy only, and valid. Sydnor v. Palmer, 32 Wis. 406. Change of procedure for foreclosure of mortgages, whereby, instead of an immediate personal judgment, to be followed by an immediate sale subject to one year's redemption, there was only permitted a judgment postponing the sale for one year, and allowing a personal judgment only for the deficiency to be ascertained after such sale, held to merely regulate the remedy, and not impair obligations of the mortgage. Insurance Co. v. Neeves, 46 Wis. 147, 49 N. W. 832. A statute imposing additional terms on change of venue, held goes only to remedy, affects pre-existing actions, and not unconstitutional. Lee v. Buckheit, 49 Wis. 54, 4 N. W. 1077. Change of practice as to mechanics' liens from law to equity, with substantial alteration as to form of judgment, method of sale, etc. (chapter 143, Rev. St. 1878), held applicable to pre-existing claims. Constitutionality apparently never questioned. George v. Everhart, 57 Wis. 397, 15 N. W. 387. Existing law made validity of attachment depend on sufficiency of accompanying affidavit. Subsequent statute permitting attachment to stand on amended affidavit afterwards filed, held remedial only, and to apply to pre-existing contracts and suits. Rosenthal v. Wehe, 58 Wis. 621, 17 N. W. 318. Abolition of imprisonment for debt held no impairment of contract. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Penniman's Case, 103 U. S. 714, 26 L. Ed. 602. Reasonable additional exemptions from execution do not impair obligation of contract. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143, and Edwards v. Kearzey, 96 U. S. 595, 604, 24 L. Ed. 793 (opinions Hunt and Clifford, JJ.; contra, Swayne, J.). Statute changing the law, by requiring that suit on notes owned by banks be brought in the name of the cashier, does not impair the obligation of contracts. Craw-

ford v. Bank, 7 How. 279, 12 L. Ed. 700. Existing law as to sale of decedent's real estate required it to be at public, open sale; on full notice, and new law authorized a private sale under direction and approval of the court. Held no impairment of existing contracts between estate and its creditors. Florentine v. Barton, 2 Wall. 210, 17 L. Ed. 783. Imposing a notice as a condition of taking out tax deed held no impairment of contract embodied in the certificate. Curtis v. Whitney, 13 Wall. 68, 20 L. Ed. 513, affirming Curtis v. Morrow, 24 Wis. 664. Where charter of corporation required service of process on its president, a subsequent statute authorizing service on other officers held not to impair the contract. Railroad Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423. Statutes of limitation, provided reasonable time is allowed for commencement of suit. Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886; Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. 312, 28 L. Ed. 279; Relyea v. Pulp Co., 102 Wis. 301, 78 N. W. 412. Under pre-existing law, state bank bills were made receivable for taxes. Taxpayer could compel receipt by mandamus, or have other common-law remedies. New law prohibited their receipt, and also prohibited any process to compel it, and denied all remedy, except to allow payment under protest after tendering the bank bills, and a suit substantially against the state to recover back; the judgment to be enforceable only by entitling claimant to a comptroller's warrant, payable when funds were in state treasury. Held that, an adequate remedy being given, there was no impairment of the obligations of the contract resulting from the cutting off of the former existing remedies. Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; McCullough v. Com., 172 U. S. 102, 124, 19 Sup. Ct. 134, 43 L. Ed. 382. Nor did impairment result from a later statute repealing that above mentioned, whereby the existing remedy of suit against the state was taken away, and common-law remedies revived. McCullough v. Com., supra. A statute subsequent to the issue of bonds prohibited mandamus or other process against individual officers of a city to enforce judgment, and also prohibited execution, and substituted as the sole remedy a registration of the judgment, accompanied by a duty on the city officers to pay out of first available money. Held adequate remedy for enforcement of pre-existing debts, and not unconstitutional; reserving power of court to compel city to provide money if it failed to do so in the next succeeding tax levy. Louisiana v. City of New Orleans, 102 U. S. 203, 26 L. Ed. 132. Under pre-existing law of Louisiana, minors, etc., had tacit mortgages on the property of their guardians and tutors. A subsequent act denied validity to such tacit mortgages unless registered, allowing less than a year for registration of existing ones. Held valid for the reason that it left an adequate

remedy. Vance v. Vance, 108 U. S. 514, 518, 2 Sup. Ct. 854, 27 L. Ed. 808. Law authorizing service of process on mayor or clerk may be changed to require service on the mayor without impairing obligation of prior contracts. Perkins v. Watertown, 5 Biss. 320, Fed. Cas. No. 10,991. Chapter 49, Laws 1858, made fraud in procuring railroad farm mortgages or want of consideration an absolute defense in suit, even by an innocent holder for value. Held to impair the obligation of the contract. Cornell v. Hichens, 11 Wis. 368. Chapter 88, Laws 1861, greatly modified the remedy upon farm mortgages to corporations. It required security for costs; deprived parties of trial before court, substituting a referee, with extremely dilatory procedure before him; gave intermediate appeal on rulings as to evidence, with stay; extended the time for appeal four years, with stay meanwhile, apparently without bond; provided that no title should be acquired on the sale under any judgment until that time for appeal expired; provided that such sale should be of no effect in case of reversal; denied the right to any deficiency judgment; denied plaintiff right of appeal until he had paid all costs; required suit on the note or bond alone to be in the county where the mortgaged premises were situated; declared that the plaintiff should be deemed to hold the security prima facie with full notice of all equities; stayed all sales under power of sale in the mortgage, in case misrepresentation or want of consideration were alleged, until such issue should be finally determined; and deprived the plaintiff of all other remedies except those specified in the chapter. This act was held to so burden the remedy as to impair the obligation of the contract. The court said that several of the detailed provisions, taken alone,—as, for example, the requirement of security for costs,—would not of themselves have that effect, but that the purpose of the act was so obviously to embarrass, restrict, and postpone the enforcement of these mortgages according to their terms that it must be held void. Oatman v. Bond, 15 Wis. 20. A law authorizing the issue of certain city bonds required the levy of a tax to meet the same. A subsequent act prohibited the city from raising any taxes, except for each year's interest as it accrued. Held unconstitutional so far as it prohibited a tax to meet judgments on previously defaulted interest. State v. Common Council of City of Madison, 15 Wis. 30. Suspension of all process against volunteers "during service" held to impair the obligation of the contract, because it deprived the creditor of all remedy for an indefinite period,—as the court said, "five, ten, or twenty years." Hasbrouck v. Shipman, 16 Wis. 296. The contrary has been held in other states, where the suspension was not indefinite. McCormick v. Rusch, 15 Iowa, 127; Breitenbach v. Bush, 44 Pa. St. 313; Clark v. Martin, 49 Pa. St. 299. Statute making order of publication proof of sufficiency of grounds therefor held not constitutional as applied to pre-existing void judgments. Nelson v. Rountree, 23 Wis.

367. Statute giving subcontractor's lien limited by the amount of the owner's debt to the contractor, changed to make owner liable without limit, held to modify the obligation of existing contract between owner and building contractor, and therefore unconstitutional. Hall v. Banks, 79 Wis. 229, 48 N. W. 385. Statute giving debtor power to vacate the lien of an execution or attachment by making assignment within 10 days thereafter impairs obligation of existing contracts and is unconstitutional. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569; Peninsular Lead & Color Works v. Union Oil & Paint Co., 100 Wis. 488, 76 N. W. 359; Bank v. Macauley, 101 Wis. 304, 77 N. W. 176. Statute prohibiting sale, under power contained in a mortgage, for less than two-thirds of an appraisal, and giving one year for redemption, held to impair the obligation. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143. Law staying execution of a judgment or enforcement of a contract impairs the obligation. Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93, and cases there cited. Laws requiring that negotiable coupons from existing state bonds must, before receipt for taxes, be accompanied by principal bond, and that their genuineness be established without expert evidence, held to impair obligation. Production of principal bond inconsistent with contracted negotiability of separate coupons. Expert evidence only way to prove genuineness of printed coupons, and its exclusion worked complete repudiation. Intent to repudiate the coupons was obvious, and above provisions only parts of general scheme. McGahey v. Virginia, 135 U. S. 685, 10 Sup. Ct. 972, 34 L. Ed. 304.

In the light of the general rules on the subject, and the foregoing illustrations of their application, we turn to an examination of the changes in procedure for enforcement of claims not allowed by the council, accomplished by amendment of defendant's charter. Under the former law, jurisdiction of the court could be invoked by service of summons, which, if accompanied by complaint, the city must answer within 20 days, except for extension of time in discretion of court. Defects in summons or service thereof could be waived by voluntary appearance. Mistakes in procedure whereby plaintiff failed of hearing on the merits usually worked only nonsuit, and he might sue again, subject only to statute of limitations. In contrast with this procedure, it is pointed out that under the charter of 1891 the plaintiff, before invoking jurisdiction of any court, must file his claim with the city clerk, and must await examination by the comptroller, and action of the council disallowing it, which may postpone him 60 days, instead of 20. Further, in order to reach a judicial forum, he must give security for cost in a form prescribed by law, and with sufficient sureties. He must obtain approval of the sureties by the city attorney and comptroller. Practically, he must do this within 20 days, appellant contends; for, if a new

bond be rendered necessary by a disapproval, that must be filed within that period from the disallowance of the claim. No method for coercing the action of these officers is expressly provided. Appellant also suggests the possible absence of either, casual or intentional, as a contingency burdening a claimant's chances of reaching the court. Lastly and most urgently, counsel dwells on the asserted inability to correct any mistakes by amendment, and on the fatal effect of any such mistakes, not only on the action, but upon the cause of action as well. Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of service of summons on the mayor is so. Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment. It can hardly be said that there is any vested right to make mistakes. A variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract. A law permitting amendment of attachment affidavit has been held valid as to existing contracts and actions. Rosenthal v. Wehe, supra. Why not the converse? The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof, which in ordinary practice would result only in nonsuit, leaves claimant barred of his claim, no more affects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered. It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment. Sydnor v. Palmer, supra.

Perhaps the most cogent of appellant's objections to the new procedure is that there is a period of suspension of his right to sue, resulting from the requirement that he must first present his claim to the council and await its disallowance. It is by no means certain that such obstacle is a new one. It has been held that the statute (sections 79, 80, c. 15, Rev. St. 1858) requiring claims to be presented to town boards of audit before they could be paid, impliedly prohibited suit until that had been done. Putnam v. Town of Rubicon, 32 Wis. 498. That statute is not very obviously distinguishable from the requirements of the Oshkosh charter of 1883, either in the procedure indicated or the legislative purpose to be accomplished. It is not, however, necessary to decide upon their identity at this time. It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for enforcement of a contract right, as by staying execution or creating or extending period of redemption from judicial sales (Barnitz v. Beverly, supra), no case has been cited to us, and none discovered, where reasonable delay, resulting incidentally from the requirement of certain new steps in procedure, or from enlargement of time for taking such steps, has been held fatal, provided such legislation did not

clearly appear to be in bad faith and for the purpose of defeating or impairing the very obligations of the contract. On the other hand, such modifications of proceedings imposing either increased burdens or increased time have been recognized as legitimate exercise of legislative power over remedies and procedure. Von Baumbach v. Bade, supra; Starkweather v. Hawes, supra; Lee v. Buckheit, supra; Relyea v. Pulp Co., supra; Vance v. Vance, supra; Clark v. Martin, supra. In addition to these instances, it is worthy of note that very many such enactments have been enforced without challenge, some of them since very early days; thus adding the tacit consensus of legislature, courts, and the profession to a construction of the constitution which permits them. Among such may be noted the adoption, with reference to claims against counties, of the same policy as that with reference to cities, now complained of (sections 676, 682, 683, Rev. St. 1898); the postponement of suits against towns until after presentation and consideration of claim (section 824, Id.); the stay laws for purposes of reassessments (section 1210b, Id.). Plumer v. Board, 46 Wis. 163, 50 N. W. 416, and many others. The requirement that before invoking judicial action the claimant must submit his claim to consideration of the common council is not a serious burden upon him. In practical affairs the instances are rare, if not unknown, that a claimant commences suit until he has first invited payment without suit. The effect of the charter of 1891 is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution proof, and thus defeat the purpose of an action.

The only remaining obstacle to judicial hearing and enforcement which appellant urges upon our attention is the requirement of a bond for costs in the sum of $150. This is in itself hardly a new burden; for our practice statutes have since long prior to 1883 subjected plaintiffs to a security for costs, in the discretion of the court, in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs, as prerequisite to suit, cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court, as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in Oatman v. Bond, supra. But counsel urges that the bond is not amendable, and a mistake therein is fatal to the cause of action. The answer to this suggestion

is that no mistake need be made. The charter, in terms easy of comprehension if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult. A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation, because one straying out of the prescribed path cannot reach the goal. But, again, counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either willfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts, wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim, but such possibility does not render the remedy inadequate.

That the change of legislative policy as to procedure upon claims against Oshkosh and many other cities was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands, cannot be doubted. Putnam v. Town of Rubicon, supra; Seegar v. City of Ashland, 101 Wis. 515, 77 N. W. 880. It is the duty of the courts to uphold and enforce such deliberately adopted and important changes of policy, unless it appears clearly and beyond all reasonable controversy that the legislative power has been exceeded. Adams v. City of Beloit, 105 Wis. 363, 373, 81 N. W. 869, 47 L. R. A. 441. After careful consideration of the changes wrought by the amendment of 1891 to the Oshkosh charter, we are unable to say with the requisite certainty that the legislature has transgressed the bonds to its authority over remedies and procedure by so modifying them as to relieve the city from any obligation resting upon it by reason of the contract with plaintiff, or to so diminish the remedy as to render those obligations substantially less valuable. We, therefore, are bound to enforce the law as it is written, and affirm the decision of the trial court in sustaining the demurrer to the complaint. Judgment affirmed.

(March 13, 1901.)

BARDEEN, J. (dissenting). The obligation of a contract,

in a constitutional sense, is the means provided by law by which it can be enforced. Whatever lessens the efficacy of this means, or tends to postpone or retard the enforcement of the contract, impairs the obligation. Louisiana v. City of New Orleans, 102 U. S. 203, 26 L. Ed. 132, and note; 9 Notes U. S. Rep. 1069; Baker, Ann. Const. U. S. 68. The remedies afforded by existing laws enter into and form a part of the obligation of a contract. The legislature has a right to change such remedies, and modify the laws governing procedure in court, if it leaves the party a substantial remedy according to the course of justice as it existed at the time the contract was made. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529. One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. Bank v. Sharp, 6 How. 301, 12 L. Ed. 447. The substantial question in this case is whether the new charter so affects the remedy as to impair the obligation of plaintiff's contract and render it less valuable. I cannot persuade myself that it does not. The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness, at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and diminish its value as to come within the condemnation of the constitution. I refer particularly to those charter provisions relating to the time when an appeal must be taken commences to run, and the requirements relating to the giving and approval of a bond. The latter provisions seem to me to be of especial significance. The appellant must take its appeal, get its bond, and secure the approval both of the city attorney and city comptroller in 20 days, or its rights are forfeited. The charter contains no provisions regarding the responsibility of the sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If, perchance, one of these officers should be absent from the city during the time the right to appeal is running, the appeal is lost. The old charter contained no such technical or drastic conditions. There are several other changes which to my mind tend to lessen the value of the contract and to postpone and retard its enforcement, but I need not mention them at length. The impression in this regard is so strong that I cannot agree with the conclusion of the majority of the court.

LAKE CHARLES ICE, LIGHT & WATERWORKS CO. *v.* CITY OF LAKE CHARLES.

(*Supreme Court of Louisiana, March 1, 1901.*)

[30 So. Rep. 289.]

Light and Water—Ultra Vires Contract*—Action—Defense.

Ultra vires is defendant's principal ground of defense in an action for the water and light supplied under a contract of lease.

Same—Special Tax—Budgets.

A special tax was assessed to meet the expense in part. As to the remainder, which was not provided for by this tax, budgets were adopted looking to the setting aside of a special fund to meet the installments as they fell due.

Same—Same—Same—Payment.

In so far as the taxpayers have paid this tax, and in so far as they have paid in accordance with the requirements of the budget, the defendant is bound to remit to the plaintiff, by whom they have been earned.

Charter—Validity—De Facto Officers—Power to Bind City.

The first act of incorporation, viz. the charter of 1867, was a legal charter, and the municipal officers, acting under the authority conferred, were, at least, officers de facto, with power enough to incur liability, and bind the municipality by contract as lessee to secure light and water.

Same—Illegal Amendments—Effect on Municipal Indebtedness.

The amendment of the charter of 1867, though illegal, did not have the effect of placing the city in a situation to deny its indebtedness to its servants. The municipality had implied power to contract, as lessee, for light and water.

Same—Amendments of Original Charter—Effect.

The last statute amending the act of incorporation of 1867 looked to the payment of amounts earned by employees of the city by giving original life and vitality to the original charter, which had never been repealed, and by reinstating, as far as possible, the municipality in all its rights, and including corresponding liability in its terms, to the extent that the legislative will could thus bind municipal action.

Special Tax—Agreement to Receive in Part Payment—Effect of Failure to Collect.

The taxes not collected, which the defendant company had substantially agreed to receive in part payment, and which the city was unable to collect because of errors of form in manner of attempting to enlarge her limits, are deducted from plaintiff's claim.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; S. D. Read, Judge.

Action by the Lake Charles Ice, Light & Waterworks Company against the city of Lake Charles. Judgment for defendant, and plaintiff appeals. Reversed in part.

Pujo & Moss, for appellant.

Winston Overton (Fenner, Henderson & Fenner, of counsel), for appellee.

*See as to ultra vires light and water contracts, cross references appended to Mealey *v.* Mayor, etc., of Hagerstown, ante, p. 200.

Lake Charles I., L. & W. Co. *v.* City of Lake Charles

BREAUX, J. Plaintiff brings this suit for the sum of $15,050, with interest, for supplying water and light to the city of Lake Charles. Two contracts to this end were entered into, both dated in 1891. In November of that year the town council took steps to secure a water supply, and to that end entered into one of the contracts with the plaintiff company, which was not to be considered as completely binding before holding a taxpayers' election. It was called, and resulted in favor of the tax. By the terms of this contract, the city became the lessor of a number of hydrants from the defendant company. The city, by special ordinance, obligated itself to appropriate and set aside each year an amount sufficient to pay for the year's supply of water. Plaintiff performed its part of the contract from October 1, 1892, to the date of the trial of this suit in the district court, and the defendant, without objection at any time, received the water supplied. The number of inhabitants and the wealth of the city increased, whether owing to the attraction of the pleasing shores of the lake of the same name and the many advantages which the locality affords, or to the water supply and light furnished by the plaintiff company, we will not stop to inquire, although incidentally referred to in the argument. The other contract entered into the same year between the city and the plaintiff company was for light. The council, in matter of the details of this contract, did not submit the question of taxation to the taxpayers. No election by the taxpayers was held to assess the amount, as we infer after having read the voluminous record before us. An appropriation was made and provision adopted to set aside an amount to pay for the light during the 15 years which the plaintiff bound itself to furnish light to the city.

Defendant attacks these contracts, and urges, in defense, that they are illegal, and not binding upon the municipality, for the reason that the corporation the defendant sought to create by the amendment to the town charter, attempted in 1884, and again in 1894, was not warranted by the law, and that it never had any vitality, either as a de jure or de facto corporation, and was without authority to create obligations and incur debts; that the officers, after these amendments had been adopted, were neither de jure nor de facto officers.

The legal history of the controversy takes us back to the act of incorporation of the town of Lake Charles, in the year 1867. Acts 1867, No. 79. In the charter then granted, the limits of the town are well defined. The town was invested with such express powers as were nearly always inserted in acts of incorporation of municipalities in those days. While there was general power and a number of special powers delegated, there was none expressly granted to provide for the supply of water and light. Owing to the growth and improvement of the city, in 1884, when the thinly-inhabited town had become a prosperous little city, an amendment to the charter

of 1867 was submitted to a vote of the citizens. It was adopted, and the limits of the city were extended so as to embrace considerable additional territory, and include, as residents within its limits, an additional large number of voters and taxpayers. The municipality continued in the exercise of its jurisdiction under the original charter and this amendment, without change, until 1894, in which year another attempt was made to amend the charter. Both attempts to amend the charter of incorporation proved of no avail. The court decided that they were abortive and completely illegal; that the claim of the corporation of having enlarged its territory according to law was unfounded, for the reasons stated in the opinion. Dees v. City of Lake Charles, 50 La. Ann. 356, 23 South. p 382. The defendant now contends that the only municipal corporation which ever had any legal existence was the town of Lake Charles, created by its legislative charter of 1867, having no powers except those delegated by that charter, covering no territory except within the limits therein defined, having no other inhabitants than those living in that territory, and no officers except those elected and qualified according to the requirements of that charter; that, in consequence, it became necessary, to relieve the city from the state of suspended animation in which it had existed since the attempted adoption of those amendments and to revive its corporate activity, to have officers appointed competent to represent it and to administer its municipal functions; that the officers of the asserted corporation retired and abdicated, and the governor exercised his appointive power, and filled the vacancies; that the officers appointed took charge and administered municipal affairs until the election day fixed in the charter arrived, and then a mayor and five councilmen were elected by the people of the corporation; that this body refused to recognize the contracts sued on, or to make any provision for their payment. After all this, by valid proceedings, the charter of 1867 was legally amended, the limits extended, the name changed, and the amended charter adopted. See Act 1899.

Defendant insists that the contracts sued on, because of the informality decreed in the cited case, are not binding. Plaintiff calls our attention to the fact that the change contemplated by the proceedings of 1884 was to annex additional territory, and that in other respects the charter of 1867 remained as it originally was, and that the legislative proceedings of 1899 amend the act of incorporation of 1867. Section 3 of the amendment sets out that the municipality shall have all the powers granted under the original charter of 1867, as though the territory annexed had formed part of the territory under the old charter. This provision of the statute has, in our view, an effect which should not be overlooked in passing upon the rights of the parties. The legislative intent evidently was, as far as possible, to remedy the informality which had

crept into the proceedings under which an election was held to extend the limits of the city, as before stated. If effect be given to this language of the statute, it follows, in our view, that creditors were to be protected in their claims.

Recurring to the charter of 1867, and the powers delegated, the defendant urges that it embraced no power authorizing the municipality to make provision to supply the city with water and light. We agree with the statement that the power was not expressed, but we are decidedly of the opinion that it may fairly be implied that the municipality did not act beyond its powers in so far as it made suitable provision for lighting the streets and for supplying the public with water. These, in modern cities, have become essential improvements. Lights lessen the opportunity for committing crime, and go far towards preventing disorder. They assist the police authorities in enforcing the ordinances and laws, and afford, in many respects, better protection to the owners of property, and add enjoyment to life not felt in dark and gloomy streets, where lights are dim, and almost darkness prevails.

The other claim is covered, we have seen, by a contract having in view the supply of water to the city, as important to the general welfare and interests as lights. It is directly conducive to good health, and to the preservation of property in the event of fire. The amount plaintiff seeks to recover is due for supplying wholesome water. The importance of such a supply, to the extent that it is needed, cannot be exaggerated. A municipality would fail of the purpose intended in its organization if it failed entirely in taking such steps as are necessary to obtain enough water and sufficient light. They are intimately connected with its existence, if the purpose be to provide efficient systems when necessary in administering public affairs. There are decisions by this court and by the courts of sister states recognizing this important right of municipalities. We are not inclined to curtail a right as important and indispensable by deciding that express words must be used in order to warrant its exercise. It is sufficiently granted, in our view, if the corporation is invested with the powers contained in the charter before us for interpretation. We find ample support in the following decisions: Conery v. Waterworks Co., 41 La. Ann. 910 (922), 7 South. 8; New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 188, 7 South. 559.

This being our conclusion regarding the power delegated by the charter of 1867, we take up for decision the liability of that portion of the corporation included within the limits of this charter. The testimony before us clearly sets forth the number of hydrants leased by plaintiff to the defendant that were within the limits of the corporation prior to the first amendment, in 1884; also the number of lights furnished. The amount due for the service within the old corporate limits is easily separated from the amount due for service outside of

these limits, i. e. for such service in the new limits. The mayor and five of the directors were residents within the old limits. As relates to domicile, no good ground of objection can arise regarding their authority. They, as relates to territory, held under the charter, and although they were elected by votes, in part, of voters residing outside of the limits, yet they were officers of the town, in charge of the administration of the municipal affairs. They were not acting under a charter illegally adopted. They filled a vacancy in the officers de jure of the corporation. They, in consequence, in our view, were at least officers de facto. We are firmly convinced that, as to the water and lights furnished to the city within the old limits, the defendant is liable for the amount and to the extent of light and water furnished.

Extending our inquiry a step further, we are led to inquire into the claim for light and water furnished in lighting the streets and supplying water outside of the corporate limits, as fixed by the amended charters of 1884 and 1894. The defendant succeeded legally to the corporation of 1867, and is liable for all legitimate debts contracted under the charter of that date, to repeal which, in its entirety, no attempt was ever made, either by the amendment of 1884 or that of 1894. These claims, we think, are due by the corporation. We have seen that, to pay a part of the amount, a tax was assessed and in great part collected. As relates to the tax collected, the defendant is scarcely in a position to retain an amount which has been specially collected, as far as it will, to pay the claim of plaintiff. The taxpayers have received the benefit of this light and water, and have paid therefor. While it is in transitu from the taxpayer to the plaintiff creditor, it would hardly be equitable to turn it aside, and apply the amount collected to another indebtedness of the corporation. It became the money of the defendant for a particular purpose. The defendant should pay it over, as was intended when the collection was made. It may be said that this is true only of part of the fund; that as to the remainder no provision was made for its payment by submitting the question to the votes of the taxpayers. We have seen that those in office during the time for which plaintiff sues bound themselves, by the contract entered into between these parties, to collect from the taxpayers and set aside an amount sufficient to pay this tax. Budgets were adopted to that end, showing the amounts needful for its payment. The taxes were paid or provided for in these budgets to meet the expense account. We understand that year after year, as shown by the budgets, the defendant collected an amount to be expended especially in meeting this account for rent.

The defendant has no authority to change the destination of the fund as budgeted, on the ground of informality in extending the city limits. The amount was earned, and no good reason presents itself to stop its payment. The act of

the board was, after all, the act of the city. Here an equitable question presents itself, relating to the rights of the defendant. The special tax has not all been collected, in great part because of the defense of a taxpayer against the tax and a judgment pronounced in the suit. To the extent that this tax has not been collected because of this decision, we think that the defendant is entitled to relief. The budget and the other proceedings of the council were based, to some extent, on the recovery of this tax. The city should not be made to account for an amount not collected, nor for an amount which was not set aside for the payment of this tax, and which the city has not, chiefly because of adverse litigation, succeeded in collecting. The following is an excerpt from the brief of counsel for plaintiff: "We do not for a moment concede that plaintiff is in any way responsible or chargeable with the failure to collect the special tax, or that the city is entitled to recover for such sum." Counsel added, in substance, that should the court entertain a different view, proper credit will have to be given. The court thinks that this credit would be equitable and just, and for that reason the decree will so order.

We will not in these proceedings seek to give vitality to the contract to the end of the term. Other issues may arise, and will have to be considered before pronouncing judgment on that question. It is therefore ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed. The law and the evidence being in favor of plaintiff, it is ordered, adjudged, and decreed that plaintiff have judgment for the sum of $15,050, with 5 per cent. interest on $1,085 thereof from October 1, 1897; on $1,085 thereof from January 1, 1898; on $1,085 thereof from April 1, 1898; on $1,085 thereof from July 1, 1898; on $1,085 thereof from October 1, 1898; on $1,085 thereof from January 1, 1899; on $1,085 thereof from April 1, 1899; on $1,085 thereof from July 1, 1899; on $1,085 thereof from October 1, 1899; on $1,085 thereof from January 1, 1900; on $600 thereof from June 1, 1898; on $600 thereof from September 1, 1898; on $600 thereof from December 1, 1898; on $600 thereof from March 1, 1899; on $600 thereof from June 1, 1899; on $600 thereof from September 1, 1899; and on $600 thereof from December 1, 1899,—until paid, and all costs of the suit, subject to a credit of that part of the tax of a mill and a half, which the city did not succeed in collecting. The case is remanded only as relates to this credit. The court a qua will, after the case shall have been remanded, ascertain the amount of the 1½ mill special tax not collected, owing to the failure to collect because of the adverse decision to its collection from those by whom it was due (as said decision was a test case, the court understands), and, after proper credit given, the present decree will be subject to no other change. In all other respects the rights of the plaintiff and defendent are reserved.

On Application for Rehearing.

(June 28, 1901.)

BLANCHARD, J. The charter of the town of Lake Charles, adopted in 1867, contained the grant of power to the municipality to construct public works. Under this authority, the town could erect, maintain, and operate a waterworks system requisite for supplying water for flushing streets and gutters, for extinguishing fires, and for all other public purposes, and could erect, maintain, and operate an electric light plant requisite for lighting the streets and public places of the town; and this carried with it, by necessary implication, the lesser power to contract for supplying the town with water and lights needed for public purposes. The town of Lake Charles, as organized under the act of 1867, never ceased to exist until it was merged into the city of Lake Charles, as now existing, and as incorporated by the amendments adopted in 1899; and the city of Lake Charles, as thus latterly incorporated, is held to be the legitimate successor of the town of Lake Charles, as it existed under the charter of 1867, and as it existed under that charter as attempted to be amended and extended in the years 1884 and 1894. Municipal corporations cannot extinguish their debts by changing their names, or enlarging their limits and powers, or organizing under new charters. A debt once contracted by a municipal corporation will survive as a debt against whatever corporate entity is subsequently created to take its place, at least to the extent that the new or enlarged corporation absorbs the old, and, certainly, to this extent the obligation of the contract remains intact and cannot be impaired. The water and electric light contracts made by the municipality with plaintiff corporation must, therefore, be held to evidence valid obligations, binding, at least, upon all the inhabitants and all the property within the territorial limits of the town of Lake Charles as defined by the act of 1867, to the extent that water and electric lights were supplied for the purposes of the municipality within such limits under the contracts. And to this extent the defense of error of fact and law, pleaded as relieving the town of Lake Charles from liability under the contracts, cannot be entertained. The fact that persons who did not reside in the old limits may have voted for the election of the mayor and aldermen in office at the time the contracts were let, and may, too, have voted for the special tax, has no bearing, unless defendant has shown—which it has not done—that the votes of such persons would have changed the result of the election. Paine, Elect. § 510. It may be that the town, in making the water and light contracts, erred, and went beyond its authority, in extending the benefits of the same over territory beyond its limits. But the effect of this, in our view, is not to destroy the contracts themselves, in so far as the town proper was concerned, but to limit the liability of the corporation under the same to water and lights supplied it under the contracts

within its true territorial limits. This is what the judgment of the court practically does when it decrees recovery against the corporation for the amount claimed, subject to a credit to the extent of the avails of the special tax levied on property outside of the limits of the corporation as defined by the act of 1867, which, up to the institution of this suit, the authorities had not been able to collect on account of the adverse decisions of the courts. It is not considered that any allowance of credits further than this should be made. Rehearing denied.

DECKER *v.* MCSORLEY.

(*Supreme Court of Wisconsin, June 20, 1901.*)

[86 N. W. Rep. 554.]

Animals Running at Large*—Wrongful Death—Pleading—Municipal Ordinance.

A complaint in an action for death of plaintiff's decedent alleged generally that at the time of the injury a city ordinance, duly enacted, prohibited the running of horses at large within the city limits, and that the ordinance provided, among other things, that an owner or person in charge of such animal who should permit the same to run at large within the city limits should be punished by fine: *held*, that the ordinance was sufficiently pleaded to entitle it to be received in evidence.

Same—Municipal Ordinance—Exceptions.

An ordinance provided that animals should not be permitted to run at large in the streets, or to be herded or pastured or to graze or feed in the streets. An exception permitted such grazing or feeding in front of the owner's premises: *held*, that an animal unattended and untethered in the street in front of its owner's premises was running at large, and not within the exception.

Same—Same—Violation of Ordinance as Negligence.†

A contention that an ordinance prohibiting owners from allowing animals to run at large in the streets was not intended to protect persons in the streets from injuries caused thereby is untenable, and hence an infraction of the ordinance is negligence per se, which is actionable if it results in injury to a passenger in the street.

Same—Same—Same—Evidence of Animal Being at Large on Former Occasions.

Where an ordinance prohibited the permitting of animals to run at large, evidence, in an action for death of a child caused by an infraction thereof, that the horse by which the child was killed was frequently at large in the streets prior to the accident is admissible, as tending to show that the animal was at large with the knowledge and assent of the owner.

Same—Wrongful Death of Child—Contributory Negligence of Parents.

The absence of a child $4\frac{1}{2}$ years old from home, unattended on a residence street, at 9 o'clock in the morning, does not constitute contributory negligence on the part of the parent, as matter of law, such question being one for the jury.

Same—Same—Proximate Cause—Instructions.

An instruction on the subject of proximate cause stating that it must appear that the damage was the natural and probable consequences of the defendant's negligence, and stating in a subsequent

---

*See notes at end of case.

†See notes, page 293.

clause that, before finding that defendant's negligence was not the proximate cause of injury to the child, the jury should be satisfied from the circumstances of the case that defendant should have foreseen that such injury might occur from the horse being at large, is confusing and erroneous, by reason of the presence of the word "not," and the absence of the element of natural and probable cause in the subsequent clause.

Same—Same—Mortality Tables in Evidence.

The admission of a mortality table in evidence, showing the expectancy of life of a child 10 years of age, was error, in an action for the death of a child 4½ years of age, where the witness admitted that the expectancy of life of a child of 4½ years was less than that of a child of 10, but could not state what it was, and where the table did not state it.

Same—Same—Expectation of Life and Pecuniary Benefit—Verdict Not Sustained by Evidence.

Evidence that a child 4½ years of age was strong and healthy, and that the father had no property, and had a wife and four children, is insufficient to sustain a finding of damages in an action for the death of a child of 4 years, on the ground that there was reasonable expectancy of pecuniary benefit to the parents from the continuance of the life of the child beyond its minority.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

Action by Walter W. Decker, administrator, against Johanna McSorley. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action by the plaintiff, as administrator of the estate of one Blair Decker, deceased, to recover damages for the death of said Blair Decker; such death having resulted from the kick of a horse owned by the defendant. The evidence showed that the accident happened upon Caledonia street, in the city of La Crosse; that Blair Decker, the deceased, was a boy 4½ years of age, and was the son of the plaintiff; that on the morning of September 23, 1899, a horse owned by the defendant was grazing on Caledonia street, in the city of La Crosse, unattended and not tethered; that the place where the horse was grazing was in front of a lot owned by the defendant and occupied by a tenant; that the plaintiff and his family lived on the same street, at a short distance from the place where the horse was grazing; and that at some time between 8 and 9 o'clock a. m. upon the date mentioned the deceased came along the street alone and passed close by the horse, and while he was doing so the horse turned and kicked him in the head, inflicting injuries from which he died a few days later. The complaint alleged that there was an ordinance of the city of La Crosse, in force, prohibiting animals from running at large in the public streets, and also that the horse was vicious in his disposition, and known to be so by the defendant, and that she negligently permitted the horse to run at large in the public street, and that the death of the deceased was the result of such negligence. The complaint further alleged that the deceased was a strong, healthy boy, and that the plaintiff and his wife were entitled to and

dependent upon his services. The answer admitted the death of the boy and the relationship of the parties, as well as the due appointment of the plaintiff as administrator, and denied all the other allegations of the complaint. A special verdict was rendered in the action as follows: "(1) Was the defendant's horse running at large in the streets of the city of La Crosse at the time of the alleged injury? Yes. (2) In case you answer question No. 1 in the affirmative, then was the defendant negligent in permitting the horse to be at large at the time of the injury to the deceased child? Yes. (3) In case you answer question No. 2 in the affirmative, then was such negligence the proximate cause of the death of the child? Yes. (4) At the time of the alleged injury, was the horse feeding in the public highway upon lands owned by the defendant? By the Court: Yes. (5) Were the parents of the deceased child guilty of any want of ordinary care which in any way contributed to the injury? No. (6) Had the defendant's horse any propensity to kick or bite? No. (7) If you answer question 6 in the affirmative, then had the defendant ever any knowledge or information of any such propensity on the part of the horse to kick or bite? No. (8) Was section 1 of Ordinance 21 of the city of La Crosse in force on the 23d day of September, 1899? By the Court: Yes. (9) In case you find the plaintiff is entitled to recover under the law, at what sum do you assess his damages? One thousand dollars." Judgment for the plaintiff was rendered upon the verdict, and the defendant appeals.

Paul W. Mahoney, Thomas Morris, and Higbee & Bunge, for appellant.

Bleekman, Bloomingdale & Bergh, for respondent.

WINSLOW, J. (after stating the facts). The plaintiff predicated his claim of negligence on the part of the defendant in this case upon two grounds: First, on the ground that the horse was permitted to be at large in the street, in violation of the terms of an ordinance of the city of La Crosse; and, second, on the ground that the horse was a vicious horse, and was permitted to be at large by the defendant with knowledge of its vicious character.

It is claimed by the defendant that the ordinance was not sufficiently pleaded to entitle it to be admitted in evidence. The complaint alleged generally that at the time of the injury one of the ordinances of the city of La Crosse, duly enacted, prohibited the running at large of horses within the limits of said city, and that said ordinance provided, among other things, that the owner or person in charge of such animal who should permit the same to run at large within the limits of the city contrary to the provisions of the ordinance should be punished by fine. This was, we think, entirely sufficient, as against an objection made upon the trial. The ordinance was pleaded by stating its substance and legal effect. A

foreign statute may be pleaded by stating its terms, without referring to its title or the day of its passage. Trust Co. v. Burton, 74 Wis. 329, 43 N. W. 141. No reason exists why a stricter rule should be applied to the pleading of a city ordinance.

The ordinance was introduced in evidence, and section 1 thereof reads as follows: "No horse, sheep, goat, swine, mule, colt, goose or cattle, nor any poultry, turkeys or chickens shall be permitted to run at large in the city at any time, nor be herded or pastured in or upon any street of said city, nor be permitted to graze or feed in any of said streets, except in such parts of said street as are in front of or adjoining lands owned or occupied by the owner or keeper of the animal grazing or feeding thereon, and if found running at large, each and every one of the animals aforesaid may be impounded under the provisions of this ordinance, in any public pound of the city, and any owner or owners of the animals above specified, or any person in whose charge the same may be, who shall permit the same to run at large within the limits of the city of La Crosse contrary to the provisions of this ordinance, shall on conviction thereof before the justice of the peace of the city at large, be punished by a fine not exceeding ten dollars nor less than one dollar." The plaintiff's claim is that the ordinance was enacted for the purpose, among others, of protecting persons lawfully upon the street from injury resulting from the viciousness or playfulness of horses or cattle at large, and hence that an infraction of the ordinance is negligence per se, which, if it results in injury to a passenger on the street, constitutes actionable negligence. Smith v. Exchange, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504. In response to this claim the defendant makes two replies: First, that the horse was feeding in front of plaintiff's own land, and hence there was no violation of the ordinance; and, second, that the ordinance was not enacted for the purpose of protecting persons from injury, and hence that its violation cannot be ground for a claim of negligence upon which an action for personal injury can be found. As to the first of those claims of the defendant, we think it is quite plain that it is not well founded. The ordinance is not happily worded, but its purposes are quite plain. Those purposes are to prevent the running at large of animals in the street, to prevent their being herded or pastured in the street, and to prevent their grazing or feeding in the street. There is no exception to the prohibition against their running at large, but there is an exception to the prohibition against grazing or feeding, which exception consists simply in permitting such grazing or feeding in front of the owner's premises. This exception cannot be reasonably construed as meaning that, when an animal which is running at large happens to crop the grass for a few moments in front of its owner's premises, he ceases to be running at large. An animal which is unattended and

untethered in the street is as much at large when in front of its master's premises as in any other part of the street. In order to be within the exception, we think it clear that the animal must not only be in front of its master's premises, but must also be attended, or be securely tethered and not at large. As to the claim that the ordinance was not intended to protect persons from the viciousness or playfulness of animals at liberty upon the highway, we think it is equally untenable. Doubtless there were several objects in view. It was probably not expected that chickens or poultry would inflict bodily injuries on passengers, and, as to this class of animals, the only object was to prevent the well-known nuisance and danger of their committing depredations on private property which result from their being at large. As to larger animals, such as horses and cows, doubtless the same objection was in view, but we see no reason to doubt that the obviation of other dangers was also aimed at. That such animals at large in the street are dangerous to passengers is a well-known fact. They are liable to run, to play, to excite other horses, dash along sidewalks, and do numerous things well calculated to cause injury to both persons and property. There are few grown persons who will not turn aside and seek to avoid proximity to a horse at large upon the street, especially if he be gamboling or running. They will do this because they feel that there is personal danger in such proximity, and a danger which is hard to be guarded against, because of the sudden and unaccountable movements which the animal may at any time make, even if he be not vicious. To say that the common council of La Crosse had no intention of guarding the public against such dangers in enacting the ordinance would, we think, be entirely unreasonable, and would, in effect, accuse them of passing an elaborate law to protect lawns and sidewalks from disfigurement, and leave life and limb unprotected. The principle that the owner of the horse which is allowed to run at large upon the highway contrary to law is responsible for the injuries which the horse inflicts upon persons or property, even in the absence of known viciousness of the horse, has been distinctly laid down in a number of states. Baldwin v. Ensign, 49 Conn. 113; Decker v. Gammon, 44 Me. 322; Barnes v. Chapin, 4 Allen, 444.

Having concluded that the ordinance was intended for the protection of passengers in the street against just such injuries as occurred in the present case, and that the evidence here does not show that the horse was within the exception contained in the ordinance at the time the boy was hurt, we proceed to the consideration of various alleged detail errors:

The court allowed a number of witnesses to testify that the horse was frequently at large upon the public streets prior to the accident, and this ruling is claimed to have been error. We think the evidence was rightly admitted. The ordinance prohibits and punishes the permitting of animals to run at

large. The mere accidental escape of an animal, without the owner's knowledge or negligence, would clearly not be a violation of the ordinance. It was competent and in fact necessary, therefore, for the plaintiff to show in some way that the horse was at large with the knowledge and assent or permission of the owner. It was a case where the knowledge or intent of the defendant was in question, or, perhaps more accurately, where it was necessary to so show that the act in question was not accidental; and in such cases the rule is quite well settled that similar acts, though collateral in their nature, may be shown, as tending to throw light on the knowledge or intent of the party. 1 Jones, Ev. §§ 145, 146; Huganir v. Cotter, 92 Wis. 1, 65 N. W. 364.

The court refused to instruct the jury that "the absence of the child from home, unattended, on a public street, was prima facie evidence of negligence on the part of the parents, and there is no evidence in the case which tends to show justification or excuse for their failure to look after him," and this refusal is now claimed as error. The instruction so asked was tantamount to an instruction that contributory negligence was proven as matter of law. It must be remembered that contributory negligence is a defense, and that, unless the facts which show it appear by the evidence introduced by the plaintiff, it must be proven by the defendant. Randall v. Telephone Co., 54 Wis. 140, 11 N. W. 419. The only facts appearing here bearing upon the question were that the deceased was a strong boy, 4½ years of age, and was upon a public street, unattended, at about 9 o'clock in the morning. It is not shown whether the street was largely traveled, but it was evidently a mere residence street, and may not have been traveled to a much greater extent than a country highway. A railroad track, frequently used, crossed the street at a distance of about a block from the plaintiff's house. It is true that in Massachusetts it has been held contributory negligence for a mother to allow a child 20 months of age to escape from her sight and stray into the street, and there remain for 15 minutes without attendance or attention. Grant v. City of Fitchburg, 160 Mass. 16, 35 N. E. 84. We are not inclined to approve so strict a rule as this, and, furthermore, in the present case the child is nearly 2 years older than the child involved in the Massachusetts case cited. It may well be that circumstances might arise when a court would be well justified in deciding the question of contributory negligence as matter of law. If, for instance, a parent knowingly permitted a child of very tender years to go alone and unattended upon the main streets of a great city, where travel was great and constant, such a case might perhaps be presented. But the present is certainly not such a case. The street in question here may have been a rarely-used street. If it was otherwise, the burden lay on the defendant to prove the fact. The child may have only momentarily escaped from its mother's care,

under circumstances which would exonerate her from all lack of due attention. If not, the burden was also on the defendant to prove the fact. Ordinary care on the part of the parent is all that is required. We cannot say that the evidence here shows lack of ordinary care. It is a well-known fact that children of 4½ years are frequently on the public street unattended. Whenever an accident happens to such a child through the negligence of others, must it be said that the parent is negligent, as matter of law? Such a rule would amount, practically, to a notice to all, whether rich or poor, who live in a crowded city and are blessed with children, that they must employ a nursemaid to be continually at the side of their children, or keep them locked up at home. The question was one for the jury, upon the evidence.

The trial judge charged the jury upon the subject of proximate cause as follows: "This term, 'proximate cause,' has a certain, definite meaning in law. It has been referred to by attorneys during the argument of the case, and proximate cause of damage to a person cannot be referred to a failure or neglect of some other person to perform some duty or act which such other party owes or was under obligations to perform, unless it appears that such damage was the natural and probable consequences of such failure or neglect, and that such loss or damage ought to have been foreseen in the light of the attending circumstances. That is, from all the circumstances in this case, before you are justified in finding that negligence of the defendant was not the proximate cause of injury to the child, you should be satisfied, from all the circumstances in the case, she ought reasonably to have foreseen that an injury to a person upon the street might be liable to happen from the horse being at large. It is not necessary, in order to warrant a finding to this effect,—that it was the proximate cause,—that the defendant should have foreseen that an injury might happen to this particular child; but if, from all the circumstances in the case, in the exercise of reasonable and ordinary care the defendant ought to have foreseen or anticipated that an injury to a person on the street might be liable to happen from the horse running at large, then this element of proximate cause would be found in this case." There was inaccuracy, if not prejudicial error, in the last part of the instruction. In the first definition given, the jury were told that it must appear that the damage was the natural and probable consequences of the negligence, but in the subsequent clause not only is the word "not" inserted, when it manifestly renders the instruction the exact reverse of what it should be, but the element of natural and probable result is entirely omitted. Certainly the whole charge on the subject was confusing and well calculated to lead the jury astray.

Upon the subject of damages there were errors committed which certainly require reversal of the judgment. The court permitted the introduction of a mortality table showing the

expectancy of life of a child 10 years of age. The witness admitted that the expectancy of life of a child of 4 years was less than that of a child of 10, but he could not state what it was, nor did the table give it. This was clearly error. Upon the subject of damages, generally, the evidence was very meager. Practically all that the testimony shows is that the child was strong and healthy, and that the father had no property and had a wife and four children. Under this condition of the evidence, we cannot say that there was any evidence which would justify the jury in finding that there was any reasonable expectancy of pecuniary benefit to the parents from the continuance of the life of the child beyond its minority. It is true that there is very little of such evidence which can be introduced in any case, especially where the child is of such tender years, but this fact simply emphasizes the need of introducing all that can be obtained. In the present case the health of the parents might have been shown, their age, and the business and earning capacity of the plaintiff. All these things would have thrown some light on the subject. Potter v. Railway Co., 21 Wis. 372. Nevertheless the court submitted to the jury the question as to the pecuniary loss suffered by the plaintiff, resulting from the loss of the boy's services and help after he attained his majority, and we are unable to say what part of the damages allowed by the jury was allowed for services after majority. Nor can we say with any certainty what should have been allowed by the jury for the boy's services while a minor. We think, therefore, that it would not be possible for us to allow the plaintiff to remit any certain sum from the verdict, but that the interests of justice would be best subserved by a new trial. Judgment reversed, and action remanded for a new trial.

NOTES.

Animals in Streets—Municipal Liability for Injuries from.

The doctrine relating to municipal liability for failure to enact or enforce ordinances prohibiting the running at large of stock within city limits rests upon the distinction which exists between governmental duties and functions, and those which pertain to the municipality in its capacity as a private corporation. The function of passing and enforcing ordinances is purely governmental, and the city enjoys, in this respect, the same immunity from liability as the state itself. Hence persons injured by stock running at large in the streets are, in so far as the city is concerned, entirely without redress. Rivers *v.* City Council of Augusta, 65 Ga. 376, 38 Am. Rep. 787. A contrary doctrine is held in Cochrane *v.* Mayor of Frostburgh, 81 Md. 54, 31 Atl. Rep. 703, the court basing its decision upon the ground that the running of cattle at large had become a nuisance which rendered the streets unsafe, overlooking the distinction between the liability of a city for the unsafe physical condition of the street, and for permitting a dangerous use of the street.

Same—Negligence of Policeman Attempting to Impound Animal.

So where the city has employed a special policeman whose duty it is to impound such stock, it is not liable for injury which results

Notes

from the negligent manner in which he performs the duty, as where he recklessly drives the animal through a populous part of the city without rope or halter on it, and it escapes into plaintiff's house and garden, doing him personal violence. Givens *v.* City of Paris, 5 Tex. Civ. App. 705, 24 S. W. Rep. 974.

Same Where City Authorizes the Exhibition or Going at Large of Animals.

Nor will any liability attach to the city even though it has expressly authorized the exhibition of animals, wild or tame, upon the streets. Thus in Cole *v.* City of Newburyport, 129 Mass. 594, 37 Am. Rep. 394, the city had duly authorized, in consideration of a license fee, the erection of a booth in the public square for the exhibition of a bovine monstrosity known as the "Sacred Ox." Not only was the animal of strange shape and appearance, but it was decorated with gaudy trappings, and emitted an offensive odor, which of itself was sufficient to cause horses to shy and become unmanageable. The plaintiff's horse, upon meeting the animal as it was being led about the square for exercise, took fright and ran, as a result of which the cart was destroyed and the horse seriously injured. Upon an action against the city to recover damages, it was held that a demurrer was properly sustained.

So in Little *v.* City of Madison, 49 Wis. 605, 35 Am. Rep. 793, the license was a general one "to give a bear show." Whether the city intended to authorize the exhibition of the animals in the streets, does not appear from the report, but as a matter of fact, the "show" took place in the street, and the jury found that the city officers were negligent in not taking the proper steps to prevent it, though it appeared that several of them warned the exhibitor to remove the bears from the street to some private place. But conceding that it was improper to license the exhibition of bears upon the street in the first instance, and that the officials were guilty of negligence in not removing the show from the streets, it was held that the city was not liable to one whose team became frightened thereat, and ran, inflicting injury upon the plaintiff's wife. See same case on former hearing reported in 42 Wis. 643, 24 Am. Rep. 435.

In Rivers *v.* Augusta, 65 Ga. 376, 38 Am. Rep. 787, cited above, the city authorities had suspended the ordinance prohibiting the running of cattle at large that they might destroy the weeds and grass, growing rank in certain streets. During the time of such suspension, the plaintiff, a female child, was set upon and seriously gored by a cow roaming the streets. It was held that there was no cause of action against the city.

Same—Animal Owned by City.

But where the plaintiff sued for injuries inflicted by a ram owned by the defendant town, and kept by it on its poor farm for propagating sheep, but negligently suffered to run at large, it was held that he was entitled to recover, upon the ground that the maintenance of the farm was not the performance of a public duty enjoined upon it by law, but a voluntary corporate enterprise, entered upon, not only as an aid to the more economical support of its poor, but for purposes of profit. This decision, of course, is not in conflict with the cases cited above. The city having lawful authority to maintain the farm as a private enterprise, its liability for torts in connection therewith was the same as that of a private person.

Cross References.

Upon the general subject of municipal powers and liabilities as to animals running at large, see Armstrong *v.* Brown, 1 Mun. Corp. Cas. 765, and note; Jones *v.* Duncan, 5 Mun. Corp. Cas. 32, and note; Walker *v.* Towle, 5 Mun. Corp. Cas. 357, and note.

Notes

VIOLATION OF ORDINANCE AS AFFECTING THE INTER SESE LIABILITY OF INDIVIDUALS.

I. The Affirmative View.
II. Qualified Doctrine.
  A. Where Ordinance Does Not Create a Duty in Favor of the Public Considered as Individuals.
  B. Violation of Ordinance as Evidence of Negligence.
III. Contrary Doctrine.
IV. Contributory Negligence.
  A. Generally.
  B. Violation of Ordinance by Plaintiff.
V. Comparative Negligence.

I. THE AFFIRMATIVE VIEW.

It is well settled that where one sustains injury through the breach of a public statute by another, he may maintain an action to recover damages for the injury so sustained. Willey *v.* Mulledy, 78 N. Y. 314; Pauley *v.* Lantern Co., 131 N. Y. 90, 29 N. E. Rep. 999; Queen *v.* Iron Co., 95 Tenn. 463, 32 S. W. Rep. 460. This doctrine rests upon the theory that the statute creates a legal duty in favor of the public, considered both as a whole and as individuals, the breach of which duty constitutes negligence and gives a right of action to the person injured thereby.

Whether this doctrine applies in favor of one sustaining injury through the failure of another to comply with a municipal ordinance, is a question upon which the courts in different jurisdictions are not agreed. In some states the courts take the view that, within the local jurisdiction, ordinances are of the same force and effect as statutes, and have the same effect as regards the raising of duties on the part of one individual toward another, and hence, that where the breach of an ordinance results in injury to another, and is the proximate cause thereof, the injured person may sue to recover damages just as in the case of a breach of statute, provided, of course, he is not barred by contributory negligence.

Telegraph Wires—Failure to Insulate.

Thus in Clements *v.* Louisiana Electric Light Co., 44 La. Ann. 692, 16 L. R. A. 43, plaintiff's decedent was killed by coming in contact with an uninsulated wire on top of a building on which he was at work. There was a city ordinance relating to the insulation of wires within the city, and which provided, inter alia, "that all splices or joints, wherever the same may occur, shall be thoroughly soldered, after such joint or splice is made, and, in addition thereto, shall be well and thoroughly wrapped with kerite tape or other insulating material, so as to produce perfect insulation at such joint or splice." It was by reason of the company's failure to observe this ordinance that the decedent was killed. The ordinance, said the court, was a contract with each and every inhabitant in the city; the defendant's standard of duty was fixed by it; and omission to comply with its requirements was negligence.

Poison—Unlawful Sale of.

In Osborne *v.* McMasters, 40 Minn. 103, 12 Am. St. Rep. 698, the defendant's servant, a drug clerk, sold poison without labeling it, in violation of the law relating thereto, and by reason thereof the plaintiff's intestate partook thereof and died. The court said it was well settled, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those, for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.

Elevators Breach of Ordinance Concerning.

In Siddall *v.* Jansen, 168 Ill. 43, 48 N. E. 191, the defendant was

Notes

held liable in damages for injuries sustained by a child of tender years because of his, the defendant's, failure to comply with an ordinance relating to elevators, and forbidding the use of doors which could be opened from without the shaft. See also, Parker *v.* Barnard, 135 Mass. 116, 46 Am. Rep. 450.

Fire Escapes—Breach of Ordinance Requiring.

In Weeks *v.* McNulty, 48 S. W. Rep. 809, the action was based upon the defendant's failure to provide fire escapes as required by ordinance. The supreme court of Tennessee, while basing its decision upon other grounds, approved the doctrine that an ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute, but expressly declined to decide whether the failure to observe a municipal ordinance gave a cause of action to the person injured thereby. See also, Schmalzreid *v.* White (Tenn.), 36 S. W. Rep. 393.

Oil—Storing in Unlawful Quantity.

In Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200, it was held that the defendant's act in violating an ordinance relating to the storing of oil in certain places, would render him liable to one injured thereby, provided the same were shown to be the proximate cause of the injury.

Firearms—Discharging in Street.

In Daingerfield *v.* Thompson, 33 Gratt. (Va.) 136, the defendant below was held liable in heavy damages ($8,000) for wounding the plaintiff by a pistol shot fired recklessly (though without malice) in a city street in violation of a municipal ordinance, the defendant and another being engaged at the time in committing a trespass upon the plaintiff's premises by attempting to force the door to his place of business after he had closed for the night.

Sign Board—Breach of Ordinance Forbidding over Sidewalk.

In Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354, one who had suspended a sign board over the sidewalk in violation of the municipal ordinance was held to be absolutely liable to one injured by its fall during an extraordinary gale.

Vaults under Sidewalk—Breach of Ordinance Concerning.

And so where injury resulted from the defendant's failure to comply with an ordinance relating to vaults under the sidewalk, it was held to give a right of action to the person injured. Owings *v.* Jones, 9 Md. 108.

Falling Bricks—Failure to Construct Shed over Sidewalk as Required by Ordinance.

So where there was an ordinance requiring the defendant to erect a substantial shed over the sidewalk in front of a building which he was having erected, his failure to do so was held to be negligence per se, and he was liable to a passer-by who was injured by a brick falling from the building. It was held, furthermore, that the duty thus created by the ordinance was absolute, and could not be excused by a plea of independent contractor. Smith *v.* Exchange (cited in the principal case), 91 Wis. 360, 64 N. W. Rep. 1041.

Dragging Timbers in Street—Breach of Ordinance Prohibiting.

So the dragging of heavy timbers along city streets in violation of ordinance renders the defendant liable for the death of a child who is caught and dragged to death thereby, the court saying that the ordinance was intended, not only for the protection of the streets, but for the protection of the public also, and was of the same force and effect as a statute. Doran *v.* Flood, 47 Fed. Rep. 543.

Horses—Team Left Standing in Street.

Bott *v.* Pratt, 33 Minn. 323, 23 N. W. Rep. 237, 53 Am. Rep. 47, was a case where the defendant left a team of horses standing unfastened and unattended upon a public street in violation of a city ordinance. The plaintiff was injured by their running away and colliding with his vehicle. In its opinion the court said that an ordinance within

Notes

keeping of the charter powers had the same force and effect within the local jurisdiction as a statute, and that where its purpose was to create a legal duty for the protection or benefit of the public considered as individuals, any person injured through the neglect of another to observe such ordinance was entitled to a remedy to recover damages. To the same effect, see Siermers *v.* Eisen, 54 Cal. 418.

Racing and Fast Driving upon Streets.

Racing or fast and reckless driving upon city streets in violation of ordinance will give a right of action to any person injured thereby. Baker *v.* Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620; Potter *v.* Moran, 61 Mich. 60; Middlestadt *v.* Morrison, 76 Wis. 265, 44 N. W. Rep. 1103.

Steam Railways—Running Trains in Violation of Ordinance.

As applied to ordinances, the doctrine finds its most frequent application, perhaps, in those cases where accidents have occurred through the failure of the employees of steam and street-railway companies to comply with ordinances tending to effect the greater security of the public from accidents resulting from such dangerous instrumentalities as rapidly moving cars and engines in city streets. Thus it has often been held to be negligence per se to run cars or engines within city limits at a speed greater than that prescribed by ordinance, and to give a right of action to any one injured thereby who was not himself guilty of contributory negligence. Pennsylvania Company *v.* Horton, 132 Ind. 189, 31 N. E. Rep. 45; Railroad Company *v.* Mathias, 50 Ind. 65; Pennsylvania Company *v.* Hensil, 70 Ind. 569; Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. Rep. 843; Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. Rep. 20; Western & Atlantic R. Co. *v.* Young, 81 Ga. 397, 7 S. E. Rep. 912; Correll *v.* B. C. R., etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22; Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. Rep. 919; Bluedorn *v.* Mo. Pac. Ry. Co. (Mo.), 18 S. W. Rep. 1103; Keim *v.* Railway Co., 90 Mo. 314, 2 S. W. Rep. 427; Erwin *v.* Railway Co., 96 Mo. 290, 9 S. W. Rep. 577; Schlereth *v.* Railway Co., 96 Mo. 509, 10 S. W. Rep. 66; Grube *v.* Railway Co., 98 Mo. 330, 11 S. W. Rep. 736; Kelluy *v.* Railway Co., 101 Mo. 66, 13 S. W. Rep. 806; Murray *v.* Railway Co., 101 Mo. 237, 13 S. W. Rep. 817; Bergman *v.* Railroad Co. (Mo.), 1 S. W. Rep. 384; Karle *v.* Railroad, 55 Mo. 476; Maher *v.* Railroad, 64 Mo. 267.

Same—Flying Switches.

So it has been held that the "kicking" of cars along parallel tracks at a rate of speed greater than that prescribed by ordinance for the moving of detached cars within city limits, was negligence per se. Tobey *v.* Burlington, etc., Ry. Co., 94 Iowa 256, 62 N. W. 761.

Same—Failure to Observe Required Precautions at Crossings.

Failure to keep a flagman or watchman at a crossing, or to maintain and operate let-down bars, as required by ordinance, is negligence, which, if it be the proximate cause of the injury, will give a right of action to the person injured. And it would seem that the doctrine should particularly hold in such instances, for the reason that the failure to have the flagman at his post, or to let down the bars, amounts, practically, to an assurance on the part of the company that the way is clear, thereby disarming of their vigilance and luring to their destruction, perhaps, those who had a right to rely, and who did rely, upon the company's doing its duty as required by the ordinance. Pennsylvania Company *v.* Hensil, 70 Ind. 569, 36 Am. Rep. 188.

Same—Ordinance Must Be Reasonable.

In order that the violation of the ordinance on the part of the company may constitute negligence, however, the ordinance itself must be reasonable. And in this connection it has been held that an ordinance may be reasonable as applied to a certain state of facts, but unreasonable as applied to others, or may become unreasonable through the conditions being changed. Thus an ordinance required that when

locomotive engines were in use within the city limits, they should carry a lookout, stationed on the front of the engine, if going forward, at a point not more than twelve inches from the track, or in a similar position upon the tender if moving backward. A change in the style and construction of the engines used by the company having rendered it hazardous for a person to ride in such a position, it was held to be unreasonable to require it; hence the failure of the company to comply with the ordinance was not negligence. Baltimore, etc., R. Co. *v.* Mali, 66 Md. 53, 28 Am. & Eng. R. Cas. 628.

So where the locality in which the accident occurred, while within city limits, was low, swampy, and uneven, having neither streets, lights, nor inhabitants, being, in fact, as much a wilderness as though it had been without the city limits, it was held that the ordinance requiring a watchman to be carried on the front of the engine did not apply. Baltimore, etc., Co. *v.* State, 62 Md. 479, 50 Am. Rep. 233.

So in an action to recover for the killing of the plaintiff's cow, it was held that an ordinance forbidding the running of trains at a greater speed than four miles an hour was unreasonable as applied to a stretch of track which, although within city limits, lay for several miles through agricultural lands, and was fenced on both sides. Meyers *v.* Chicago, etc., R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50.

See, however, Neier *v.* Missouri Pac. R. Co., 12 Mo. App. 35, where it was held that the running of trains through a city at a greater rate of speed than was permitted by ordinance, was negligence, although the track was laid before the passage of the ordinance upon a grade and curve which rendered it impossible to comply with the ordinance.

Street Railways—Running Cars at Unlawful Speed.

In Baltimore City Ry. Co. *v.* McDonnell, 43 Md. 534, under a city ordinance limiting the speed of cars to six miles per hour, it was held that the company would be liable if the accident would not have happened but for the unlawful rate of speed at which the car was moving.

In Jetter *v.* N. Y. & H. R. Co., 2 Keyes (N. Y.) 154, the plaintiff's intestate, a child of tender years, was killed while attempting to cross a street-car track a few steps in advance of the nurse. It appeared that the car came around the corner a short distance from the point of the accident with the horses moving at an immoderate rate of speed. It was held that the attendant in charge of the child had a right to rely upon the ordinance which prohibited cars from turning corners faster than a walk, or to travel on a street faster than six miles an hour; hence the company was liable for the resulting accident.

Brown *v.* The Buffalo and State Line R. Co., 22 N. Y. 191, is said to be a case which stands practically alone. In that case it appeared that by an ordinance of the city of Buffalo, the defendant company was forbidden to run its cars through the streets at a greater speed than six miles an hour, under a penalty of $150.00 for each offence. The plaintiff was injured while the car was moving at a greater rate of speed than the ordinance permitted. The trial judge charged the jury, that if the accident would not have occurred but for the violation of such ordinance, then the defendant was guilty of negligence. This was held an erroneous instruction and the judgment reversed. See this case criticised in Shearman and Redfield on Negligence, § 484, note 2, and in Jetter *v.* N. Y. & H. R. R. Co., 2 Keyes (N. Y.) 154.

Same—Obstructing Street.

In Mueller *v.* Milwaukee St. Ry. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721, the sudden stopping of a street car in front of a funeral procession, whereby it was caused to check up so suddenly that the pole of one carriage was driven through the rear of another, was held to give a cause of action to the owner of the injured carriage, on the

Notes

ground that the cars were forbidden by ordinance to obstruct the streets.

II. QUALIFIED DOCTRINE.

A. WHERE ORDINANCE DOES NOT CREATE A DUTY IN FAVOR OF THE PUBLIC CONSIDERED AS INDIVIDUALS.

In another class of cases the failure to comply with an ordinance is held to give no right of action to one injured thereby, unless the purpose and intent of the ordinance was to raise a duty in favor of the public considered as individuals, and not merely toward the local public considered as a municipal body.

Snow and Ice—Breach of Ordinance Requiring Removal.

Thus where one was injured by reason of the defendant's failure to remove the snow and ice from in front of his premises as required by ordinance, it was held that no action could be maintained, because the duty created by the ordinance was a duty to the whole public, and not to any one individual, and hence no one could maintain a private action for the breach thereof. Taylor *v.* Lake Shore Ry. Co., 45 Mich. 74, 7 N. W. Rep. 728.

Wooden Ash Barrel—Breach of Ordinance Prohibiting.

And so where the defendant's violation of an ordinance forbidding the use of wooden ash barrels resulted in injury to the plaintiff's person and property by fire, it was held that the ordinance was not intended to create a duty in favor of individuals, and that the negligence, if any, must be proved as any other fact. Cook *v.* Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703.

Racing in Streets—Breach of Ordinance Prohibiting.

But where the plaintiff's horse was injured by one of two sleighs, the drivers of which were racing upon the streets in violation of ordinance, it was held that the plaintiff had a right of action, the court basing its opinion upon the illegality of the fast driving, which, it said, was forbidden for the purpose of preventing collisions and accidents, and in favor of personal safety. Potter *v.* Moran, 61 Mich. 60, 27 N. W. 854.

Steam Railroad—Failure to Fence Tracks.

So where a railroad company was required by ordinance to fence its tracks in certain parts of the city, it was held to create a duty, not only to the city as a municipal body, but to the public considered as composed of individual persons, and that this latter duty was absolute. Hence, one injured by reason of the company's failure to comply with the ordinance, was entitled to recover damages. Hayes *v.* Mich. Cent. R. Co., 111 U. S. 228, 28 L. Ed. 410.

B. VIOLATION OF ORDINANCE AS EVIDENCE OF NEGLIGENCE.

In another line of cases the fact that the act or omission resulting in injury to the plaintiff was also a violation of ordinance is held to be nothing more than evidence of negligence,—sometimes prima facie, but usually not so much.

Blasting in City—Failure to Observe Precautions.

Thus in Devlin *v.* Gallagher, 6 Daly (N. Y.) 494, the failure to comply with an ordinance prescribing certain precautions to be observed in blasting, was held to be prima facie evidence of negligence, and sufficient to support an action on the part of a person injured by reason of such failure.

Racing in Streets.

In Middlestadt *v.* Morrison, 76 Wis. 265, 44 N. W. Rep. 1103, the plaintiff, who had sustained injuries through the running away of his horses, caused by their taking fright at the defendant and others who were racing upon the streets, annexed to and made a part of his complaint an ordinance of the common council prohibiting persons from driving at greater speed than six miles per hour. It was held that the violation of the ordinance was not the gravamen of the com-

plaint, as the plaintiff had a remedy for his injury independent of the ordinance, but that the ordinance might be offered in evidence as proof of negligence.

Horses -Team Left Standing in Street.

In Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488, the driver of one of the defendant's ice wagons left his team standing upon the street unfastened and unattended in violation of one of the city ordinances. By reason of such action on the part of the driver, plaintiff's intestate met with his death. It was held that proof of the violation of the ordinance was competent but not conclusive evidence of negligence.

Generally.

To the effect that proof of violation of a municipal ordinance is competent but not conclusive evidence of negligence, see generally, Beisiegel *v.* N. Y. Cent. R. Co., 40 N. Y. 9; McGrath *v.* N. Y., etc., R. Co., 63 N. Y. 522; Massoth *v.* Del. & H. Canal Co., 64 N. Y. 524; McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. Rep. 153; Lane *v.* Atlantic Works, 111 Mass. 136; Foote *v.* American Product Company, 195 Pa. 190, 45 Atl. 934; Lederman *v.* Pa. R. Co., 165 Pa. 118, 30 Atl. Rep. 725; Railroad Co. *v.* Lewis, 79 Pa. St. 33; Lind *v.* Beck, 37 Ill. App. 434; Hall *v.* Ripley, 119 Mass. 130.

III. CONTRARY DOCTRINE.

In a large majority of the cases cited in the foregoing portions of this note, the unlawful acts or omissions complained of were such as would have constituted negligence on the part of the defendants regardless of the existence of statute or ordinance upon the subject; so that in reality the ordinance created no new duty. It is this power of the municipality to create a duty where none existed before that is most strenuously denied by those who oppose the doctrine that the violation of an ordinance confers a cause of action upon the person injured thereby; and there are not wanting cases which deny that the question of negligence is affected one way or the other by the ordinance, no matter what may be the nature of the act or omission causing the injury.

Wharves—Failure to Maintain Cap-Logs.

Thus in Philadelphia, etc., R. Co. *v.* Ervin, 89 Pa. St. 71, 33 Am. Rep. 726, the defendant company had failed to comply with an ordinance of the city of Philadelphia requiring wharf owners to maintain cap-logs upon their wharves. By reason of such failure, the plaintiff's unruly horse backed off the edge of the wharf and was drowned. It was held, first, that the place was reasonably safe, and that it was not the duty of the company to provide for unusual and unexpected accidents such as might result from horses becoming unruly; second, that the ordinance requiring the cap-logs was a mere police regulation of the city, raising a duty on the part of the company to the city as a municipal body only, because the city had not the authority to create new duties between individuals, such power belonging to the legislature alone, and not subject to delegation to municipal authorities. (See Kennedy *v.* Mayor, 73 N. Y. 365, 29 Am. Rep. 169.)

Street Railway Running Cars at Unlawful Speed.

And in Missouri, notwithstanding the doctrine of that court that the running of a railway train in violation of ordinance is negligence per se, it is held generally in other cases that the laws controlling the inter sese liability of individuals must emanate from the legislature. Hence, in the absence of other negligence, the fact that a street-railway company was violating a city ordinance at the time of an accident, does not confer a cause of action upon the injured party, unless the company in accepting its franchise has thereby agreed to comply with the ordinance. Sanders *v.* So. Electric Ry. Co., 48 S. W. Rep. 855; Fath *v.* Ry. Co., 105 Mo. 537, 16 S. W. Rep. 913; Senn *v.* Railway Company, 108 Mo. 152, 18 S. W. Rep. 1007.

Notes

Steam Railroad—Running Trains in Violation of Ordinance.

So in Whelan *v.* New York, etc., R. Co., 38 Fed. Rep. 15, it was said that an ordinance regulating the rate of speed of trains passing through the city, the ringing of bells and the blowing of whistles, did not change the duties or rights of parties growing out of the doing, or the failure to do, that which the ordinance prohibited or commanded.

Snow and Ice—Breach of Ordinance Requiring Removal.

The doctrine that breach of a municipal ordinance gives a right of action to any person injured by reason thereof, has often been invoked in cases where the aggrieved party has sustained injury from a fall or other accident caused by snow and ice upon the sidewalk which the abutting owner has failed to remove as required by ordinance. Sometimes the action has been brought directly by the injured party, and sometimes by the city to recover the amount of a judgment which it has been compelled to pay; but in either case it has usually been held to have no application. Thus it was denied in Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, the court saying that the power to enact ordinances was given for particular purposes, among which the raising of individual liability to third persons, through failure to observe their requirements, was not included. In Norton *v.* City of St. Louis (Mo.), 11 S. W. Rep. 242, the action was brought directly against the city itself. The city set up as a defence that the abutting owner had been sued and held not liable, and therefore no recovery could be had against the city. But it was held that the duty of keeping the streets and sidewalks in proper condition was one which the city could not assign or get rid of by imposing upon another, and that it had no power to create a liability to damages in a civil action brought by a private individual against one who failed to discharge the city's duty in that behalf. See, to the same effect, Kirby *v.* Boylston Market, 14 Gray (80 Mass.) 249; Flynn *v.* Canton Company, 40 Md. 312, 17 Am. Rep. 603; City of Hartford *v.* Talcott, 48 Conn. 525, 40 Am. Rep. 189; Moore *v.* Gadsen, 93 N. Y. 17; Vandyke *v.* Cincinnati, 1 Disney 532; City of St. Louis *v.* Conn. Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. Rep. 637; Fuchs *v.* Schmidt, 8 Daly (N. Y.) 317; Chambers *v.* Ohio Life & Trust Co., 1 Disney 327; Railroad Co. *v.* Ervin, 89 Pa. St. 71; Jenks *v.* Williams, 115 Mass. 217.

Sidewalks—Failure of Abutter to Repair.

And so where there is an ordinance requiring abutters to construct or repair sidewalks, it is held to create no duty in favor of individual persons; and the liability to the city extends only to the amount of the penalty imposed, or the expense which the city has incurred in repairing the walk. City of Rochester *v.* Campbell, 123 N. Y. 405, 25 N. E. Rep. 937; Noonan *v.* City of Stillwater, 33 Minn. 198, 53 Am. Rep. 23; City of Keokuk *v.* Independent Dist., 53 Iowa, 352, 36 Am. Rep. 226.

IV. CONTRIBUTORY NEGLIGENCE.

A. GENERALLY.

In those jurisdictions where the breach of an ordinance is held to confer a right of action upon persons injured thereby, the contributory negligence of the plaintiff will bar a recovery as in other cases. Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, 52 N. W. Rep. 664; Pennsylvania Co. *v.* Horton, 132 Ind. 187, 31 N. E. Rep. 45; Railroad Co. *v.* Mathias, 50 Ind. 65; Pennsylvania Co. *v.* Hensil, 70 Ind. 569; Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. Rep. 843; Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. Rep. 20; Baker *v.* Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620; Jetter *v.* N. Y. & H. R. Co., 2 Keyes 154.

B. VIOLATION OF ORDINANCE BY PLAINTIFF.

Whether one who is engaged in the violation of a municipal ordinance at the time of his injury is to be deemed guilty of such contributory negligence as will bar a recovery, is a question upon which

there is some conflict of authority; but according to the better view, the mere fact that the injury and the plaintiff's violation of the ordinance were contemporaneous will not preclude a recovery. In order that it may have such an effect, it must have concurred in causing the injury, or, as it has frequently been otherwise expressed, it must have been a cause which directly contributed thereto. The fact that it was a mere condition, but for the existence of which the accident would not have happened, is not sufficient.

Wagon Left Standing in Unlawful Position.

Thus in Steele *v.* Burkhardt, 104 Mass. 59, it was said: "A person who places his wagon in the street in a position prohibited by statute or ordinance may yet maintain an action against another negligently driving against it. It is true, generally, that while no person can maintain an action to which he must trace his title through his own breach of law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed."

In Newcomb *v.* Boston Protective Dept., 146 Mass. 600, 16 N. E. Rep. 555, the plaintiff was run into and injured by one of the wagons of the defendant corporation while sitting upon his cab, which, at the time of the accident, was standing crosswise with the street in violation of a city ordinance requiring all vehicles waiting in the streets to be placed lengthwise therewith and as near as possible to the sidewalk. It was held, that if the plaintiff's violation of the ordinance was a mere condition to his injury, he was entitled to recover; but that if it was a cause which directly contributed thereto, then he was conclusively barred. See also, Spofford *v.* Harlow, 3 Allen (Mass.) 176; Kearns *v.* Sowder, 104 Mass. 63.

Fast Driving in Violation of Ordinance.

In Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274, it was held, that the mere fact that the plaintiff was driving at a speed of more than six miles an hour in violation of a city ordinance, would not preclude him from recovering against the city for injuries caused by colliding with a heap of stones which the city had negligently permitted to remain in the street, the court saying, that "unless the plaintiff's claim originates in his offense and he is obliged to prove the offense in order to establish his claim, or unless the commission of the offense has in some degree contributed to produce the injury, or necessarily negatives some point which the plaintiff is bound to establish in proof, it will not bar a recovery." See also, Herries *v.* City of Waterloo, 6 Mun. Corp. Cas. 595, 86 N. W. Rep. 306.

In Heland *v.* City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670, the plaintiff, while driving over a bridge at a rate faster than a walk, was injured by reason of a defect in the bridge. It was held that he could not recover, the court assuming that his violation of the ordinance contributed to his injury, and saying that it was well settled that where a plaintiff's own unlawful act concurred in causing the damage that he complained of, he could not recover compensation for such damage. See also, Worcester *v.* Essex Merrimac Bridge Corp., 7 Gray (Mass.) 459.

In Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. Rep. 925, the plaintiff approached from one direction driving at a speed of more than six miles an hour in violation of a municipal ordinance. The defendant approached from the opposite direction driving a balky and unmanageable horse. As they drew near together, a collision occurred through the defendant's horse making a sudden dash across the road. *Held*, that the plaintiff's violation of the ordinance was not a mere question of fact to be taken into consideration along with other facts in determining whether or not he was guilty of contributory negligence, but that if it directly contributed to the injury sustained, it was a conclusive bar to a recovery as a matter of law.

Same--Ordinance Not Applicable to Members of Fire Department.

But an ordinance forbidding and making it a misdemeanor for any

person to drive any horse, mule, or other beast upon the city streets at a gait faster than a walk, is unreasonable when applied to members of the fire department driving to a fire; hence a fireman who was thrown from the trucks, and killed, by colliding with a pile of building material in the street while driving rapidly to a fire, was not, by reason of the violation of the ordinance, guilty of any contributory negligence. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. Rep. 123; Farley *v.* Mayor, etc., of New York, 152 N. Y. 222, 46 N. E. Rep. 506.

V. COMPARATIVE NEGLIGENCE.

In Bergman *v.* St. Louis, etc., R. Co. (Mo.), 1 S. W. Rep. 394, the doctrine of comparative negligence was applied. The facts were, that the plaintiff's decedent had stepped from one track to avoid an engine, and had stepped upon and was walking along another, when he was killed by freight cars which were being moved backward over that track, and which approached the deceased from his rear. It was held that the company was liable in damages, because although the deceased was guilty of contributory negligence; yet had there been a lookout stationed on the advance car and the bell rung as required by ordinance, the accident would not have occurred.

LEE *v.* CITY OF PORT HURON.

(*Supreme Court of Michigan, Oct. 22, 1901.*)

[87 N. W. Rep. 637.]

Bicycles*—Power of City to Authorize Use of Wheels on Sidewalks.

Where a city charter confers on the common council control of all sidewalks, it is proper for the council by ordinance to authorize the riding of bicycles on sidewalks within limits where the conditions are such that the use of bicycles will not amount to a nuisance, or where, owing to the condition of the streets, they are impassable for a bicycle.

Same—Liability of City for Injury Sustained by Wheelman on Defective Sidewalk.†

Comp. Laws, § 3441, requiring sidewalks to be kept in reasonable repair and in a condition reasonably safe for travel, only requires that a sidewalk shall be kept in such repair as to render it safe for ordinary uses, and does not mean that it shall be kept in a safe condition for bicycle riding, though a lawful city ordinance authorizes such use.

Case made from circuit court, St. Clair county; Frank Whipple, Judge.

Action by Anna Lee against the city of Port Huron. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following are the stipulated facts: Plaintiff was injured while riding on her bicycle upon a sidewalk of the defendant city. The city passed an ordinance licensing bicyclists to ride

---

*On the general subject of municipal control and regulation of bicycles, see People *v.* Bruce, 5 Mun. Corp. Cas. 226, and note; Wheeler *v.* City of Boone, 1 Mun. Corp. Cas. 694.

†As to municipal liability for injuries sustained by wheelmen upon defective streets and sidewalks, see Leslie *v.* City of Grand Rapids, 1 Mun. Corp. Cas. 683; Richardson *v.* Danvers, 4 Mun. Corp. Cas. 92; Benton *v.* Philadelphia, 6 Mun. Corp. Cas. 770.

upon the sidewalks of certain streets under certain restrictions, they first paying a fee and procuring a license therefor. Plaintiff had complied with this ordinance, and was in the exercise of due care when the accident occurred. The sidewalk was defective, and the city had notice of such defect in time to repair it. The stipulated facts do not state what the defect was. The declaration charges that plaintiff, in turning to the right to allow a footman to pass, her bicycle went near the end of a plank, which ran crosswise of the walk, and was so rotten and loose that it tipped up, and caused her to fall. The court directed a verdict for the plaintiff, the stipulated amount of damages being $100.

Lincoln Avery (Beach & Benedict, of counsel), for appellant.

Henry A. Babcock, for appellee.

GRANT, J. (after stating the facts). The statute (section 3441, Comp. Laws) requires sidewalks to be kept in reasonable repair, and in a condition reasonably safe and fit for travel. A failure on the part of a municipality to keep them in such repair entails upon it liability for injuries sustained by the traveler who is in the exercise of due care. While a bicycle is a vehicle, it is not one to be classed, in all its methods of use, with other vehicles drawn by animal or mechanical power. This distinction is clearly recognized and pointed out in Murfin v. Road Co., 113 Mich. 675, 71 N. W. 1108, 38 L. R. A. 198, 67 Am. St. Rep. 489. To ride a bicycle upon a sidewalk may not be a nuisance, where to drive a horse and wagon upon it would. A baby carriage is a vehicle, but is not a nuisance upon either streets or sidewalks. The riding of a bicycle upon a sidewalk is not an unlawful act at the common law. Counsel for defendant cite Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76, cited also in 4 Am. & Eng. Enc. Law (2d Ed.) 20, in support of the proposition that it is. The decision does not sustain that contention, but is based upon a statute making it "unlawful for any person to ride or drive upon the sidewalks of any town or village, or upon any similar sidewalk for the use of foot passengers by the side of any public highway, unless in the necessary act of crossing the same." One riding a bicycle occupies no more space than he would in walking. With proper care and proper warning, there is no danger of collision with foot passengers, or any others lawfully using the sidewalks. The charter of the defendant expressly confers upon the common council the entire control over the streets and sidewalks, and the power "to regulate the use thereof." What would be a nuisance upon a sidewalk continually crowded with foot passengers would not be a nuisance upon a sidewalk where there was little travel. The bicycle has become almost a necessity for the use of workmen, clerks, and others in going to and from their places of work. Where the streets are unpaved, they are oftentimes impassable for the bicycle, and

it is entirely proper for municipalities to permit and regulate the use of the sidewalks in such cases. Under the broad power conferred by the charter upon the defendant, it is clothed with the right to permit this use of the sidewalks. Such use is sustained in Lechner v. Village of Newark (Sup.) 44 N. Y. Supp. 556, and Purple v. Inhabitants of Greenfield, 138 Mass. 1. It should be borne in mind that in this decision we carry the doctrine no further than was done in Leslie v. City of Grand Rapids, 120 Mich. 28, 78 N. W. 885, where we held that the measure of duty imposed by the statute upon municipalities included ordinary vehicles, and did not require that the streets should be so constructed and repaired as to include safety to bicycles. It was held sufficient in that case if the highway was in reasonable repair for the passing of ordinary vehicles, though it might be dangerous for bicycles. So, in this case, we must assume that the sidewalk was not in reasonable repair for the ordinary uses for which sidewalks were constructed. There might be a defect in a sidewalk similar to the defect in a street in that case, which would involve no danger to a traveler on foot, but might involve danger to one riding a bicycle over it. If a walk were constructed of planks running lengthwise, the planks might be so far apart as to permit the tire of a wheel to be caught in the openings, and cause the rider to fall, while it would be entirely safe for pedestrians. Or there might be a depression in a cement walk, entirely safe for pedestrians, but unsafe for bicyclists. Such conditions would be controlled by Leslie v. City of Grand Rapids.

Judgment affirmed. The other justices concurred.

MAYOR, ETC., OF CITY OF HAGERSTOWN *v.* KLOTZ.

(*Court of Appeals of Maryland, June 12, 1901.*)

[49 Atl. Rep. 836.]

Bicycles—Liability of City for Failure to Enforce Ordinance Regulating Speed of Wheelman.*

A declaration stating that defendant city passed an ordinance making the riding of bicycles on its streets above a certain rate of speed unlawful, and that the defendant negligently failed to enforce such ordinance, but permitted it to become a dead letter, and that plaintiff, while crossing a certain street in the city, was knocked down by a bicycle going at an immoderate rate of speed, and was injured, owing to defendant's neglect of duty, states a cause of action against the city.

---

*As to municipal liability for failure to enact or enforce ordinances regulating the use of wheels on streets and sidewalks, see Tarbutton *v.* Town of Tennille (Ga.), 3 Mun. Corp. Cas. 140; Jones *v.* City of Williamsburg (Va.), 3 Mun. Corp. Cas. 444, and note. No action lies against a city for the negligent exercise, or nonexercise, of its discretionary powers of a public or legislative character. Wheeler *v.* City of Poplar Bluff (Mo.), 3 Mun. Corp. Cas. 20, and note.

Mayor, etc., of City of Hagerstown *v.* Klotz

Same - Same - Negligence of Third Person—Pleading.

It was not error to sustain a demurrer to defendant's plea that the injury had been done by a third person, while conducting himself in accordance with defendant's ordinance, where the general issue was set up in another plea, since the plea demurred to is equivalent to a denial that defendant was negligent.

Appeal from circuit court, Washington county.

Action by Max Klotz against the mayor and council of the city of Hagerstown. From a judgment in favor of plaintiff and an order overruling a demurrer to the declaration, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

J. A. Mason, W. J. Witzenbacher, and R. J. Halm, for appellant.

M. L. Keedy, A. C. Strite, and Roger T. Edmonds, for appellee.

SCHMUCKER, J. The appellee in this case instituted an action against the appellant for damages for an injury resulting from being struck and knocked down by a rapidly moving bicyclist on a public street in Hagerstown. The appellant demurred to the narr., and, its demurrer having been overruled, filed pleas, and went to trial upon the issue joined thereon, and, the verdict and judgment being against it, appealed. The record contains no exceptions to the court's action upon the evidence, or its instructions to the jury, and the main question, therefore, presented for our consideration, is whether the declaration stated a good cause of action. The declaration alleges the incorporation of the appellant, and that it was vested by its charter with control over its streets, and was given full power and authority to prevent, suppress, remove, and abate all nuisances and obstructions thereon, and, for the purpose of carrying out its powers and for the preservation of the peace and good order of the community and the protection of the lives and property of its citizens, to pass and enforce appropriate ordinances; that, in the exercise of the powers thus conferred on it, the appellant, some time prior to the happening of the injury complained of, passed an ordinance to regulate bicycle riding within its corporate limits, by which it was provided that it should be unlawful for any person to ride a bicycle at an immoderate speed on its streets, and a fine was imposed for a violation of the ordinance; that, by virtue of the power and authority conferred upon the appellant, it became its duty not only to pass such ordinances as were necessary to protect the lives and limbs of its citizens, and prevent, suppress, and abate all nuisances and obstructions as aforesaid, but also to exercise all reasonable care and diligence in the enforcement of the same. The declaration alleges, further, that the appellant negligently, carelessly, and wrongfully failed, refused, and omitted to enforce the provisions of said ordinance; that the provisions were negligently

permitted to remain and be unenforced, so as, practically, to be a dead letter, although immoderate bicycle riding, trials of speed between riders of bicycles, and racing of bicycle riders upon the streets of Hagerstown had become and was at the time of the injury complained of, and for some time prior thereto had been, a nuisance upon that portion of West Franklin street between North Potomac street and Walnut street, a menace to the lives and limbs of the citizens of said Hagerstown traveling along, upon, and across said West Franklin street at its intersection with said North Jonathan street, as well as at other places on said portion of West Franklin street; that on divers days and at divers times, both in the daytime and after night, immoderate bicycle riding, trials of speed, and racing between bicycle riders occurred on said portion of West Franklin street, openly, publicly, and notoriously, and that the appellant negligently, carelessly, and wrongfully failed, refused, and omitted to enforce the provisions of said section 3; that, by reason of the failure of the appellant, the provisions of said ordinance became and were treated and considered, by persons riding bicycles on said portion of West Franklin street, as a dead letter, or an ordinance the provisions of which could be violated with impunity. The declaration further alleges that on the 5th day of August, A. D. 1899, the plaintiff, while in the exercise of due care and caution on his part, was crossing said West Franklin street at its intersection with said North Jonathan street, and while so crossing was struck and knocked down by a certain person or persons unknown to the plaintiff, who were then and there riding at an immoderate speed along and upon said portion of West Franklin street, at its intersection with said North Jonathan street, by reason of the carelessness, negligence omission, and default of the appellant in the premises; that, by reason of such carelessness, negligence, omission, and default of the appellant in the premises, the plaintiff was seriously and permanently injured.

In the cases of Mayor, etc., v. Marriott, 9 Md. 160, 66 Am. Dec. 326; Taylor v. Mayor, etc., 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759, and Cochrane v. City of Frostburg, 81 Md. 54, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728, this court held that a municipal corporation having powers similar to those possessed by the present appellant is bound to exercise them for the public good, and to protect persons and property, and that its duty is not discharged by merely passing ordinances upon the subject. It can relieve itself from responsibility only by a vigorous attempt to enforce them. In Marriott's Case the city was held liable for damages to the plaintiff who suffered injury from falling upon ice which had accumulated upon the footway of one of the streets in such manner as to constitute a nuisance, and to obstruct and endanger the public in walking thereon; the injury having occurred after the lapse of a sufficient time after the city might,

by the exercise of ordinary care and diligence, have obtained notice of the condition of the street. In Taylor's Case the plaintiff was injured by being struck by a sled coasting on the public street at a high rate of speed, at a place where large numbers of men and boys had for several days prior thereto been coasting at a rapid and dangerous rate of speed. This sport was held to constitute a nuisance of a dangerous character, which the city should have suppressed. Inasmuch, however, as the city had, through its police, made a vigorous effort to suppress the coasting, and had so far succeeding in doing so that the sled by which the plaintiff was injured was the only one then on the street, the court, while affirming the principle of Marriott's Case, held that the lower court should have submitted to the jury the question whether the defendant had used reasonable care and diligence to suppress the nuisance. In Cochrane's Case the declaration averred that large numbers of horses, cows, hogs, and horned cattle were permitted to run at large upon the public streets, until they, especially the horned cattle, became a nuisance, and a source of danger to persons passing along the streets, and that, although the nuisance had become notorious, the city refused to take any steps whatever to abate it. The further allegation was made that the plaintiff, while passing along the street with due care, was attacked and seriously injured by one of the horned cattle so negligently permitted to be at large upon the street. The defendant demurrerd to the declaration, and the demurrer was sustained. Upon an appeal this court held the declaration to be sufficient, and reversed the judgment of the lower court. In the opinion in that case the cases bearing upon the subject, in both this and other states, were reviewed, and, although it was conceded that the law in some of the other states was different, the Cases of Taylor and Marriott were affirmed and relied upon by the court in reaching its conclusion. It is apparent that the allegations contained in the declaration in the present case, which we have already stated at some length, bring it within the principle of the last-mentioned cases. We think the learned judge below committed no error in overruling the demurrer filed by the appellant.

Nor was there any error in sustaining the demurrer to the appellant's third plea, which alleged that the injury complained of had been done by one Lester Davis while conducting himself in accordance with the provisions of the ordinance regulating the use of bicycles on the streets. The plea in question amounted to general issue; for to aver that a third party committed the wrong alleged is the same thing as to say that the defendant did not commit it. The general issue is set up in the first plea, and under it the facts alleged in the third plea could have been offered in evidence, so that the appellant was, in no aspect of the case, injured by the court's action upon that demurrer. The judgment appealed from will be affirmed. Judgment affirmed, with costs.

MILLER *v.* CITY OF FITCHBURG.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 18, 1901.)

[61 N. E. Rep. 277.]

Water Supply—Municipal Ownership of Water Rights and Reservoir in Another Town—Taxation of Same.

The city of Fitchburg, pursuant to the authority granted by St. 1892, c. 60, purchased certain lakes and connected water rights for the purposes of a water supply. As a part of such improvement, and pursuant to contract with certain mill owners, it also purchased a reservoir in another town, and water rights connected therewith, to be used, as a compensating reservoir by such mill owners, to save them from damage by reason of the diversion of the waters of the lakes. The second purchase included the land for dams and buildings requisite to utilize such water rights. No revenue was derived from such reservoir or the property connected therewith: *held*, that such reservoir and improvements were purchased by the city for the purpose of its water supply, and under St. 1893, c. 352, providing that a city so purchasing property in another town shall not pay any tax thereon, but instead shall pay annually to such town a certain amount of money, the city cannot be compelled to pay a tax levied under Pub. St. c. 11.

Same—Public Necessity—Legislative Questions.

The question whether a public exigency or necessity exists for the establishment of a reservoir as a part of the water supply of a city is for the legislature to determine.

Same—Public Use—Question for the Court.

The question whether the use authorized by the legislature of a reservoir in connection with the water supply of a city is or is not a public use is for the court to determine.

Same—Reservoir—Whether Subject to Taxation.*

Where a city, to procure a water supply, purchases and maintains a reservoir and dam in another town under a contract with mill owners for their use in consideration of their release of damages for water rights taken by the city which they had previously had, such reservoir is not taxable under St. 1893, c. 352, providing that any such land or building from which any revenue in the nature of rent is received shall be subject to taxation, since such release of damages is not revenue or rent.

Appeal from superior court, Worcester county; William B. Stevens, Judge.

Action by Louie S. Miller, as collector of taxes of the town of Westminster, against the city of Fitchburg. Judgment for defendant.

Frank P. Goulding and James A. Stiles, for plaintiff.
Wm. P. Hall, City Sol., for defendant.

LATHROP, J. On December 1, 1891, the city council of the defendant passed a vote that the mayor be requested to petition the general court to give the defendant the right "to take and hold, by purchase or otherwise, for the purpose of supplying said city with pure water, the waters of Wachusett lake, in the town of Princeton, the waters of Meetinghouse

*See City of Newport *v.* Commonwealth, 2 Mun. Corp. Cas. 148, and note; Negley *v.* City of Henderson, 3 Mun. Corp. Cas. 539; Negley *v.* City of Henderson, 4 Mun. Corp. Cas. 704.

pond, in the town of Westminster, and the waters of Wyman's reservoir, in the town of Westminster, for a compensating reservoir for all damages that would otherwise result to mill owners, and for authority to take in like manner all lands, water rights, etc., as shall be necessary for the use and enjoyment of said waters taken or purchased." In pursuance of this vote the mayor petitioned the general court to grant such authority, and St. 1892, c. 60, was enacted, which, by section 10, was to take effect upon its passage, and was approved March 14, 1892. By sections 1 and 2 of this act the city was authorized to take and hold, by purchase or otherwise, the waters of Wachusett lake, in the town of Princeton and Westminster, and of Meetinghouse pond in the town of Westminster, and the waters which flow into and from the lake and pond, and any water rights connected therewith, and convey the water to and into the city, for the purpose of supplying water to its inhabitants, and to take and hold, by purchase or otherwise, such land on and around the margin of the lake and pond, not exceeding five rods in width, as might be necessary for the preservation and purity of the waters. Section 4 of the act is as follows: "Said city is also authorized to take and hold, by purchase or otherwise, the waters of Wyman's reservoir, so-called, in the town of Westminster, and the waters which flow into and from the same, and any water rights connected therewith, to be used as a compensating reservoir for all damages that would otherwise arise to mill owners by reason of the taking and diverting of the waters of Wachusett lake and Meetinghouse pond; and to take and hold in like manner such lands as may be necessary for building, erecting and maintaining a dam for storing and distributing said waters. Said city is authorized to contract with mill owners whose rights are affected, in relation to the manner and mode of using, controlling and operating said compensating reservoir." Wachusett lake and Meetinghouse pond are great ponds, whose natural outlets flow through Wyman's reservoir, and thence into a branch of the Nashua river, carrying the waters through the defendant city. On April 26, 1892, in pursuance of the power given by section 4, above cited, and of a vote of the city council, the city bought of one Wyman various tracts of land in Westminster, including therein the whole of Wyman's reservoir, together with all the rights of Wyman in the waters of the pond and reservoir. The purchase money so expended was charged by the city to its water-loan account. After this purchase the city proceeded to construct a reservoir, occupying substantially the same position as Wyman's reservoir, and a dam, gatehouse, etc. The new dam was built where the old dam of Wyman's reservoir had stood. This land, in 1899, was assessed by the town of Westminster as "dam and land flowed," and this is the tax sought to be collected to this action. The city also bought land above the reservoir, and constructed therein a basin, now known as

"Smith's Basin," a dam, and a gatehouse. This was for the purpose of turning the waters of Meetinghouse pond into the distributing pipes for the use of the inhabitants of the city, which are laid from this basin to, through, and beyond Wyman's reservoir. These pipes go into a chamber of the gatehouse at the dam of Wyman's reservoir in such a manner that, by shutting certain gates and opening certain other gates, the waters of Wyman's reservoir can be drawn into the pipes leading from Meetinghouse pond to the city, and distributed to its inhabitants, though in fact no water has yet been drawn from this reservoir for use by the city. On April 10, 1895, the city made an agreement with the owners of mills on the branch of the Nashua river flowing through the city by which, in consideration of the release of damages on the part of the mill owners, the city agreed to maintain the reservoir for the use of such owners, and to allow the water to flow only into the natural channel of the Nashua river, except in case of a serious conflagration in West Fitchburg or in the city of Fitchburg proper, or in case of a break in the pipes above Wyman's reservoir. In such case the city reserved the right to draw the waters of the reservoir into the pipes which supply the city with water. The city also reserved the right to withdraw the waters of the reservoir, when necessary, for the purpose of repairing the pipes laid upon the bottom thereof. The agreed facts contain also the following statements: "Said Wyman's dam and gatehouse is necessary at the present time in order to turn the waters of Wyman's reservoir into the distributing pipes, and would always be necessary if it were desired to utilize the waters of Wyman's reservoir for distribution to the inhabitants of the city; but said dam at Wyman's reservoir, as a mechanical proposition, is not necessary at the present time in order to store the water of Meetinghouse pond or Wachusett lake for distribution to the inhabitants, nor to aid in its distribution, and is built at a level lower than the point at which water for the city is and was admitted to the distributing pipes at Smith's basin. All the lands, waters, and water rights conveyed by said Franklin Wyman to the city of Fitchburg were purchased by the city at its sole expense, and became the property of the city. All the dams, gates, and gatehouses erected or maintained thereon by the city, and the Wyman dam, have been so erected and maintained at the sole expense of the city, and are the property of the city. All the water pipes laid or maintained by the city in, through, and upon said premises have been so laid and maintained at its own expense by the city, and are the property of the city. The city has also, at its own expense, provided for the adjustment of the gates at said Wyman's reservoir at Wyman's dam, and the regulation of the flow of the waters thereof in the manner stipulated in the aforesaid agreement with the mill owners. The city has never received, nor does the city now receive, any revenue in

Notes

there is some conflict of authority; but according to the better view, the mere fact that the injury and the plaintiff's violation of the ordinance were contemporaneous will not preclude a recovery. In order that it may have such an effect, it must have concurred in causing the injury, or, as it has frequently been otherwise expressed, it must have been a cause which directly contributed thereto. The fact that it was a mere condition, but for the existence of which the accident would not have happened, is not sufficient.

Wagon Left Standing in Unlawful Position.

Thus in Steele *v.* Burkhardt, 104 Mass. 59, it was said: "A person who places his wagon in the street in a position prohibited by statute or ordinance may yet maintain an action against another negligently driving against it. It is true, generally, that while no person can maintain an action to which he must trace his title through his own breach of law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed."

In Newcomb *v.* Boston Protective Dept., 146 Mass. 600, 16 N. E. Rep. 555, the plaintiff was run into and injured by one of the wagons of the defendant corporation while sitting upon his cab, which, at the time of the accident, was standing crosswise with the street in violation of a city ordinance requiring all vehicles waiting in the streets to be placed lengthwise therewith and as near as possible to the sidewalk. It was held, that if the plaintiff's violation of the ordinance was a mere condition to his injury, he was entitled to recover; but that if it was a cause which directly contributed thereto, then he was conclusively barred. See also, Spofford *v.* Harlow, 3 Allen (Mass.) 176; Kearns *v.* Sowder, 104 Mass. 63.

Fast Driving in Violation of Ordinance.

In Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274, it was held, that the mere fact that the plaintiff was driving at a speed of more than six miles an hour in violation of a city ordinance, would not preclude him from recovering against the city for injuries caused by colliding with a heap of stones which the city had negligently permitted to remain in the street, the court saying, that "unless the plaintiff's claim originates in his offense and he is obliged to prove the offense in order to establish his claim, or unless the commission of the offense has in some degree contributed to produce the injury, or necessarily negatives some point which the plaintiff is bound to establish in proof, it will not bar a recovery." See also, Herries *v.* City of Waterloo, 6 Mun. Corp. Cas. 595, 86 N. W. Rep. 306.

In Heland *v.* City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670, the plaintiff, while driving over a bridge at a rate faster than a walk, was injured by reason of a defect in the bridge. It was held that he could not recover, the court assuming that his violation of the ordinance contributed to his injury, and saying that it was well settled that where a plaintiff's own unlawful act concurred in causing the damage that he complained of, he could not recover compensation for such damage. See also, Worcester *v.* Essex Merrimac Bridge Corp., 7 Gray (Mass.) 459.

In Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. Rep. 925, the plaintiff approached from one direction driving at a speed of more than six miles an hour in violation of a municipal ordinance. The defendant approached from the opposite direction driving a balky and unmanageable horse. As they drew near together, a collision occurred through the defendant's horse making a sudden dash across the road. *Held*, that the plaintiff's violation of the ordinance was not a mere question of fact to be taken into consideration along with other facts in determining whether or not he was guilty of contributory negligence, but that if it directly contributed to the injury sustained, it was a conclusive bar to a recovery as a matter of law.

Same—Ordinance Not Applicable to Members of Fire Department.

But an ordinance forbidding and making it a misdemeanor for any

person to drive any horse, mule, or other beast upon the city streets at a gait faster than a walk, is unreasonable when applied to members of the fire department driving to a fire; hence a fireman who was thrown from the trucks, and killed, by colliding with a pile of building material in the street while driving rapidly to a fire, was not, by reason of the violation of the ordinance, guilty of any contributory negligence. Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. Rep. 123; Farley *v.* Mayor, etc., of New York, 152 N. Y. 222, 46 N. E. Rep. 506.

V. COMPARATIVE NEGLIGENCE.

In Bergman *v.* St. Louis, etc., R. Co. (Mo.), 1 S. W. Rep. 384, the doctrine of comparative negligence was applied. The facts were, that the plaintiff's decedent had stepped from one track to avoid an engine, and had stepped upon and was walking along another, when he was killed by freight cars which were being moved backward over that track, and which approached the deceased from his rear. It was held that the company was liable in damages, because although the deceased was guilty of contributory negligence; yet had there been a lookout stationed on the advance car and the bell rung as required by ordinance, the accident would not have occurred.

LEE *v.* CITY OF PORT HURON.

(*Supreme Court of Michigan, Oct. 22, 1901.*)

[87 N. W. Rep. 637.]

Bicycles*—Power of City to Authorize Use of Wheels on Sidewalks.

Where a city charter confers on the common council control of all sidewalks, it is proper for the council by ordinance to authorize the riding of bicycles on sidewalks within limits where the conditions are such that the use of bicycles will not amount to a nuisance, or where, owing to the condition of the streets, they are impassable for a bicycle.

Same—Liability of City for Injury Sustained by Wheelman on Defective Sidewalk.†

Comp. Laws, § 3441, requiring sidewalks to be kept in reasonable repair and in a condition reasonably safe for travel, only requires that a sidewalk shall be kept in such repair as to render it safe for ordinary uses, and does not mean that it shall be kept in a safe condition for bicycle riding, though a lawful city ordinance authorizes such use.

Case made from circuit court, St. Clair county; Frank Whipple, Judge.

Action by Anna Lee against the city of Port Huron. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following are the stipulated facts: Plaintiff was injured while riding on her bicycle upon a sidewalk of the defendant city. The city passed an ordinance licensing bicyclists to ride

---

*On the general subject of municipal control and regulation of bicycles, see People *v.* Bruce, 5 Mun. Corp. Cas. 226, and note; Wheeler *v.* City of Boone, 1 Mun. Corp. Cas. 694.

†As to municipal liability for injuries sustained by wheelmen upon defective streets and sidewalks, see Leslie *v.* City of Grand Rapids, 1 Mun. Corp. Cas. 683; Richardson *v.* Danvers, 4 Mun. Corp. Cas. 92; Benton *v.* Philadelphia, 6 Mun. Corp. Cas. 770.

Jeff H. Irish, Frank Richardson, and Harris Richardson, for appellants.

M. L. Countryman, for respondents.

BROWN, J. This action was brought to enjoin the municipal authorities of the village of Detroit from issuing certain bonds of the village. At the time of the commencement of the action plaintiffs obtained from the court commissioner, ex parte, a temporary injunction, which was dissolved by the district court on motion of defendants, and plaintiffs appeal.

The bonds threatened to be issued and negotiated by defendants were authorized by the voters of the village at a special election held on June 23, 1900, for the purpose of establishing and equipping an electric light plant. This action is founded on certain irregularities and defects in the conduct of the election, because of which irregularities and defects it is claimed that the election was a nullity. The complaint sets out the facts very fully, the allegations of which are in the main admitted. But one material question of fact is put in issue by the answer. Plaintiffs allege that the petition for the election, which by the statute authorizing it is required to be signed by 25 voters and freeholders (chapter 200, Laws 1893), was not signed by the requisite number, and that some of the persons who signed the same were not freeholders or voters of the village. The answer puts this allegation in issue, and, as we view the matter, it presents the only material issue of fact in the case. There is, however, another issue of fact on the face of the pleadings, in reference to whether the issuance of the bonds would increase the rate of taxation above the maximum allowed by Gen. St. 1894, § 1639. But as the bonds here in question are expressly authorized by the act of 1893, supra, the general statute can have no application, and the issue is not a material one. It is not claimed that the rate of taxation would be increased above the 10 per cent. limit fixed by the act of 1893. All other issues present questions of law only. The facts are not in dispute.

The proceedings looking to the issuance of the bonds were conducted under the provisions of chapter 200, Laws 1893. This act provides that every village in this state may issue its bonds for the purpose of raising money for any lawful public improvement, by conforming to the provisions of the act. It then proceeds, and particularly specifies the proceedings to be had for such purpose, the submission of the question to the voters, and the manner of conducting the election. The first essential step required by the law, where the village council does not act of its own motion, is the presentation of a petition, signed by 25 voters and freeholders residing within the village, requesting the council to make the designated improvement therein. When such petition is so presented, the council is required to cause the proposition embodied therein to be submitted to the electors of the village at the next annual

election, or such special election as the council shall by resolution designate.

1. The first contention of appellant is that the notice of election was not given as prescribed by law, and that for this failure the election was void and of no force or validity. The act under which the election was called and conducted does not provide what notice shall be given. It simply requires the village council, upon the filing of a proper petition, to submit the proposition for the proposed public improvement to the voters of the village at the next annual election, or at such special election as they shall by resolution designate. The act provides for no form of notice or manner of calling the election. Upon the presentation of the petition in question, and on June 11, 1900, the appellant village council adopted a resolution calling a special election for the 23d following, and providing therein "that ten days' notice of such special election shall be given by posting written notices thereof in three of the most public places in the village and by the publication of this resolution." The notices of election were all duly posted as required by the resolution, but the resolution itself was not published until June 15th, eight days before the election was to be held. It is insisted by appellant that because the resolution was not published 10 days before the election, the notice required by the resolution was not given. There being no provisions in chapter 200, supra, under which the election was called and conducted, as to the manner of calling the same, we must look to the general statutes governing the calling of such elections for information as to what notice is essential and necessary. Gen. St. 1894, § 1216, provides for holding an annual village election, and that notice thereof shall be given, either by posting notices thereof in three public places of the village, or by publishing the same in some newspaper published in the village. Section 1217 provides that special elections may be called, but no such election "shall be held unless ten days' notice thereof is given." We find no other provisions on the subject of notice of either general or special elections, nor has our attention been called to any provisions of the law which require notice of a village election, either general or special, to be both posted and published. The only statutory requirement on this subject is that the notice must be either posted or published. If it be either published or posted, the statutes are complied with. The municipal authorities had no power or authority in this instance to modify or change the statutes on this subject, by requiring, by resolution or otherwise, any additional notice to be given. It was wholly unnecessary to both post and publish the notice, and, as the statutes were fully complied with by the posting of the notices, the election was properly called, and notice thereof sufficient, even though that portion of the resolution requiring the same to be published be construed as requiring its publication 10 days before

the election. It was wholly unnecessary to publish it, and, as just stated, the posting of the notices was a sufficient compliance with the statutes. City of Waycross v. Youmans, 85 Ga. 708, 11 S. E. 865.

2. Appellants also contend that the form of the proposition as submitted to the voters was not in compliance with the law; that it embodied two distinct questions, when only one should have been included therein. The proposition as voted upon is as follows: "Shall the village of Detroit, Minnesota, purchase, build, establish, and control all necessary and proper buildings, machinery, apparatus, and material for making, generating, and supplying electric light for public and private use in said village, the cost thereof not to exceed the sum of $15,000, said sum to be raised by the issuing and negotiating of the bonds of said village, of the par value of $500 each, payable fifteen years after their date, with interest payable semiannually, at the rate of 5 per cent. per annum?" We are unable to concur in the claim that this proposition is bad in form, or that it contains more than one question. The sole object of the election was to determine whether the village should establish, build, equip, and pay for an electric light plant for the use of its inhabitants. The plant could not well be established without payment being made therefor, and the question whether the bonds should be issued for that purpose was a very material and essential part of the issue before the people. The statutes do not require any particular form of proposition to be submitted, and, as the one actually submitted was full and complete, plainly informed the voters of the objects and purposes intended to be accomplished in the event of a favorable expression at the polls, it is not open to the objections urged against it, and sufficiently complied with the law. People v. Sisson, 98 Ill. 335.

Objection is also made to the form of the petition presented to the village council, but we find no defect sufficient to warrant holding it defective. With reference to the question whether this petition was signed by the necessary number of voters and freeholders, it may be said that if it was not, and the trial court so finds as a fact, the election was unauthorized, and the proceedings a nullity. The mere fact that the village council investigated and determined that the signers were freeholders and voters of the village is not conclusive. The order appealed from is affirmed.

BOARD OF WATER COM'RS OF CITY OF DETROIT *v.* COMMISSIONERS OF PARKS AND BOULEVARDS.

(*Supreme Court of Michigan, May 7, 1901.*)

[85 N. W. Rep. 1132.]

Water--Liability of Park Board on Contract—Failure of Appropriation as a Defence.

No appropriation having been made by the city council of the city of Detroit, for the use of the park board, to pay for water for the

operation of drinking fountains, hydrants, etc., the Detroit waterworks was not entitled to recover from the park board for water so furnished.

Long and Grant, JJ., dissenting.

Certiorari to circuit court, Wayne county; George S. Hosmer, Judge.

Certiorari to the circuit court of Wayne county to review its action in denying the application of the board of water commissioners of the city of Detroit for mandamus to require the commissioners of parks and boulevards to audit relator's claim for water rates. Writ denied.

Gray & Gray, for relator.

Timothy E. Tarsney, for respondent.

GRANT, J. The main question in this case is, must the board of water commissioners of the city of Detroit furnish water for the public parks of the city without charge? The relator is a corporation organized under Act No. 90, Sess. Laws 1853. By the terms of the act the possession and control of the waterworks are vested in the relator. It is vested with the sole power to assess the water rates to be paid by the owner or occupant of each house or other building having or using water. It is also authorized to purchase such land and materials, and to construct such reservoirs, etc., "as shall be deemed necessary or desirable to furnish a full supply of water for public and private use in said city." It is also required to invest any surplus not required for the payment of running expenses or the extension of its works so as to make the same available for the payment of interest and principal of the bonds issued in pursuance of the act. It is also vested with power "to construct reservoirs, jets and fire hydrants, at such localities in said city as they may deem expedient and necessary, and to lay pipes in and through all the alleys and streets of said city; and also to construct in such localities as they may deem expedient, not exceeding one to each block, hydrants for public use, and to keep the same in repair; and also, with the consent of the common council of said city, to construct fountains in the public squares, or other public grounds of said city as they shall deem expedient." The theory of the act seems to be that it is to be maintained by the consumers of water. It was not contemplated that it should be supported by a tax upon the city. There is nothing in the act to indicate that it was the intention of the legislature to require water to be furnished to the public parks, buildings, etc., in the city, free. It is manifest, therefore, that, if the contention of the respondent be maintained, the cost of water furnished to the parks and for other public purposes will not be paid by a tax upon the inhabitants of the city, but must be paid by the consumers of water. These water rates are not taxes. Jones v. Board, 34 Mich. 273; Preston v. Same, 117 Mich. 589, 76 N. W. 92. If a private

corporation had been authorized to supply the city and its inhabitants with water for public and private use, and in granting the franchise the city made no provision that water should be furnished free for public uses, it would hardly be contended that such corporation could be compelled to furnish it free for those purposes. The relator was evidently established in the interests of economy, and for that reason the exclusive power was vested in a board consisting of five persons. The fact that the legislature, by Act No. 302, Laws 1873, authorized an annual levy of a tax of $75,000, to be used in payment of interest upon the bonds issued by said board, does not detract from or add to the powers of the board under its act of incorporation. It in no manner affects the right of the board to fix the water rates, or implies that water must be furnished free for public purposes. We are therefore of the opinion that relator is empowered to charge reasonable rates for water furnished for public purposes, and that the legislature alone possesses the power to exempt the city from the payment of water rates.

It is also urged as a defense that the board of estimates made no provision for raising the money, and that therefore there are no funds out of which to pay. We think this defense is not available. The prayer of the petition is that the respondents audit the account. The respondents are not the custodians of the moneys. By Act No. 380, Loc. Acts 1897, the bills must be audited by the respondents, after which they are delivered to the comptroller, who is authorized to submit the same to the council with his approval or disapproval. Should the authorities whose duty it is to pay refuse to pay after the bill is audited, this question might arise. We presume, however, there will be no difficulty, inasmuch as the main object of this suit was to settle the power of the relator. The writ should issue.

LONG, J., concurred with GRANT, J.

MOORE, J. I cannot agree with the conclusion reached by Mr. Justice Grant. Section 2, of the act approved March 8, 1873, being section 540 of laws relating to the city of Detroit, requires the common council to include in the general tax, annually, the sum of $75,000, to be paid over to the water board, to be used in the payment of the interest, so far as may be necessary, on any outstanding bonds issued for the purposes of the board; the balance to go into a sinking fund to be used in paying the bonds when they mature. Section 528 of the laws relating to the city requires the council to assess on all the taxable property of the city such sums as the board of water commissioners need, over and above the revenue of the board, to meet the payment of the principal and interest of the bonds issued. It is shown in Preston v. Board, 117 Mich. 589, 76 N. W. 92, that from 1882 to 1895, inclusive, there was received from water rates $4,952,959.30,

while there was paid by the city during the same time $1,036,-532.81, of money raised upon all the taxable property of the city. It was also shown that the water used by the fire department, the park commissioners, and for all other purposes which may be called water used for public purposes, was only 4 per cent. of the pumpage of the waterworks. The city then has paid, by tax levied on all the taxable property of the city, upward of 18 per cent. of the entire receipts of the water board, while it has used only about 4 per cent. of the pumpage. Section 430 of the laws relating to the city of Detroit requires the park and boulevard commissioners, annually, to submit to the common council an estimate of the needs of the board for the ensuing year, which estimate shall specify the sums desired for each of the several objects of expenditure. The following section provides for the raising of this money by a general tax, and that when raised it shall be paid out only for the purposes approved by the common council and board of estimates. By the next section, the commissioners are forbidden to incur any liability during any fiscal year in excess of the money in any fund, or not authorized by the common council. By section 511 of the laws relating to the city of Detroit, it is made the duty of the board of water commissioners, when the necessary funds are supplied, to make such provision as shall be necessary to furnish a full supply of water for public and private use. The following section requires the board to provide fire hydrants at such localities as may be ordered by the fire commission or the common council; the expense thereof to be paid from the funds of the fire commission, when ordered by it, and from the appropriate fund of the city when ordered by the common council. It also provides that the board may erect drinking hydrants for public use in each block of said city, and, with the consent of the common council, may erect fountains in such public grounds of the city as they may deem expedient. It will be observed, the erection of fountains is impossible, either by the board of park commissioners or the board of water commissioners, without the consent of the common council. The erection of fire hydrants is impossible, except by the consent of the fire commission, whose funds must be provided by general tax, or by the common council. It is also clear that fire hydrants, without an adequate supply of water, would be of little use, while drinking hydrants and fountains would be such only in name, unless supplied with water. The provision for the assessment of water rates by the board is found in section 513 of the laws relating to the city of Detroit. It reads as follows: "Said commissioners shall, from time to time, cause to be assessed the water rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they shall deem equitable; and such water rate shall become a continuing lien until paid, upon such house or other building, and upon the lot or lots

upon which such house or other building is situated." It will be observed that authority is nowhere given to assess the fire department, or the board of park commissioners, or the city of Detroit for water used by these various departments. In view of the fact that the city is paying for the water used by its various departments three or four times as much as is paid by the ordinary consumer, this failure to confer authority upon the water board is very significant. Section 428 provides that the commissioners shall have the control and management, and shall have charge, of the improvement and maintenance of all the parks and public grounds of said city, including Belle Isle Park, and shall have control of the improvement and maintenance of the boulevards. The commissioners then having the right, in the improvement of the parks and boulevards, to erect fountains, when the funds are raised by the board of estimates and the common council, it would seem to follow, by implication, that the water necessary to be used to supply these fountains should not be made a charge against the park and boulevard commission. The property under the control of these boards is the property of the city of Detroit. The boards are part of the municipal machinery, called into being for the purpose of managing the several departments placed under their control, not for their own benefit, but for the benefit of the city of Detroit and its citizens. I think the writ should be denied.

MONTGOMERY, C. J., concurred with MOORE, J.

HOOKER, J. I am unable to find in the water board act any provision that makes the furnishing of water free for drinking hydrants or fountains except when they are erected by the water board under the terms of said act. The park board may doubtless erect fountains under the provisions of the park board act without the concurrence of the water board, but it is nowhere made the duty of the water board to supply them without compensation. The act providing for a board of park commissioners contains no implication that such board may impose the expense of improving or maintaining the parks upon any other board or department of the city government, but, on the contrary, contemplates that provision for such expenditures shall be made by general tax, and the board is limited to such expenditures as the council may authorize. The board of water commissioners is not under obligation to furnish water without pay. The park board is prohibited from incurring obligations beyond the amount appropriated for specific purposes. It does not appear that an appropriation has ever been made for water, or that any such item has ever been allowed or paid. On the contrary, the council has refused such appropriations, upon the claim that it is the water commissioners' duty to furnish the water without charge. The writ should be denied.

REID *et al. v.* TROWBRIDGE *et al.*

(*Supreme Court of Mississippi, Jan. 21, 1901.*)

[29 So. Rep. 167.]

Electric Lights—Power of Board to Contract—Advertising for Bids—Construction of Charter.

Vicksburg city charter enacts that the board of mayor and aldermen shall not make contracts exceeding a certain amount, for work on public streets or public buildings, without advertising for sealed bids, and that certain additional powers may be exercised by such board, "by ordinance and resolution," at "regular or special meeting." Acts 1886, p. 694, gives the board additional power "to provide for the lighting of said city by electric lights or other methods": *held*, that electric lighting was not to be regarded as relating to work on public streets or buildings, and the board might pass ordinance for electric lighting without advertising for bids.

Same—Same—Submission to Electors—Charter Not Altered by General Law.

Act March 10, 1888, § 1, appointing a commission with power to contract with electric lighting companies for lights for public use, and providing that the power granted should extend to incorporated cities, the authorities of which should make such contracts after submitting them to the voters, "unless otherwise provided" by the charter of any such city, does not apply to or modify Vicksburg city charter, since such charter, as amended by Acts 1886, p. 694, gives its municipal board power to provide for electric lighting by ordinance, and is therefore "otherwise provided."

Same—Contract for Term of Years—Reasonableness.

A contract by a city for the lighting of its streets for a period of 10 years was not invalid as for an unreasonable time.

Same—Same—Constitutional Law.

A contract by a city for the electric lighting of its streets for a period of 10 years by a corporation was not contrary to Const. § 183, forbidding a municipality to make appropriation or loan its credit to any corporation.

Same—Same—Same—Exclusive Privileges.

A contract by a city for the lighting of its streets for a period of 10 years was not void as conferring an exclusive privilege.

Same—Same—Same—Same—Objections—Who May Raise.

The objection that a contract by a city for the lighting of its streets was void, as being exclusive, could only be invoked by the city or a party making application for privileges.

Same—Same—Special Levy—Right of Taxpayer to Object.

A taxpayer cannot object to a provision for a special levy in a city's contract for electric lighting until it is shown to be a damage to him by being in excess of the charter limitations as to total levy.

Appeal from chancery court, Warren county; William C. Martin, Chancellor.

"To be officially reported."

Bill by John B. Reid and others against W. L. Trowbridge and others to enjoin the execution of a contract by the city of Vicksburg for electric lighting. From a decree dissolving the injunction, plaintiffs appeal. Affirmed.

On the 5th day of May, 1899, the mayor and board of aldermen of the city of Vicksburg passed an ordinance directing a contract to be entered into with the Vicksburg Railroad,

Power & Manufacturing Company for lighting the streets of the city, to run for 10 years from its date, at a cost of $100 per light per annum, the number of lights to be 125. At that time the city was being lighted under a contract entered into in 1895 with the Vicksburg Electric Light Company, at a cost of $102 per lamp per annum, which had about 2 more years to run. This contract had been assigned to the Vicksburg Railroad, Power & Manufacturing Company. On the following day a contract in all respects similar to the one in existence, except as to the number and cost of lights, was signed by the mayor, and sent to a Mr. Shaffer, who was the president of the company. On May 17, 1899, appellants filed their bill in chancery to enjoin the execution of the contract for the following causes: (1) Under the act of March, 1888, the city could not make such a contract except after submitting it to the qualified voters; (2) if this is not true, then it must have advertised for bids; (3) it guaranties a special levy of taxes to meet the obligations incurred; (4) it is unreasonable and oppressive; (5) it grants an exclusive right; (6) it was entered into for the purpose of making an appropriation, and giving the aid of the city to the street-railway company; (7) in awarding the contract, the council acted arbitrarily, without exercising any discretion whatever, which made it illegal; (8) the company suppressed a contemplated bid for the contract. On motion of appellees, the injunction was dissolved. From that decree this appeal was taken by appellants.

Catchings, Hudson & Catchings and Magruder & Bryson, for appellants.

Miller, Smith & Hirsh, Henry & Scudder, Shelton & Bruninni, Anderson & McLaurin, and Voller & Mounger, for appellees.

CALHOON, J. The city of Vicksburg is not under the municipal chapter of the Code of 1892, and so the contractual powers of her governing board must be controlled by her charter. In the case before us the question arises, to be first disposed of, whether that board could under that charter, and under a legislative act of 1888, make a valid contract for electric lighting, without advertising for bids and without submitting it to popular vote. On this and all the questions in controversy counsel on either side have exhausted authority in their briefs, which are Parian monuments of laborious research and professional skill and ability. To them we point the curious for all the learning on the subject, and proceed to state conclusions, after carefully examining the leading citations they offer.

The appellants, two gentlemen who are citizens and taxpayers of the city, say that the contract they complain of in this record is ultra vires and void, and that its execution should be perpetually prohibited by injunction. It must be premised that before this contract was made the city was under a con-

tract, whether valid or void it is bootless to inquire, with a corporation known as the "Vicksburg Electric Light Company," the term of which then lacked 2 years of expiring; that this contract had been bought by another corporation, known as the "Vicksburg Railroad, Power & Manufacturing Company," an appellee in this cause; and that the new contract,—the one with the latter,—being the one complained of, extended the former for 8 years, with a reduction $2 per lamp per annum for the unexpired 2 years and the remaining 8 years, but added about 25 lamps to be furnished. It must also be noted that, before making the former contract,—the one with the Vicksburg Electric Company,—the municipal board did advertise for competitive bidding, but this was the only instance of such action for street lighting in the whole history of the city.

The following are the provisions of the charter in any way pertinent, as it appears in Pamph. Acts 1884, p. 422 et seq.:

"Sec. 25. Be it further enacted, that the board of mayor and aldermen shall not make any contract involving an expenditure of corporation funds relating to work on public streets, or the erection, extension or repair of public buildings, where the cost of the proposed work shall exceed five hundred dollars, or for materials to be furnished exceeding $200.00 in value, except in the following manner: Upon the direction of the board the mayor shall advertise for sealed proposals to do the contemplated work for ten days in a newspaper published in the city. At the first meeting of the board after such publication the mayor shall open and lay before the board all proposals received by him, and the board shall accept the lowest and best bid, or they may reject all bids made, and direct publication to be made for other proposals. No proposals shall be considered unless accompanied by the names of the surety or sureties proposed to be given by the bidder upon his bond for the faithful execution of the contract if awarded to him; and in all cases of contracts under this provision, bond and security in a sum sufficient to indemnify the city shall be required of the contractor."

"Sec. 28. Be it further enacted, that the following additional powers may be exercised by the board of mayor and aldermen by ordinances and resolutions adopted at any regular or special meeting: * * * Art. 27. To provide for the health, peace, security, good government, convenience and general welfare of the inhabitants of the city."

Next we find an amendment of the charter in Acts 1886, p. 694, which adds article 29 to the twenty-eighth section of the charter. This added article is in these words: "Art. 29. To provide for the lighting of said city by electric lights or other methods." So, condensed for easy examination, the charter reads: The mayor and aldermen of the city of Vicksburg shall be capable of contracting, but shall not contract in a matter relating to work on the public streets, or the

erection, extension, or repair of public buildings, where the cost of the work exceeds $500, or materials for it exceed $200, except upon sealed proposals, after advertisement made, the lowest and best bid to be taken, with the right to reject all and readvertise; and the right to contract to bind the city is vested in the board; and the "following additional powers may be exercised by the board at any regular or special meeting," viz.: (1) To provide "for the general welfare of the inhabitants"; (2) to provide "for the lighting of said city by electric light or other methods."

From the context, we are forced to conclude that, first, electric lighting was not regarded as "relating to work on the public streets, or erection, extension, or repair of public buildings"; and, second, that the board might, at any "regular or special meeting," pass ordinances or resolutions for the general welfare, and for electric lighting, without first advertising for bids. Any other construction appears strained and artificial, and the tension is not loosened by the suggestions that the city, without any charter authority, had the inherent power to light her streets, and that the charter clause was simply a legislative reaffirmance of antecedent right. The intent of the legislature to confer the power without restriction appears to us to be too plain from the collocation and order and sequence of the sections and articles of the charter act to admit of obscuration by learned argument about original power. The very last legislative action on the subject, that in the municipal chapter of the Code of 1892, shows that the lawmakers thought the power to be one to be conferred or prohibited, because it expressly confers it on cities and towns, and prohibits its exercise by villages.

We are very clear in the opinion that section 25 of the charter has no application. It seems certain from the whole act that the hiring of light was not regarded as a matter "relating to work on the public streets, or the erection, extension, or repair of public buildings." It is equally clear to us that, granting electricity to be a "material," the hiring of electric lamps lights was not regarded as "material for" such "work, extension, or repair." Here no material is furnished, in the purview of the act. There is no purchase, but simply a hiring of light belonging to another. Of this cannot be predicated the hiring of work on the streets or buildings of the city. An argument about what the law ought to be cannot change what the law is. That is for the legislative, and not the judicial, branch of the government.

We come now to the act of 1888 (Pamph. Acts, p. 468), approved March 10, 1888, which is, in so far as pertinent, as follows:

"An act to better secure safety and health in the state institutions, and in the cities and towns of this state, and for other purposes.

"Section 1. Be it enacted by the legislature of the state of Mississippi, that Hon. J. M. Stone, Hon. J. P. Walker, Gen. G. Y. Freeman, Hon. George G. Dillard and Hon. T. W. Sullivan, be and they are hereby constituted a commission on the part of the state of Mississippi, with full power and authority, to contract with any waterworks company or electric light company or gas company, or each, for a series of years, not exceeding twenty-five, for annual supplies of water, electric lights or gas lights, or each, reasonably sufficient for public uses in the capitol and various humane and charitable institutions of the state of Mississippi; such contracts to provide that the yearly cost to be variable so as not to exceed in cost, in any year, the cheapest furnished by any similar company in any of the Southern states with similar surrounding circumstances; that the powers hereby granted shall also extend to the municipal governments of incorporated cities and towns, and the authorities provided by law for the management of the affairs of such cities and towns shall make such contracts for them, after first submitting the proposition to the legally qualified voters of said city or town, and a two-third majority thereof voting for same, unless otherwise provided by the provisions of the charter of any city or town."

"Approved March 10, 1888."

Precedently to the passage of this act, and on February 29, 1888, there was passed an act referring to the municipal board of the city of Jackson, section 3 of which reads as follows:

"An act to authorize the board of mayor and aldermen of the city of Jackson to sell College Green, North Jackson, and issue bonds for the erection of a public school building, and for other purposes."

"Sec. 3. Be it further enacted, that the said mayor and aldermen be, and are hereby authorized and empowered to contract with any reliable corporation, association or individual for supplying the said city of Jackson with water and electric or gas lights, from year to year, and to levy and collect the tax necessary to discharge the debt in that behalf contracted by them; and they are directed and required to levy and collect such tax as may be required, from time to time, to pay the interest annually accruing on the bonds issued under the second section of this act, and create a proper sinking fund to discharge the same at maturity, or purchase them before maturity.

"Approved February 29, 1888."

It is claimed now that the last clause of section 1 of the first quoted of the above acts (that approved March 10, 1888) applied to and modified the charter of the city of Vicksburg so as to make the contract here in controversy void because not submitted to vote. In order to this result, it is claimed that in the charter of Vicksburg it is not "otherwise provided." We hold, under the previous reasoning of this opinion, that it

is so "otherwise provided," because the charter expressly confers the power, without restriction, on the municipal board, at any "regular or special meeting." Besides, in construing the section of the act secondly above quoted, this court expressly so held in the case of Light, Heat & Water Co. v. City of Jackson, 73 Miss. 644, 19 South. 771. If the precise point was not made, the omission is quite significant of the opinion of the eminent counsel for appellee in that case that there was nothing in it. Aside from this, the question was at the very root of the cause, and was considered and decided, and it is the exact question in the case at bar, except that this case is somewhat stronger in favor of the power than the case decided.

By section 3 of the act of February 29, 1888, the Jackson board was "hereby authorized and empowered to contract," etc., while by the Vicksburg charter act the board was authorized to so contract "at any regular or special meeting." We presume that no charter then existent "otherwise provided" by an express prohibition of electric lighting without vote. The grant of the power without restriction is to "otherwise provide."

In the case before us we think the time of the duration of the contract, which was 10 years at most, was reasonable. Within its charter powers, the board has a discretion independent of courts, and no exercise of it will be held void for unreasonableness, unless so gross as to strongly suggest fraud or corruption. The people elect their council, and the courts are not chosen members of it.

We think from the evidence that the price to be paid was reasonable; that fraud is not shown; that the contract was not exclusive, in the purview of the law, and not violative of section 183 of the constitution, and not avoided by the provisions for special tax levy; and, on the question of the propriety or necessity of the contract, very manifestly the board, and not the courts, must determine.

It cannot be assumed that the board was actuated by the purpose to "lend the credit" of the city in aid of the corporation, with which it contracted for a reasonable time and price, or that it was so influenced by anything in the application for the contract.

If the contract was reasonable and necessary, it is difficult to see how the question of its being exclusive, even if the contract be exclusive—and we hold it was not—can be raised by a taxpayer. That would arise where another person or company applied, or where the city itself invoked it. Waco Water & Light Co. v. City of Waco (Tex. Civ. App.) 27 S. W. 675; Grant v. City of Davenport, 36 Iowa, 396.

It is not easy to see, either, how a taxpayer can complain of the provision for a special levy until it is shown to be a damage to him by being in excess of the charter limitation of

total levy, and, unless it exceeds this limitation, there can be no objection to that clause in the contract. We fail to find evidence of any such improper lobbying as could vitiate the contract.

We have not cumbered this opinion by citation of authority. For these we refer to briefs of counsel. Affirmed.

GLOUCESTER WATER-SUPPLY CO. *v.* CITY OF GLOUCESTER.

(*Supreme Judicial Court of Massachusetts, Essex, June 19, 1901.*)

[60 N. E. Rep. 977.]

Water Company—Eminent Domain—What Land May Be Taken—Compliance with Statute.

St. 1881, c. 167, § 3, organizing a water-supply company, authorized it to take real estate necessary for building dams, and that a description of the property taken should be filed in the office of the register of deeds: *held* that, where land was taken into which no stream flowed, and the description filed stated it was taken to build reservoirs "to take and hold water," there was a taking of water that gathered from springs or by percolation.

Same—Same—What Amounts to a Taking—Temporary Diversion of Waters from Pond.

Under St. 1881, c. 167, § 3, authorizing a water company to take real estate for its purposes, and pointing out the method of appropriation, the actual appropriation and diversion of the water of a pond temporarily for less than a year, which use was then abandoned, was not a legal taking, as against one having rights in the water, and who has not elected to treat the company's acts as a taking.

Water Rights—Easement—Mill Privilege—When Not Lost by Nonuser.

An easement in a pond, consisting of a mill privilege, is not lost by nonuser, when it was created by grant.

Water Company—Powers—Extent.

A water company authorized to secure and sell water has, as an incident to such right, power to purchase and hold a mill privilege on a pond, so as to enable it to dam the pond, though the running of a mill is beyond its powers.

Grant of Mill Privilege by Town—Extent of Title Conveyed.

A grant by the town of Gloucester in 1682 to D. and others of a mill privilege on a pond passed a fee, though no words of inheritance were employed; strict construction not being applicable to such an early conveyance.

Water Company—Powers—Extent.

The purchase by a water company of a mill privilege, giving the right to dam a pond, did not authorize the company to draw all the water for its use.

Water Supply—Establishment by City—Purchase of Property of Water Company—Whether Mill Privilege Included.

St. 1895, c. 451, § 16, authorized a city to establish a water-supply system, but provided that, if a water company desired to sell its plant to the city at an appraised value, the city could purchase the company's property rights, etc.: *held*, that a mill privilege, consisting of a right to dam a pond, was property of the company, under the statute, for which it should be compensated, inasmuch as the city might acquire the fee to the pond, and so use the water with the aid of the mill privilege.

Same—Same—Same—Estimating Value of Property.

St. 1895, c. 451, § 16, authorized a city to supply itself with water, conditional on the city's purchasing the property of the water company if

it elected to sell; and it was provided that the city should pay the fair value of the plant, "which should be estimated without enhancement on account of future earning capacity or good will, or on account of the company's franchise": *held* that, as the franchise of the company at that time was practically an exclusive one, its earnings were not a criterion of the value of the property apart from such franchise, and hence, in determining the value of the property, evidence of past earnings was properly excluded.

Same—Same—Same—Same.

The statute did not forbid the allowance to the company of a sum in addition to the mere cost of reproduction of the property, less depreciation; the company being a growing concern, capable of continuing in business.

Same—Same—Same—Same.

It was proper to make the basis of valuation the value of the property at the date of the transfer to the city, with interest to the date of payment.

Same—Same—Same—Same—Fees Charged by Commissioners—Objections to.

Objection by the company to the reasonableness of the fees charged by the commissioners in assessing the value of the property can only be raised before a single justice of the court.

Same—Same—Same—Same.

It appearing from the report of the commissioners that the company had not been directly allowed anything for the right to certain additional sources of water supply in a certain ward, but which had not been taken, but that the commissioners had regarded such right as a refutation of any claim that the water supply might be shortly exhausted, and the right having been revoked by St. 1895, c. 451, § 16, which provided that the city might take any waters that the company had not taken, the company would be regarded as having secured all the advantages it was entitled to by such right.

Petition by the Gloucester Water-Supply Company for a determination as to the value of its property on a purchase thereof by the city of Gloucester under St. 1895, c. 451, §16.

Robt. M. Morse and Forest L. Evans, for petitioner.
A. E. Pillsbury and Chas. A. Russell, for respondent.

LORING, J. 1. The defendant's first contention is that, in estimating the value of the Dikes and Wallace reservoirs, the water company is not entitled to include the value of any water or water rights. These two reservoirs formed the water supply which was in use on September 25, 1895, when the petitioner's plant was transferred to the defendant city. The water which feeds these reservoirs was obtained by digging out two swamps and damming up their outlets. No brook flowed into either swamp in its natural state, but the water collected in the reservoirs gathers there, coming from the watersheds of the neighboring land. Both swamps were taken in 1884 by the water company, and written descriptions of their bounds were filed in the registry of deeds, under St. 1881, c. 167, § 3. In these descriptions it is stated, among other things, that "the above land or real estate has been taken * * * for forming and erecting dams, reservoirs, to take and hold water for the purposes above set forth, * * * and such other use and purpose as may be necessary

and may be authorized by said act." We are of opinion that this was a valid taking of the water which gathers in the reservoirs. Where land is taken for a reservoir "to take and hold water," all water which gathers in the reservoir from springs or by percolation, and none of which flows into the reservoir from a stream, is also impliedly taken. In such a case the requirements of an adverse taking of such water under the right of eminent domain are complied with. See Glover v. City of Boston, 14 Gray, 282, 288; Kenison v. Arlington, 144 Mass. 456, 11 N. E. 705; Hollingsworth & Vose Co. v. Foxboro Water-Supply Dist., 165 Mass. 186, 189, 42 N. E. 574; Lexington Print Works v. Inhabitants of Canton, 167 Mass. 341, 344, 45 N. E. 746. Where a reservoir is fed by the waters of a brook which has been taken, in terms, by the water company, and is also fed by water which gathers in the reservoir, as water gathers in a well, it would be impracticable to hold that the only water to which the company had a title was the water of the brook, and that it had no title to the water which gathered in the reservoir. Land cannot be used as a reservoir by a water company, without the water company having a right to the water which gathers in the bottom of it by percolation or from springs. We are therefore of opinion that in estimating the value of Dikes and Wallace reservoirs the water company is entitled to the value of the water which gathers there. The objection originally taken by the defendant to the water company's title to the land on which the pumping station stands was waived at the argument.

2. As to the waters of Lily Pond: We are of opinion, on the one hand, that the water company had no right to use these waters for domestic purposes, and therefore that $20,000 must be deducted from the amount of the award; but, on the other hand, we are of opinion that the water company did own the right to flow Lily Pond, and to use its waters for mill purposes, and therefore that the $4,650 allowed by the commissioners is not to be deducted from the amount of the award. The only ground on which the water company claims the right to use these waters for domestic purposes is that for part of the year 1885–86, while Dikes and Wallace reservoirs were being built, it used the waters of this pond in supplying the defendant city and its inhabitants with water. The water company contends that "the actual appropriation and diversion of the waters was sufficient to constitute a legal taking," and relies upon Moore v. City of Boston, 8 Cush. 274; Bailey v. Inhabitants of Woburn, 126 Mass. 416; Cowdrey v. Inhabitants of Woburn, 136 Mass. 409; and Inhabitants of Northboro v. County Com'rs, 138 Mass. 263. In addition to these cases cited by the water company is the case of Brickett v. Aqueduct Co., 142 Mass. 394, 8 N. E. 119. The defendant relies principally upon the decision in the case of Warren v. Water

Co., 143 Mass. 9, 8 N. E. 606, and upon the case of Hamor v. Water Co., 78 Me. 127, 3 Atl. 40.

Whether the actual diversion of water is a legal taking of it is a question on which the cases in this commonwealth are not in entire harmony. It seems to have been held in Brickett v. Aqueduct Co., 142 Mass. 394, 8 N. E. 119, that the actual diversion of water was in that case a legal taking of it. It appears from the original papers in that case that a permanent dam had been built across the outlet of the pond whose waters were claimed by the plaintiff to have been tortiously used to his (the plaintiff's) detriment, and a pumping station had been built in connection with it; and it was stated in the bill of exceptions "that the operations of the company as aforesaid were under the assumed authority of said chapter [St. 1867, c. 73], and were necessary for the purpose of said act." In that case there was no pretense that the defendant had passed any vote stating that the waters of the pond in question, or any part of them, had been taken. The act in question (St. 1867, c. 73) gave the defendant aqueduct company authority to take the waters of the pond, and to enter upon and dig up any land through which it might decide to lay its pipes; but it did not require any description either of the land or of the water rights taken by it to be filed in the registry of deeds or elsewhere. It appears from the brief of the defendant in that case that there are many acts in this commonwealth drawn like the act there in question. St. 1839, c. 114; St. 1845, c. 90; St. 1850, c. 192; St. 1850, c. 198; St. 1850, c. 273; St. 1852, c. 210; St. 1856, c. 241; St. 1857, c. 135,—are all acts which, like St. 1867, c. 73, authorize the taking of water and land, without stating in what the taking shall consist, or requiring a description either of the land or of the water taken to be filed in the registry of deeds or elsewhere. On the other hand, Warren v. Water Co., 143 Mass. 9, 9 N. E. 606, seems to be a decision the other way. The statute there in question (St. 1882, c. 119) authorized the water company to take the waters of any brook, and to take any real estate necessary for its use, and provided that the company "should cause to be recorded in the registry of deeds for the county of Worcester a description of any land so taken," but made no provision as to requiring, there or elsewhere, a description of the waters taken by the water company. The declaration in Warren v. Water Co. contained two counts,—one for entering upon the plaintiff's land and laying pipes therein, and the second for deflecting the waters of a brook which had formerly flowed through her (the plaintiff's) pasture. The presiding judge ruled, with respect to the second count, that "the turning of the water of Shaw Pond by the defendant's servants into its pipes, in the absence of any other act or proceeding of the corporation in relation thereto, was not such a taking of the water or of water rights, under the statute, as would preclude the plaintiff from maintaining an

action of tort for the diversion of the waters from the brook running through her pasture"; and an exception to that ruling was overruled, although the question was not discussed in the opinion delivered by this court. And it is of some importance that there are many statutes like the statute in question in Warren v. Water Co., which provide that the water company may take land and water, and then provide that if land is taken a description of it shall be filed in the registry of deeds, making no provision as to what must be done with respect to the taking of water taken by the water company under the act. Among such statutes are St. 1865, c. 132; St. 1866, c. 175; St. 1867, c. 84; St. 1867, c. 272; St. 1868, c. 182; St. 1871, c. 218; St. 1872, c. 345; St. 1873, c. 242; St. 1874, c. 191; St. 1876, c. 42; St. 1880, c. 127; St. 1880, c. 179; St. 1880, c. 203; and St. 1882, cc. 119, 142. And finally in Moore v. City of Boston there is a statement that the legal taking is the actual use of the property taken, as is shown by the fact that it is a description of a previous taking that is to be filed in the registry of deeds. The act in question in Moore v. City of Boston was not drawn like either of the two classes of acts already spoken of. That act (St. 1846, c. 167) authorized the defendant city to take water and land in order to supply its inhabitants with water, and provided, "The city of Boston shall, within sixty days from the time they shall take any lands, or ponds, or streams of water, for the purposes of this act, file, in the office of the registry of deeds, for the county where they are situate, a description of the lands, ponds, or streams of water so taken." A parcel of land belonging to the plaintiff's estate was actually used by the defendant city for the purpose of building an aqueduct passing through it, during her lifetime, and a description of the land so taken was filed in the registry of deeds after her death. It was held that the petition for compensation was properly brought by the administrator, and on the ground that the exercise of the physical dominion over the property which it was claimed had been taken was the legal taking of that property. There is a similar statement in Inhabitants of Northboro v. County Com'rs, 138 Mass. 263, in which it was held that a petition for damages must be brought within one year after water has been actually diverted, under a statute which provides that the petition shall be brought "within one year after the taking of such land, water source, or water right, or other injury done as aforesaid, and not thereafter. No assessment for damage shall be made for the taking of any water right or any injury thereto until the water is actually withdrawn or diverted." The conclusion reached in that case puts the statute there in question on the same footing as the act in the case at bar (St. 1881, c. 167, § 3), which is a common, if not a usual, form of limitation of such petitions. In the act in the case at bar it is provided that the petition shall be brought "within three years from the time the water is actually withdrawn or diverted,

and not thereafter." Bailey v. Inhabitants of Woburn, 126 Mass. 416, and Cowdrey v. Inhabitants of Woburn, 136 Mass. 409, are cases where the owner of the land did not undertake to assert that his land had not been taken, but where he was seeking to obtain damages on the footing that it had been taken, and may well rest upon the ground that in such a case the water company or the defendant city is estopped to deny that there is no legal taking, even if there has been no legal taking. Spaulding v. Inhabitants of Arlington, 126 Mass. 492, 494; Lewis v. City of Boston, 130 Mass. 339. And Moore v. City of Boston, 8 Cush. 274, and Inhabitants of Northboro v. County Com'rs, 138 Mass. 263, 266, are also cases where the owner of the land was seeking to obtain compensation on the footing that his property had been taken, and are not cases where he was asserting his right to his property as still his own, in spite of what had been done by the defendant city or company, and therefore are not cases which are decisive of the question whether a man can be deprived of his property by an act in pais, unaccompanied by a writing or other declaration defining the measure of interference with his ownership of the property which it is claimed has been taken under the exercise of the right of eminent domain. See Glover v. City of Boston, 14 Gray, 282, 288; Kenison v. Arlington, 144 Mass. 456, 11 N. E. 705; Hollingsworth & Vose Co. v. Foxboro, 165 Mass. 186, 189, 42 N. E. 574; and Lexington Print Works v. Inhabitants of Canton, 167 Mass. 341, 344, 45 N. E. 746. In connection with Moore v. City of Boston and Inhabitants of Northboro v. County Com'rs, which was decided on the authority of Moore v. City of Boston, it is important to note that the case of Davidson v. Railroad, 3 Cush. 91, on which the decision in Moore v. City of Boston was largely based, is a case which was subsequently explained to be a case resting on the doctrine of estoppel; that is to say, a case in which the defendant railroad company, having used the plaintiff's land, was estopped to say that it had not taken his land, when the use it had made of it could only be justified by it if it had in fact taken his land. To that effect, see Shaw, C. J., in Boston & P. R. Corp. v. Midland R. Co., 1 Gray, 340, 361. See, also, Drury v. Railroad Co., 127 Mass. 571, 580. Moreover, it is well settled, in case a railroad constructs its roadbed on the land of the plaintiff, that the plaintiff may, at his election, assert his title to his land and to the rails affixed to it by the railroad (Meriam v. Brown, 128 Mass. 391); or he may, at his election, bring a petition for compensation on the ground that the defendant is estopped to say that the land has not been taken (Boston & P. R. Corp. v. Midland R. Co., 1 Gray, 340, 361; Drury v. Railroad Co., 127 Mass. 571, 580). In the case of a railroad, the filing of the location is the act of taking. Charlestown Branch R. Co. v. Middlesex County Com'rs, 7 Metc. (Mass.) 78; Hazen v. Boston & M. R. R., 2 Gray, 574, 580; Chandler v. Aqueduct Corp., 114 Mass. 575,

577. Finally, in Saunders v. City of Lowell, 131 Mass. 387, 388, Moore v. City of Boston is treated as a case resting on this doctrine of estoppel.

It is not necessary in this case to decide the abstract question which we have been discussing. However that question may be decided, we were of opinion that such an equivocal act as the temporary use of water for less than a year, which use is then abandoned, and has never since then been resumed, is not a legal taking of that water, under St. 1881, c. 167, § 2, as against a person who has rights in the water in question, and who had not elected to treat it as a taking of it. The defendant city, in objecting to the title of the water company to the waters of Lily Pond, has a right to test its title by the question whether the rights of such a person have been extinguished. For these reasons, we are of opinion that the $20,000 allowed as the value of the waters of Lily Pond for domestic purposes must be deducted from the amount of the award. But we are of opinion that the $4,650 allowed for the value of the right to use the waters of Lily Pond for a mill privilege must stand. The defendant city contends that the mill privilege which was conveyed to the water company by the Webster Company deed had been previously extinguished by abandonment. It bases this claim on the fact that in 1873 a fire destroyed the sawmill and the net and twine mill then built at the mill pond, and that no use was made of the waters of Lily Pond after that until they were temporarily used by the water company in supplying the defendant city and its inhabitants with water during a part of the year 1885 to 1886, while Dikes and Wallace reservoirs were being constructed. The defendant also contends that under its charter the water company could not acquire title to any land or water rights by purchase, and could not acquire a mill privilege at all; and, finally, that under the terms of the original grant in 1682 a fee did not pass in the easement thereby created, but only a life estate. But we are of opinion that the mill privilege has not been extinguished by abandonment. The easement was created by grant, and in such a case it is not lost by nonuser. Butterfield v. Reid, 160 Mass. 361, 369, 35 N. E. 1128. The cases of French v. Manufacturing Co., 23 Pick. 216, Fitch v. Stevens, 4 Metc. (Mass.) 426, and Hodges v. Hodges, 5 Metc. (Mass.) 205, were cases involving a right to maintain a dam under the mill acts, and rest on other principles. The right of the water company to acquire land or water rights by purchase is plain. It is recognized in the third section of its charter. And we are of opinion that, as an incident to its business of securing and selling water, it could purchase and hold this privilege of damming the waters and flooding the Lily Pond meadow, although the running of a mill was beyond its charter powers (Brown v. Winnisimmet Co., 11 Allen, 326), and, further, that although no words of inheritance were used in the original grant by the town of Gloucester "to Jacob

Davis & others joyninge with him," made in 1682, a fee in the easement passed to the grantees. It is well settled that the rigid rules of construction which are applicable to modern conveyances are not to be applied to transactions of the kind in question, which took place early after the settlement of the country, when conveyancing was little understood. Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Inhabitants of Town of Stoughton v. Baker, 4 Mass. 521, 3 Am. Dec. 236; Feofees of Grammar School v. Andrews, 3 Metc. (Mass.) 584, 592; Green v. Putnam, 8 Cush. 21, 25. For the same reason, the easement granted was not limited to damming the waters of the stream for the purpose of running a sawmill. Adams v. Frothingham, supra. But the ownership of the mill privilege did not give the water company the right to withdraw all the water that collects in Lily Pond and sell it to the defendant city and its inhabitants, and for that reason the $20,000 allowed by the commissioners must be deducted, as we have already stated.

The defendant further contends that the $4,650 allowed by the commissioners must be deducted from the award, because the waters of Lily Pond were not in actual use when the property of the water company was transferred to the city; because the title to use the waters of Lily Pond, as a part of the mill privilege in the waters of Little river, does not confer a perfect title to the waters of Lily Pond upon the city; and, finally, because the waters of that pond cannot be made fit for the purposes of a domestic water supply without acquiring the fee in the bottom of the pond. But it is plain that the city has the power to acquire the fee in the bottom of the pond, and it is also plain that the waters of Lily Pond had been used in furnishing the defendant city and its inhabitants with water in 1885 and 1886, and that without the ownership of the mill privilege in Little river these waters could not have been so used. The mill privilege is of value as a step towards the ownership of the waters of Lily Pond as an auxiliary supply, and, those waters having once been used by the water company in supplying the defendant city and its inhabitants with water, the mill privilege is the property of the water company, owned and used within St. 1895, c. 451, § 16.

3. It will be convenient to consider the defendant's contention that the commissioners had no right to award the $75,000 allowed by them in addition to the cost of reproduction of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence. The act under which the award was made (St. 1895, c. 451) is an act enabling the city of Gloucester to "supply itself and its inhabitants with water." By section 16 of that act that right is made conditional on its (the city's) purchasing the property of the water company in case the

water company elects to sell its property to the city. In case the city agrees to buy the water company's property under an offer from the water company made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof"; "such value shall be estimated without enhancement on account of future earning capacity or future good will or on account of the franchise of said company." In determining the true construction of these provisions of section 16, it is important to bear in mind the purpose which the legislature had in asking the right of the city to supply itself with water, conditional on its buying the company's property in case the company elected to sell it to the city, and in providing that, in ascertaining the "fair value" of that property, it should not be enhanced "on account of either future earning capacity or future good will, or on account of the franchise of said company." On the one hand, it is plain that a private water company, organized for net profits, cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that, if the legislature had not required the city to buy the water company's property, the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in section 16 providing that the value shall not be enhanced "on account of the franchise of said company." The franchise of the Gloucester Water-Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water-Supply Company. And, finally, the sale to the city was not obligatory on the water company. The company was given the option of selling its property to the city, or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property which the city is compelled to buy ought not to be enhanced "on account of the franchise of said company." It is also plain, so long as a water company has no competitor in supplying a town or city with water, that it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the earnings of this company were not evidence of the "fair value" of this property. The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a fair criterion of the "fair value" of the property, apart from an exclusive franchise. For that reason, we are of the opinion that the evidence of past earnings offered by the water company was properly excluded. Newburyport Water Co. v. City of Newburyport, 168 Mass. 541, 47 N. E. 533. It is argued by the petitioner that the admissibility of such evi-

dence derives support from St. 1891, c. 370, § 12, which provides that, in determining the "fair market value" of a gas or electric plant under similar circumstances, "the earning capacity of such plant, based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant," is to be included "as an element of value"; but this clause as to the earning capacity being considered as an element of value was omitted from the act in question. The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant, is whether the principles on which the commissioners proceeded were sufficiently favorable to the water company. It is plain that the real commercial market value of the property of the water company is, or may be, in fact, greater than "the cost of reproduction, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant. Suppose one manufacturing plant has been established for some 10 years, and is doing a good business, and is sold as a going concern. It will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. National Waterworks of New York v. Kansas City, 10 C. C. A. 653, 62 Fed. 853, 27 U. S. App. 165. We think it is plain that there is nothing in the provisions of section 10 of the act in question (St. 1895, c. 451) forbidding the commissioners considering this element of value, which, as we have seen, in fact exists. The provisions of the act are that the "fair value" "shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good will, apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute. It is also plain that the commissioners, in allowing the $75,000 allowed by them in addition to the cost of reproduction, less depreciation, of the plant in its physical features, did not go beyond this. They state that, in their opinion, "the cost of duplication, less depreciation, of the different features of the physical plant, * * * does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city, in purchasing it, without considering its income or right to do business, but having the power

to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a valuation that we have found to be seventy-five thousand dollars ($75,000), that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it."

4. We are of opinion that the commissioners could properly adopt, as a basis of their valuation, the value of the property at the date of its transfer to the city, adding interest to the date of payment.

5. The objection made by the defendant to the reasonableness of the fees charged by the commissioners must be raised before a single justice of this court.

6. The right to have the report recommitted because the company had a right to take additional sources of water supply in Ward 8, to lay and maintain pipes in the streets, and to charge water rates, was not raised in the commissioners' report, nor is it mentioned in the motion to recommit that report, and therefore it is not open, under the terms of the report reserving the case for this court; but we think that the water company got all the advantage to which it was entitled by its authority to take additional sources of water supply. The commissioners found that: "The failure to take and create property by the exercise of its franchise rights gives nothing that we can appraise under the statute. We, however, permitted the petitioner's experts to take into consideration the effect upon the value, if any, of the water rights owned by the company by the presence of these additional supplies. We did not, after considering the amount of the available water supply of the company in 1895, enhance the value of its supply on account of the presence of the supplementary sources, but the fact that they could be so employed prevented any impairment under any claim that the company's sources would be shortly exhausted, and therefore likely to be abandoned." Apart from these considerations, we think the commissioners were correct in not considering these rights of the water company. These rights could be revoked, and were revoked by St. 1895, c. 451.

It follows that the following sums are to be deducted from the total award made by the commissioners: (1) $20,000 for water rights in Lily Pond; (2) $3,955.40, an amount agreed upon between the parties. The report of the commissioners should be affirmed as a report for $576,544.60, with interest from September 24, 1895; but the case is to stand for hearing on the amount to which the petitioner is entitled by its payment of the costs charged by the commissioners. So ordered.

TOWN OF BRISTOL *v.* BRISTOL & W. WATERWORKS.

(Supreme Court of Rhode Island, July 27, 1901.)

[49 Atl. Rep. 974.]

Municipal Purchase of Waterworks—Completeness of System.

The fact that a waterworks system supplying the complainant town gets its water from a reservoir, which also supplies another town, does not render the system incomplete, so as to preclude a purchase by the town of the plant, the supply being ample for both towns.

Same—Franchise as an Element of Value.

Complainant town granted to the defendant's assignor the exclusive right to use the public streets for the laying of water pipes for 50 years, and the use of all water pipes owned by the town for 50 years, or until the town should avail itself of the privilege reserved to buy the waterworks, pipes, reservoir, and appurtenaces for a fair and reasonable price: *held* that, in estimating the value of the plant, on the exercise of the option by the town, the franchise for the unexpired term should be considered.

Suit by the town of Bristol against the Bristol & Warren Waterworks to enforce an option given complainant to purchase defendant's waterworks plant. The master's report as to the value of the plant and the part subject to purchase by the complainant was filed, and both parties filed exceptions. Cause referred again to a master, with instructions.

Comstock & Gardner, for complainant.
Arnold Green, for respondent.

PER CURIAM. The town of Bristol, between which and George H. Norman a contract was made January 30, 1882, for the building of waterworks for the supply of water to said town and its inhabitants, which contract was afterwards assigned to the Bristol & Warren Waterworks, brings this bill against the said corporation for the enforcement of an option given to said town by said contract to purchase and acquire the waterworks constructed under said contract, with the rights and appurtenances belonging to the same. Upon a hearing of the case upon demurrer, Norman, who had originally been made a party defendant, was dismissed, and certain objections raised by the present defendant were overruled, and it was decided that the town has the right to exercise the option in question, and has sufficiently claimed its privilege to purchase, and that this court has jurisdiction in the premises to fix the value of the property and to order the conveyance therefor. 19 R. I. 413, 34 Atl. 359. It is alleged in the bills that Norman agreed to construct a complete system of waterworks for the supply of water to the town of Bristol, and that neither he nor his successor had fulfilled this agreement; but it is admitted that the defendants did construct, and the defendant corporation has in operation, a system of waterworks from which the town of Bristol, and also the town of Warren, are furnished with water. It also alleges that the water supplied by the defendant is of inferior quality, and insufficient in amount and in pressure. Both these allegations of default are denied in the defendant's answer. On this point, we think,

the master's finding that the water furnished is of reasonably good quality, and ample in quantity, is sustained by the evidence. The bill, however, does not insist upon such alleged failures of performance as grounds of cancellation of the contract and of forfeiture of the privileges granted by it, but prays that it may be ascertained what part of its system of waterworks for the supply of the town of Bristol the defendant has power and right to convey, and ought to convey, under said contract, and that the defendant may be compelled to convey the same to the town; and offers to pay a fair and reasonable price therefor. The issues raised by the bill and answer as to the full performance of the contract were thus waived by the complainant, and it only remained to determine whether the whole, or what part, of the defendant's system could be conveyed to the town as reasonably necessary and useful for supplying water to the town and its inhabitants, and what would be a fair and reasonable price for the same. These questions were referred to a master by decrees entered by consent of the parties April 27, 1896, and May 23, 1896, and he filed his report April 7, 1900, to which both parties filed exceptions. After the hearing a supplemental report was filed by direction of the court June 29, 1901, dividing into several items the gross sum which the master had reported. The questions raised by the exceptions are whether the master has correctly enumerated the property and rights which ought to pass by this purchase and sale, and whether his estimation of values is correct. His estimation is as follows:

Lot of land on which is located the standpipe of the respondent, the wrought-iron standpipe thereon, together with foundations, by-pass, gates, connections, appurtenances, and appliances used or connected therewith..	$ 4,819 00
Wrought-iron, cement-lined pipe laid between the standpipe and the town line of Bristol and in the streets of the town, varying in diameter from one inch to thirteen inches.....	46,761 56
Cast-iron pipe laid in streets of Bristol.....	491 00
Three fountains.....	375 00
Ninety-five hydrants.....	3,800 00
Service pipes, stopcocks, gates, service boxes, connections, fixtures, appurtenances, or appliances used or connected with the aforementioned property.....	11,600 00
All the above are situated in the town of Bristol or between the standpipe and the town line.	
Franchise for unexpired term of 37 years.....	151,804 44
Good will of plant.....	50,000 00
Enhanced value due to the fact that the plant is a running plant.....	25,000 00
Making a total of.....	$294,651 00
Taking from this $75,000.00 for damages on account of the failure of Norman and his successor, Bristol and Warren Waterworks, to carry out the contract with the town of Bristol, there is a balance of.....	$219,651 00

—Which I find is a fair and reasonable price to be paid by the complainant for that part of the waterworks that it is incumbent upon it to purchase in accordance with the terms of the contract with Norman.

The master's method of arriving at the values he has assigned for this property was ingenious. He first decides that only a part of the works ought to pass. Then he estimates the value of that part, taking the cost of reproduction, less depreciation of the physical plant, adding arbitrary sums for adaptation and good will, and estimating the value of the franchise as if the elements considered constituted a complete plant, and then deducting an arbitrary sum as damages, because the plant, as he constitutes it, is not complete. In considering his report it must first be observed that the items of $50,000 and $25,000 credited and $75,000 charged should be eliminated. The subject of this sale consists of—First, certain material things, the value of which is to be determined by the cost of reproduction, less depreciation; and, second, the right to use them in a certain business, without competition, for a certain time, the value of which right is to be determined by the probable profit of such use. The fact that the plant is a running plant, and the probable retention of customers, which is what is meant by "good will," are elements which are included in the valuation of the franchise. A monopoly has no good will, for its customers are retained by compulsion, not by their voluntary choice. The laying of the pipes in their actual position, adapted to the use to be made of them, is the result of skilled labor, and the skill of arrangement, as well as the labor of laying and material, are all comprehended in the actual cost. So the assessment of damages for nonfulfillment of the defendant's contract is a matter entirely outside the scope of the master's duty, or the province of the court in this case. To recover such a claim would require a different proceeding from the present suit. As the elimination of these sums equal on both sides of the estimate does not change the result, we need only mention them, and pass on to the radical issues in the case.

Has the master included in his estimate all the property and rights which should be included in the sale and purchase? He has reported two bills; one of property and rights which he says the defendant can sell; and another of certain items which he says it is incumbent upon the complainant to buy. We think he was led into error in this regard by the uncertain frame of the bill and the language of the decree. The bill asserts again and again that the defendant has not constructed a complete system of waterworks for the supply of the town of Bristol, and offers to buy of the defendant a complete system, or such part of the system as can be made useful by the town of Bristol for its water supply. Now, under the subsisting contract and the vote of the town, the town of Bristol is not obliged to buy anything less than a complete system. It is only by virtue of its offer contained in the bill accepted by the defendant's answer that it is obliged now to purchase anything less. If the defendant can sell the town a complete system, the town, having claimed the option in the contract, is bound

to buy that. If the defendant cannot sell a complete system, but has portions of a system available to the town, which it can sell, then, by the offer of the bill and the acceptance of the answer, not by the contract, the town is bound to take and pay a fair price for that. And here again it may be observed that, if the master takes the later view of the facts, —as he has done,—there is no place for damages for nonperformance of the contract. A consent to buy part is a waiver of damages for not getting the whole. In either case what the defendant can sell and what the complainant should buy are identical.

The idea is strenuously urged by the counsel for the town that the system of waterworks now operated by the defendant for the supply of the town of Bristol is not complete, because its reservoirs are used as a source of supply by the works which supply the town of Warren also, and because the town of Warren might resume certain rights appertaining to a portion of the land inclosed in the Kikemuit reservoir, and the master adopts these views. We think this finding is erroneous. It is true that the defendant has included in the Kikemuit reservoir what was originally one-half acre of tide-flowed marsh at the outlet of the stream, and that certain rights in this marsh were claimed by the town of Warren, and the right to overflow the marsh, and thus extinguish the use of these rights, was made a consideration for certain obligations assumed by the defendant to the town of Warren; but we do not consider this half acre an essential part of the defendant's plant. It is in evidence that it may be excluded from the reservoir at an expense of $4,000. If this were done, the town of Warren would have all the rights in the marsh which it had before. As the land is all below high-water mark, the fee is in the state, and the only private rights the town can have are such as may have been derived from the owner of the adjacent upland, and may now be appurtenant to some other upland estate owned by the town. The town has no rights or riparian ownership on the river itself. The master is mistaken in holding that riparian rights and littoral rights are the same. Among the former, but not among the latter, is the right to have the stream flow its natural volume, and of its natural quality. Such an impediment cannot be insuperable if the parties desire to sell and purchase the property. It appears, however, that, while the works must be considered complete as a plant, taking the water from its reservoirs, and distributing it throughout the town, the reservoirs themselves furnish water also for the town of Warren, and hence cannot be said in their entirety to be included in the "waterworks for the supply of Bristol with water," which Norman was to construct, and which the town of Bristol was to have the option of purchasing. The proviso contained in the agreement between Norman and the town of Warren that, in case that town should purchase, he would provide it with a

complete waterworks, "independent of any other waterworks or conflicting rights," is not contained in the agreement with the town of Bristol. As the watershed drained by the Kikemuit river seems be the natural and most available source of supply for both towns, and is ample for the requirements of both, it was wise and proper to use it for their common benefit so long as the company should serve both towns; but we cannot consider it incumbent upon the complainant, either under the contract or under the offer in the bill of complaint, to purchase this whole water supply, which is so much beyond its need, and which was constructed and is used in a large measure for another town's consumption. It seems to us that the ownership of one of these reservoirs, with the right to detain the water so far as may be needed, or the right to take from one of the reservoirs either a certain quantity of water or a certain fractional part of the natural supply without the acquisition of ownership of the reservoir itself or some divided part either in ownership or use of the reservoir, might be set out as part of the property to be acquired by the town, and the defendant be left with ample facilities to carry out its contract with the town of Warren. The case must, therefore, go back to a master to appertain the reservoirs or water rights, and to estimate the value of the whole plant, including these items, and the pipes, engines, and appurtenances between the reservoirs and the standpipe.

Another important question raised by the exceptions to the master's report is whether or not, in estimating the price to be paid by the town for the property to be conveyed, the exclusive right to maintain water pipes in the streets and highways for the remainder of the term of 50 years ought to be included. There is no question of the right of the town to grant such a franchise conditionally or unconditionally. Pub. Laws, c. 566, in force at the time the contract was made, gave such a power to any town. Neither is there any question that the waterworks have the power to sell and convey this franchise if it was given, for, when granted, it was given to George H. Norman, his heirs and assigns. The question is, was it given absolutely for 50 years, or absolutely for 10 years, and so much longer as the contract to furnish water should continue? The answer to this question is to be found in the words of the contract which the parties made. The terms of the contract are contained in the proposal of Norman and the vote of the town. Norman offers to do certain things provided the town will grant him the exclusive right, and also the use of the water pipes belonging to the town, both for 50 years, for the purpose of selling water therefrom. The town council voted as follows: "Voted and resolved, that said proposition be and hereby is accepted, and the exclusive right to use the public streets, lanes, and squares of the town for the purpose of laying water pipes, and continuing the same therein, and

of using said streets, lanes, and squares for the purpose of making the necessary alterations and repair in said pipes for the period of fifty years, is hereby granted to said Norman for the purpose of selling water therefrom, and the use of all water pipes now owned by the town is hereby granted to said Norman for said term of fifty years, or until the town shall avail itself of the privilege reserved herein to buy said waterworks." Thereupon Norman, in consideration of the above agreements, etc., covenanted and agreed for himself and his assigns on his part to execute faithfully all the terms and conditions contained in his proposition to the town council, "as qualified and added to by the acceptance of said town as contained in the foregoing vote of the said council thereof." The grant which was made by the town and accepted by Norman was not the grant which he asked for, but that grant as modified by the town itself. The alteration of this language by the town is very significant. He asked for an exclusive right and privilege, and the use of the existing pipes for a term of 50 years. They gave him, in separate sentences, the exclusive right to lay pipes for the term of 50 years, and the use of the existing pipes for said term of 50 years, or until the town should buy the waterworks. Language could hardly be plainer than this to annex a new limitation of time to the grant of the use of the pipes, and to exclude the application of the limitation to the grant of the exclusive right to use the streets. The exclusive right is given for 50 years, the right to use the pipes is for 50 years or until the town shall elect to purchase. The condition reserving a right to purchase does not in any manner qualify or limit the terms of the grant any more than the condition of a mortgage affects the description of the land described. The whole concession was made subject to an option in the town to purchase, but it is by virtue of the description in the grant that the right to use the pipes terminates when that option is exercised, not by any other clause in the agreement. To this grant were annexed two conditions affecting the duration of the exclusive right. One was a provision for a forfeiture,—"that said grant of the right to use the streets and public places for laying, continuing, repairing, and altering pipes shall cease to be exclusive whenever said grantee shall cease, neglect, or fail to supply water in reasonably sufficient quantity through all the pipes connected with said waterworks, or with water not suitable for the purposes aforesaid." If the town had proceeded under this clause to enforce its provisions, and had established the default of the grantee, it would have taken from him without compensation his exclusive rights in the streets and the use of the pipes owned by the town, and left him a right to use his own pipes as before to the end of the term of 50 years, and would have resumed the right, either by itself or any other person or corporation whom it chose, to carry on the business

of supplying the inhabitants of the town with water in competition with the grantee or his assigns. The other was a provision reserving to the town an option to purchase in the following words: "And that the town may, at its option, purchase the said waterworks, and all the pipes, reservoirs, and appurtenances connected, used, or belonging therewith, at any time after ten years, and within fifteen years herefrom for a fair and reasonable price." The res to be bought by the town under this option is exactly what would be the subject of purchase by a third party who should offer to buy of the defendant the Bristol Waterworks. It comprises the material plant and the rights possessed by the defendant and exercised in the use of the material plant. If the sale were to be made to some third party, could it be doubted that it would include the franchise derived from the town as well as the engines, pipes, and other property purchased elsewhere? The town has the option to buy, not to extinguish, the rights they have given, which, together with other property and rights, make up what the defendant owns. Everything which the defendant can sell to another he can sell to the town. A fair and reasonable price to the town is what would be a fair and reasonable price to any one else. The franchise, therefore, which would have been reduced in case of forfeiture from an exclusive one to a mere privilege which the town might make common to others, is left, in case of purchase, as a part of the property, and must be considered in estimating its value.

From what has been said it follows that the exceptions taken to the master's report shall be disposed of as follows: The complainant's first, second, sixth, seventh, eighth, ninth, twelfth, thirteenth, fourteenth, fifteenth, and eighteenth exceptions are overruled. The complainant's third, fourth, and fifth exceptions are immaterial to the true issues in the case, and are hence overruled. The complainant's tenth and eleventh exceptions are sustained. The questions involved in the sixteenth and seventeenth exceptions will be reserved until further report from the master, when they can be finally considered. The respondent's first, second, third, fourth, and fifth exceptions are sustained. The sixth is overruled in so far as it holds that it is incumbent on the complainant to purchase the whole of both reservoirs, and sustained in so far as it holds that the obligation to purchase is not confined to items 1 to 9 in the inventory. The question raised by the defendant's seventh exception is the same as that raised by the complainant's seventeenth, and is reserved until the case comes again before the court. The case will be referred again to a master, under instructions in accordance with this opinion.

TY OF CHARLESTON *et al.*

PEIPER *v.* SAME.

(*Supreme Court of South Carolina, June 20, 1901.*)

[39 S. E. Rep. 265.]

Light and Water—Contract Creating Indebtedness in Excess of Constitutional Limit.

Const. art. 8, § 7, forbids any town to incur any bonded indebtedness exceeding 8 per cent. of the value of the taxable property therein, and provides that no such debt shall be created without submission to the voters. Article 10, § 5, forbids the increase of the bonded indebtedness of the city if at the time of such proposed increase the aggregate bonded debt amounts to 8 per cent. of the value of all taxable property therein. A city having a bonded indebtedness of more than 8 per cent. of its taxable property contracted under seal to pay a certain sum each year out of its current receipts for a number of years for the purpose of supplying the city with light and water: *held*, that such contract was void, as in violation of such constitutional provisions.

Same—Vote of Electors—Statute—Validity.

23 St. at Large, pp. 51, 52, authorizing cities to purchase or contract for waterworks, and to issue certificates of indebtedness, to be paid out of current taxes for future years, is unconstitutional, as violating Const. art. 8, § 7, prohibiting an increase of bonded indebtedness where the question of such indebtedness has not been submitted to the electors.

Contracts—Validity of Contract with Corporation in Which Councilmen Are Stockholders.

Where some of the members of a city council are stockholders of a corporation, the council cannot contract with such corporation for its benefit.

Suits by John Duncan and Catherine Mansfield and by John F. Peiper against the city council of Charleston and the Charleston Light & Water Company for an injunction. Decree granted.

A. M. Lee, for petitioners Duncan and Mansfield.

R. W. Shand and John P. Thomas, Jr., for petitioner Peiper.

Geo. S. Legare, for respondent city council of Charleston.

W. C. Miller, for respondent Charleston Light & Water Co.

POPE, J. These actions, in the original jurisdiction of this court, have for their common object the perpetual injunction by this court of the city council of Charleston from entering into the contract with the Charleston Light & Water Company in regard to the latter furnishing to the former a water supply from the stream known as "Goose Creek," at a distance of about 16 miles from the city of Charleston, and at a point situate in Berkeley county. By the order passed by this court on the 3d day of June, 1901, the two actions were blended and ordered to be heard together. The plaintiffs in each action are citizens and taxpayers of the city of Charleston, and have a status in this court, under the present constitution of the state and the laws passed by the general assembly of this state, to enforce such constitutional right, always provided they can show themselves entitled to the

extraordinary writ of a perpetual injunction to restrain the invasion of their rights by the defendants, respondents. The defendants are corporations under the laws of this state, and may sue and be sued in all of our courts under their respective corporate names.

It is alleged in the pleadings that the city council of Charleston is about to execute a contract under its corporate seal to and with the Charleston Light & Water Company, whereby it binds the city of Charleston for the period of 50 years to allow the said light and water company to lay its pipes and mains in and under its streets, alleys, and ways, so that it may furnish water for public and private use and purposes for the said period of 50 years next ensuing, upon the execution of said contract by the said two parties defendant, and that as a compensation therefor the city council of Charleston will pay to said Charleston Light & Water Company $42,000 for each and every year embraced in the said period of 50 years, and will further allow said Charleston Light & Water Company to collect from its citizens the sums of money laid down in a schedule of prices for the use of water by its citizens; and all these concessions are bottomed upon the expenditure by the said Charleston Light & Water Company of large sums of money from its own treasury, to wit, $100,000, and of about $1,500,000 to be realized from the sale of its coupon bonds, at 95 per cent. of the par value of said bonds; said bonds to mature in 50 years, to bear interest at 5 per cent. per annum, and to be secured in their payment by a mortgage of all the property, immediate or prospective, of said Charleston Light & Water Company. An option is provided in said contract for the purchase by the city of Charleston of all the property of said Charleston Light & Water Company, whenever said city shall be clothed by law with the power to make such purchase on terms which are embodied in said contract. It is alleged that for a favorable consideration the American Pipe Manufacturing Company has been induced to lend a helping hand to this enterprise, and carefully prepared specifications for the system of waterworks as contemplated in the contract by the Charleston Light & Water Company with the city of Charleston are attached to the said contract. It is also sought by the petitioners or plaintiffs to enjoin the issue of any bonds by the said Charleston Light & Water Company in furtherance of the alleged contract between it and the city council of Charleston. We need not pause to enlarge upon the right of these petitioners to invoke the aid of this court in its original jurisdiction to prevent the alleged invasion of their rights as taxpayers of the city of Charleston by the alleged contract between the respondents. To better understand this contention, we deem it proper to insert the alleged contract. It is as follows:

"This agreement, made and entered into this —— day of ——, A. D. 1901, by and between the Charleston Light and

Water Company, a corporation duly authorized by and under the laws of the state of South Carolina, party of the first part, and the city council of Charleston, of the said state, party of the second part, witnesseth:

"I. First. In consideration of the promises and covenants of the party of the second part, hereinafter set forth, the party of the first part hereby covenants and agrees: (1) That it will build and equip, or cause to be built and equipped, in a thorough and workmanlike manner, and in accordance with the plans and specifications prepared by the American Pipe Manufacturing Company of Philadelphia, Penn., and identified by the signature of the parties hereto, a copy of which specification is hereto annexed, a system of waterworks, complete, of the capacity hereinafter guarantied; the said system contemplating the purchase of the plant of the present waterworks company, and the use of the same so far as it may be available; the taking of water from a point on Goose creek, in the county of Berkeley, in the state aforesaid; the filtration of said water, and the conveyance to and the distribution throughout the city of Charleston, by means of suitable pipes and mains, of the said water when so filtered; it being understood and agreed, however, that the party of the first part shall have the right to substitute a 24-inch main for the 30-inch provided for in said specifications, and that, with the consent of the board of water commissioners hereinafter appointed, said plans and specifications may be otherwise modified or altered by the party of the first part: provided, the said modifications and alterations shall not be such as to impair the efficiency or capacity of the plant contemplated in said plans and specifications. (2) The work of constructing said plant shall begin within thirty days from the date of these presents, and said plant shall be fully and finally completed and ready for use and operation within twelve months of the date hereof: provided, however, that if the party of the first part shall be prevented from beginning or prosecuting and completing the said work within the time herein agreed upon by reason of the act of God, the public enemy, by strikes, by injunction, or other legal proceedings, by municipal, state, or national interference, or by failure of the party of the second part to comply with its part of the contract, the time during which the said party may be so delayed or prevented from beginning, prosecuting, or completing said work shall be added to the said period of thirty days or twelve months, as the case may be, hereinbefore fixed for the beginning and the completion of the said plant. (3) The said system of waterworks to be built as aforesaid in accordance with said plans and specifications, and of such detailed plans and specifications as shall from time to time be furnished by the party of the first part, shall be constructed, equipped, and completed according to the plans and specifications, and the board of water commissioners of the city of Charleston, hereinafter

appointed, shall at all times have the right of inspecting, for the purpose of determining whether said plant has been so constructed, and of ascertaining the progress of the said work, and the quantity and quality of the work completed, from time to time: provided, that the said board of water commissioners shall not in any way impede the construction of the aforesaid works; and it is agreed that, in case of any dispute arising relative to the said works, the same shall be settled by arbitration, the party of the first part appointing one arbitrator, the party of the second part one arbitrator, and the two arbitrators thus appointed appointing a third; the decision of the majority of said arbitrators to be final and binding. (4) In the construction of the said plant the party of the first part shall exercise the greatest care and diligence in the use of the streets, alleys, and public places of the city of Charleston, and shall cause no unnecessary stoppage or interruption of the public travel over or upon the same, nor any unnecessary injury to or interference with any pipes or sewers which may now be lawfully located beneath the surface thereof, and will promptly repair any injury which may be occasioned thereto. It will cause all excavations and obstructions to be properly lighted and guarded at night, and when necessary it shall station watchmen to guard the same; and after the completion of the work it shall restore all roads, highways, streets, alleys, and other public places, as nearly as practicable, to their former condition, without unnecessary delay. It shall further take every precaution to provide against danger to life and limb or property happening in the construction of the said plant. And the said party of the first part hereby agrees to hold the party of the second part harmless from any liability with may result to it by means of any violation of this section. (5) The party of the first part, for itself and its successors, covenants, promises, agrees, and guaranties to and with the party of the second part, its successors and assigns, that the supply of water at the point of intake on Goose creek shall not be less than a continuous available supply of 5,000,000 gallons of water per twenty-four hours at all seasons, and that if, at any time during the next two years after the completion of the works the said supply of water shall fall below the amount so guarantied, the party of the first part will establish such auxiliary system as shall bring the supply of water up to the said guaranty of a continuous available supply of 5,000,000 of gallons per twenty-four hours. And it further covenants, promises, and agrees and guaranties that the system of works to be constructed by the party of the first part shall be capable of delivering and shall deliver within the limits of the city of Charleston not less than 5,000,000 gallons of water per twenty-four hours, at all seasons, and that the water, after filtration, shall be, when delivered, good, potable water, and suitable for domestic, laundry, and manufacturing purposes. (6) Upon the completion of the said plant the party of the

first part shall notify the said board of water commissioners, and shall submit the said work for the inspection and approval of the said board, and, with a view of determining whether the said work has been completed in accordance with the provisions of this contract, the said work shall be submitted to the tests hereinbefore agreed upon; and it is covenanted and agreed between the parties that in case of any dispute with reference to the said work, or any part thereof, that such dispute shall be submitted to and decided by arbitration in the manner hereinbefore provided. It is agreed that the tests before mentioned shall be as follows, viz.: Each of the main pumping engines shall have a capacity of 5,000,000 gallons per twenty-four hours, under a test working pressure of 100 pounds per square inch. The duty of each pumping engine shall be not less than 75,000,000 foot pounds per 1,000 pounds of dry steam; the boiler pressure to be not less than 125 pounds per square inch while the said duty test is being made. The slip of the pumps is guarantied to be not greater than three per cent. For the purpose of duty test, the party of the first part shall have the right to waste the water near the pumping station, and the said duty test shall be made independently of said other tests. The pumps shall work smoothly, and be free from pound, undue noise, or heating of the bearings. The pumping main to the city shall be subjected to hydrostatic test of 100 pounds per square inch, and, should any defects develop, they shall be immediately repaired. To test the capacity of the works the party of the first part agrees to operate the same for two months, and furnish to the water distribution station 5,000,000 gallons per twenty-four hours, while the pressure at King and John streets, in said city, is maintained at sixty pounds per square inch. The party of the second part shall furnish means for disposing of said water, and the measurement of the quantity shall be made by the displacement of the pumps. If, however, the party of the second part wishes to measure the quantity of water at the city, it shall be empowered to use a meter, weir, or other accurate means of measuring said water: provided, any water delivered to consumers or industries, or for any other purpose, outside of the city limits, shall be added to the quantity measured within said city, to bring the total up to 5,000,000 gallons per twenty-four hours. If necessary, a test shall be made to determine the amount of leakage in the mains laid between the said pumping station and the city limits, and any leakage or defects found in said mains or any other pipes laid by the party of the first part, or any of the mains in the old system, shall be repaired by the party of the first part. The water, after filtration, shall show a removal of at least eighty-five per cent. of the matter held in suspension, eighty-five per cent. of the color by the platinum cobalt standard, and eighty-five per cent. of the albuminoid ammonia held in suspension. The number of bacteria per

cubic centimeter in the filtered water after forty-eight hours incubation shall not exceed 200. The hardness of the water by the soap test shall not be greater than forty parts per 1,000,000, and the filtered water shall be free from objectionable odor and taste. Chlorine not to exceed ten parts per 1,000,000.

"Second. The party of the first part further covenants and agrees: (1) That the party of the first part shall cause to be kept accurate accounts of all work done, machinery and material furnished, and labor employed, during each and every month in connection with the execution of this contract, which accounts shall at all times be subject to the examination of the party of the second part; and the party of the first part further agrees to submit monthly to the board of water commissioners aforesaid, on or before the tenth day of each month, an approximate estimate of the work done, machinery and materials furnished and delivered on the ground, and labor employed during the preceding calendar month; and the said board of water commissioners shall pass upon the said approximate estimates, and, when approved by them, they shall authorize the party of the first part to order the mortgage trustee, hereinafter nominated, to issue the bonds of the party of the first part in payment for said work. And, before the final payment for the said work is made, the party of the first part will submit to the said board of water commissioners accurate accounts of all work done, machinery and materials furnished, and labor employed upon the said work, and said final payment will be made after said board of water commissioners shall have had the opportunity of examining said accounts and approving the same: provided, that such examination shall be made within thirty days after said accounts shall have been submitted as aforesaid, and within thirty days after said plant shall have been completed and accepted. (2) That for the costs and expenses of constructing said works, including therein interest on money borrowed, and on bonds issued up to the final completion of said works, the cost of printing and engraving, of revenue stamps, trustee's fees, fees of engineers and inspectors, legal expenses, and all other costs, charges, and expenses which have been borne by the party of the first part of the date of this contract as preliminary to the execution thereof, and which may be hereafter borne by the party of the first part in performance of said contract, and in the construction and completion of the said works to be built thereunder, the said party of the first part shall employ its capital of $100,000, and shall issue bonds of the character hereinafter described: provided, however, that said bonds shall not be sold for less than ninety-five per cent. of their face value, and that the entire amount of the bonds issued shall not, at ninety-five per cent. of their face value, exceed the actual bona fide cost of the construction and expense as above defined, after the application to such construction of

the said capital of $100,000: and provided, further, that the entire issue of bonds at their face value shall not exceed the sum of $1,325,000 in the event of the use of a 30-inch main or $1,225,000 if a 24-inch main is substituted for the said 30-inch main, except as hereinafter provided. (3) That the bonds to be issued as aforesaid shall be first mortgage gold bonds, in the denomination of $1,000, payable fifty years after date, and bearing interest at the rate of five per cent. per annum, payable semiannually; and said bonds, both principal and interest, shall be payable at the office of the trustee, but the coupons may be payable at Charleston, S. C.: provided, however, that any or all of the said bonds may be retired at any time upon three months' notice to that effect, printed weekly in a daily paper published in each of the cities of Philadelphia and Charleston, upon the payment within three years from the date of said bonds of 102½ per cent. of the par value thereof, with accrued interest, and after the expiration of three years, and within five years from the date of said bonds, of 105½ per cent. of the par value thereof, with accrued interest, and after the expiration of five years, of 110 per cent. of the par value thereof, with accrued interest, or the deposit of the said amount with the mortgage trustee hereinafter nominated, or its successors; and upon such deposit the said bonds thus proposed to be purchased shall forthwith cease to bear interest, and each of the bonds issued as aforesaid shall bear the foregoing provision upon its face. Each and every bond so issued shall bear a certificate, signed by the board of water commissioners aforesaid, that said bond is one of the bonds herein provided for, and shall be issued only in payment of a portion of the cost of the said works, and the expense above defined, and said certificate shall also contain a summary of the provisions of this contract. The bonds so executed by the party of the first part, and so certified by the board of water commissioners, shall be placed in the hands of the mortgage trustee hereinafter provided for, and by said trustee shall be issued upon the order of the party of the first part, accompanied by the authorization of the said board of water commissioners to the party of the first part monthly as the work progresses: provided, however, that at no time shall said bonds, at ninety-five per cent. of their face value, be issued in excess of the cost of the work completed and the material and machinery furnished and property acquired at such times, less the sum of $100,000; and the monthly certificates of the said board of water commissioners shall be the evidence of such costs, and the authority to the trustee to make deliveries of such bonds to the party of the first part or its assigns. (4) That as security for the payment of said bonds issued by the party of the first part, and certified by the said board of water commissioners, as hereinbefore and hereinafter provided, and for no other bonds or obligations of any kind, the said party of the first part will execute to the Girard Trust Company of

Philadelphia, Penn., a mortgage deed covering all of its franchises and property, both present and to be acquired.

"Third. That for and in consideration of the rights, powers, and privileges hereinafter granted to the said party of the first part, its successors and assigns, by the party of the second part, the said party of the first part has given and granted, and by these presents does give and grant, unto the party of the second part and its successors, the right, power, and privilege of purchasing, all and singular, the plant and property of the party of the first part, including all real and personal property, choses in action, and all cash on hand, at any time before or after the completion of the said plant, and within the period of fifty years from the date hereof, for a sum equal to the proposed capital stock of the said Charleston Light and Water Company, viz. $100,000, and interest thereon from the dates when the capital stock shall be paid into the treasury of the said company, at the rate of ten per cent. per annum, less any dividends which may be paid by the said company to its stockholders prior to such purchase, and upon the payment of said sum to execute and deliver to the party of the second part such deed or deeds as shall be necessary to convey and vest in said party the absolute ownership of, all and singular, the said property, real and personal, choses in action, and all cash on hand, subject only to the lien of the mortgage to be executed by the party of the first part as herein provided: and provided, further, that if the party of the second part shall elect at any time to purchase the said plant, and shall submit the question of such purchase to the electors of the city of Charleston, then and in that case, there shall likewise be at the same time an election of three citizens, to be known as 'commissioners of public works,' who shall hold office under all the terms and provisions of an act entitled 'An act to authorize all cities and towns to build, equip and operate a system of waterworks and electric lights, and to issue bonds to meet the cost of same,' approved March, 1896, and all acts amendatory thereof; and, so soon as the board of public works shall be elected and organized, all the powers and duties herein and hereafter devolved upon the said board of water commissioners shall at once devolve upon the said board of public works, and said board of water commissioners shall cease to exist.

"Fourth. And the party of the first part, for itself, its successors and assigns, further covenants and agrees to and with the party of the second part and its successors, as follows: (1) That unless and until the party of the second part shall purchase the said property under the option hereinbefore given, and receive the said plant from the party of the first part, its successors or assigns, then and in that case the said party of the first part, its successors and assigns, will, for and during the full unexpired period of fifty years from the date of the completion and operation of said plant, maintain in good

order and repair, and conduct and operate the said works in such manner as to be able fully to keep and perform the covenants, agreements, and guaranties of the said party, and to fully and efficiently supply the quantities of water herein agreed to be furnished to the city of Charleston, and to the party of the second part, of the character herein guarantied. (2) That during the period aforesaid the party of the first part shall keep set and connected to the system of mains to be constructed as aforesaid not less than 550 fire hydrants, which shall be located as directed by the party of the second part, and shall keep the said hydrants fully supplied with water to the extent provided in the plans and specifications; and the party of the second part shall have the right to use the water from any or all of the said hydrants for building and repairing roadways, for the extinguishment of fires, and for the necessary fire practice, but for no other purpose; and in no case, except for the extinguishment of fires, shall a hydrant be opened without first notifying and obtaining the permission of the officers of the water company; nor shall more than two hydrants be opened at any one time, and longer than ten minutes in any one week, for the purpose of fire practice. In addition to the water supply through fire hydrants as aforesaid, the party of the first part will furnish to the party of the second part a maximum quantity of 300,000 gallons of water per day for sanitary and other purposes; the said water to be furnished not through fire hydrants, but through separate connections, with water meters attached thereto. (3) At no time before the expiration of the said period of fifty years from the date of the completion and operation of the said plant shall the party of the first part, its successors or assigns, charge consumers any rate or rates exceeding the following, which may be made payable quarterly in advance. But they may at any time insert a meter into the service pipe of any consumer and supply him at meter rates, provided the meter rates shall not exceed the rates fixed in the following schedule; and any consumer shall have the right to set in an accurate meter, and pay the rent indicated by such meter, provided the amount used by the meter shall exceed twelve dollars per annum. The maximum rates per annum above referred to shall be as follows. * * *

"Fifth. And it is understood and agreed between the parties hereto that the party of the first part will purchase the property of the present water company, if the same can be obtained at a cost not exceeding $350,000, and that such purchase is to be construed as a part of the cost of the plant to be constructed under this agreement.

"II. First. (1) And the party of the second part, for and in consideration of the promises, covenants, agreements, and guaranties of the party of the first part herein contained, hereby gives, grants, and ordains to the party of the first part, its successors and assigns, the right and privilege to

construct a system of waterworks within the limits of the city of Charleston, as they now exist or may be hereafter extended, and for a period commencing at the date of the completion and operation of the said work, and ending at the expiration of fifty years from the date of such completion and operation, the right and privilege to maintain and operate said works for the purpose of supplying said city and its inhabitants with water for private and public use for the purposes aforesaid; and during the period aforesaid, and for the consideration and upon the conditions above referred to, it hereby gives, grants, and ordains to the said party of the first part, its successors and assigns, the right to use the streets, alleys, sidewalks, and public grounds, and the rivers, streams, and bridges, within the present or future corporate limits, for placing, replacing, repairing, maintaining, and operating mains, pipes, hydrants, and all other structures and devices requisite for the service of water from time to time during the period aforesaid, and in the manner contemplated by this contract: provided, however, that upon the purchase by the party of the second part of the plant and property of the party of the first part under the option given to said party of the second part as aforesaid, and upon the retirement and cancellation of the bonds of the party of the first part at the time of such purchase, all the said rights, powers, and privileges herein granted to the party of the first part shall be thereupon finally terminated and ended: and provided, further, that nothing herein contained shall be construed to prevent the party of the first part from granting, or any person or corporation from exercising, the right to maintain and operate any existing water plant, and to supply the city of Charleston and its inhabitants with water therefrom, until the full and final completion of the works hereinbefore agreed upon, and the acceptance thereof by the board of water commissioners. (2) That during the performance of the covenants, agreements, and guaranties by the party of the first part, herein set forth, upon the part of the said party to be kept and performed, and unless and until the party of the second part shall, under the option hereinbefore given said party, purchase the said plant from the party of the first part, its successors or assigns, and retire and cancel the bonds of the party of the first part, the said party of the second part will pay to the party of the first part, its successors or assigns, for and during the period of fifty years from the date of the completion and operation of the said plant, an annual rental of $42,000 for the use of the hydrants, and for the water to be supplied to the party of the second part by the party of the first part as hereinbefore provided, which said annual rental shall be paid to the party of the first part, its successors or assigns, by the party of the second part, at the office of the trustee of the mortgage given to secure the said bonds, in quarterly installments, on or before the first day of January, April, July, and October of each year. (3)

That after the purchase of the existing waterworks, and pending the completion of the new plant, the said existing works shall be operated by the party of the first part, and from the date of the said purchase and operation, and until the completion and operation of the new plant, the party of the second part shall pay to the party of the first part at the rate of $20,000 per annum for hydrant rental, and for water used for other public purposes. (4) And it is mutually agreed between the parties hereto that the party of the second part shall have the right to direct the extension of any of the mains or the setting of additional hydrants: provided, that no extension shall be ordered unless the party of the second part shall at the same time order to be erected and connected for its own use one or more additional hydrants: and provided, further, that for every mile of extension ordered by the party of the second part said party shall order at least ten additional hydrants, all of which additional hydrants so ordered shall be used only for the purposes and upon the conditions hereinbefore named. Nothing herein contained shall be construed as preventing the voluntary extension of its system by the party of the first part under the righs herein conferred upon the said party, in which case the party of the second part shall be under no obligation to order any further hydrants. (5) And for the purposes of this contract, and of providing the necessary capital for extension and improvements, it is hereby mutually agreed that the mortgage to be executed upon the said plant by the party of the first part shall secure the payment of bonds in the total amount of $1,500,000, and that $175,000 of the said bonds, together with so many of the issue of $1,325,000 herein provided for, as shall remain in the treasury of the party of the first part, after purchasing the property of the present water company and constructing and equipping the plant hereinbefore referred to, shall be retained by the trustee of the said mortgage, and shall thereafter be issued only upon the certificates of a board of water commissioners, to be appointed in like manner as the board hereinbefore provided for (in the event such extensions are made and such bonds are issued), which bonds shall be sold at not less than 95 per cent. of their face value, to pay the necessary cost of such extensions, additions and improvements in said plant which may be required from time to time after the completion thereof; and, in the event of the issue of any bonds in excess of the sum of $1,325,000, the supply of water to be used by the city for public purposes may be increased in the same proportion which such additional bonds shall bear to an issue of $1,325,000; and the party of the second part hereby agrees, in the event that they shall order any extension of the mains, to pay, as an additional annual rental or compensation for the hydrants and for the water to be used therefrom, and for the privilege of taking such additional proportionate supply of water, to be used in the city's metered connections, for other public pur-

poses, a sum which shall bear the same proportion to the annual rental and compensation of $42,000 for water supplies as hereinbefore provided for as the amount which the additional bonds so issued bears to the issue of $1,500,000 of said bonds, which additional rental or compensation shall be payable at the same time and place and in the same manner as the principal rental or compensation hereinbefore referred to, and shall be subject to all provisions of this contract in respect to such principal rental or compensation. (6) The bonded indebtedness of the party of the first part shall in no wise be regarded as an indebtedness of the party of the second part, and nothing herein contained shall be construed as creating or imposing upon the party of the second part any liability or obligation for the payment of money, other than for the payment of the sums provided to be paid as rental or compensation to the party of the first party for the public supply of water hereinbefore referred to. (7) It is mutually understood and agreed that in the construction of the said plant the party of the first part may let the same, or any part thereof, to contractors or subcontractors, and the amount paid to such contractors or subcontractors shall, to that extent, be taken as the cost of said work, or such portion thereof as may be so sublet. (8) And the party of the second part hereby resolves and ordains that the mayor shall appoint a committee, to consist of three members, to be confirmed by council, and to be known as the 'Board of Water Commissioners,' who shall act as the representatives of the city council, and whose duty it shall be to supervise the construction of the said plant, and examine into and keep accounts of the cost of construction of the same, issue permits for the issue of bonds for payments approved by them for the cost of construction accrued from time to time, and certify and keep a record of the bonds issued by the party of the first part, in accordance with the terms and conditions of this contract, and to perform the duties and exercise the powers hereinbefore provided to be performed and exercised by the board of water commissioners. And they shall also have such further powers and be subject to such further duties as may be hereafter lawfully vested in or imposed upon them by the city council of Charleston, and not inconsistent with the terms of this contract. The said commissioners shall elect the chairman and secretary, and may make such rules for their government as they may deem proper: provided, however, that such rules shall at all times be subject to revision and amendment by the city council of Charleston. The said board shall hold office until the completion and acceptance of the said plant; and if the bonds of the party of the first part remaining in the treasury, or any part thereof, be thereafter issued for any of the purposes hereinbefore named, then and in that case a new board of water commissioners shall be appointed and confirmed as hereinbefore provided, and the duties of such commissioners shall be the same with reference to such extension

and improvements as those defined by the present board, with reference to the plant to be constructed as aforesaid.

"In witness whereof, the said Charleston Light and Water Company has caused these presents to be signed by its president, countersigned by its secretary, and its corporate seal to be affixed by such secretary; and the said city council of Charleston has caused these presents to be signed by the mayor of Charleston, countersigned by the clerk of council, and its corporate seal to be affixed by said clerk, on the day and in the year above written. * * *"

The questions presented in common in the actions hereinbefore set out are: First. That the contract under investigation is illegal, null, and void, because in violation of section 5 of article 10 of our state constitution, in that the city of Charleston is plainly forbidden in said section to increase its bonded indebtedness," if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per cent. of the value of all taxable property therein as ascertained by valuation for state taxation." The value of all taxable property in the city of Charleston, as ascertained by the valuation for state taxation, is about $18,000,000, while the amount of its already existing bonded debt is $3,827,700, which is far in excess of the 8 per cent. allowed by the constitution. Second. That the proposed contract is also violative of the seventh section of article 8 of our state constitution, which provides that "no city or town in this state shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the question as to the creation thereof to the qualified electors of such city or town as provided in this constitution for such special elections; and unless a majority of such electors voting on the question shall be in favor of creating such further bonded debt, none shall be created: provided, that this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes: and provided, further, that such cities and towns shall on the issuing of said bonds create a sinking fund for the redemption thereof at maturity. * * *" Third. That the act of 1899 is unconstitutional, by which act any city in this state having over 45,000 inhabitants is authorized to enter into contract for debts and to incur liabilities by "note, bond, draft or obligation, executed, indorsed or guaranteed by the city or town council of such city or town, and approved or confirmed by a two-thirds vote of the whole of said city or town council at a regular meeting thereof, for the purpose of the establishment of a sewerage system, or for the purpose of securing a system, or for the purpose of securing a supply

of water or light for its public use, by contract, or for the purpose of a lease, purchase or construction or operation by the said city or town council of any plant or plants for water or lighting purposes, one or both; and for any of such purposes the city or town council of cities or towns of over 45,000 inhabitants are hereby expressly authorized and empowered to create debts and incur liabilities beyond the municipal income of the current year, upon the same being approved and confirmed by a two-thirds vote of the whole of the said city or town council at a regular meeting thereof: provided, that no purchase or construction of said plant or plants for water or lighting purposes shall be made by the said city or town council except upon a majority vote of the electors in such cities or towns who are qualified to vote on the bonded indebtedness of the said cities or towns." Section 2: "That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed." That the said act of 1899 is unconstitutional, and therefore null and void, because it authorizes the city of Charleston, being a city of over 45,000 inhabitants, to increase its bonded indebtedness, when not only the bonded debt of the city is already more than 8 per cent. of its whole property as listed for taxation, but especially because the indebtedness she now seeks to create, in the sum of $42,000 each year for 50 years next ensuing, is itself a bonded indebtedness, being issued under the seal of said city council of Charleston; and, furthermore, said bonded indebtedness, being for the purchase of water for the public of the city of Charleston, is forbidden by section 5 of article 8 of the constitution of this state, in that the question of such bonded indebtedness has not been submitted to the electors of said city. And, again, because such increase of the indebtedness of said city of Charleston is really a bonded debt of said city, which is forbidden by the act of 1881, by which it is especially provided that there shall never be an increase of the bonded debt of said city as it existed in the year 1881, unless: "First. A resolution declaring the intention of the said city council to create such indebtedness or incur such liability, and specifying the amount thereof, shall first be passed at a regular meeting of the said city council by a vote of two-thirds of the whole body. Second. That the proposition, after being adopted in such manner by the said city council, shall be submitted to the qualified voters of the city of Charleston, at an election to be held under resolution of the said city council, after ninety days' notice thereof; and should two-thirds of the number of qualified voters voting at the preceding municipal election vote affirmatively at said election, the proposition shall then be submitted to the general assembly of the state of South Carolina for approval." See pages 582, 583, 17 St. at Large.

The action of John Fred. Peiper also urges, in addition to the foregoing grounds, that the water supply provided for in

said contract between the Charleston Light & Water Company and the city council of Charleston "is to be taken from Goose creek, which is a stream subject to the ebb and flow of the tide, and at times the waters of said stream are salt to its source, and at all times is salt at the proposed place of intake; that this defect cannot be remedied by filtration or by any practical process, nor can the salt water be excluded from the supply by the erection of a dam across Goose creek below the place of intake, as proposed in the specifications of the American Pipe Manufacturing Company attached to said contract, for the reason that Goose creek is a tidal, navigable stream, the bed of which is the property of the state of South Carolina, upon which no structure can be placed without the consent of the state, which consent has not been given; nor can the navigation of said stream be obstructed or interrupted without the consent of the United States government, which consent has not been obtained; that Goose creek is the natural channel for the drainage of a large swamp area, covered with stagnant water, which is polluted with decaying vegetation, and the water of said stream at the place of intake is entirely unfit for the purposes of a water supply. And, upon information and belief, the petitioner alleges that neither the proposed method of filtration, nor any other feasible or practical method of purification, can make the said water potable, or otherwise than detrimental and injurious to the health of the inhabitants of the city of Charleston, and that said contract has been accepted by the city council without sufficient analysis of the water having been made on their behalf, or without other adequate assurances that a supply of pure and suitable water can be secured from the proposed source." Also that three or more members of the city council of the city of Charleston are directly or indirectly interested pecuniarily in the said Charleston Light & Water Company. And also that the price fixed for water for the city is exorbitantly high, and that expenses for construction, etc., are too large.

The city council of Charleston and the Charleston Light & Water Company in their return in the case first named admit the facts, but deny the legal conclusions, and in their return to the second action they both demur to the additional grounds set out in the case brought by John Fred. Peiper. It now remains for this court to pass upon the questions here raised.

1. It seems to us that the paramount issue here involved is whether the $42,000 to be paid each year for 50 successive years from this date by the city of Charleston to the Charleston Light & Water Company under the contract between them is a bonded indebtedness. Is it a bonded indebtedness? It certainly is, and confessedly so by all the parties to these actions, an agreement to pay $2,100,000 within 50 years, in annual installments of $42,000, made by the city of Charleston under its corporate seal. A bond is nothing more than an agreement or contract under seal to pay money, "or to do

some other thing." See 1 Rap. & L. Law Dict. 141; Canty v. Duren, Harp. 434. See, also, 4 Am. & Eng. Enc. Law, at page 620, where it is said: "In the technical sense, a bond is an obligation in writing, and under seal, binding the obligor to pay a sum of money to the obligee. * * * Under this definition is included every sealed obligation for the payment of money, whether absolutely or upon condition." See, also, Boyd v. Boyd, 2 Nott & McC. 126, where it is said: "A bond is defined to be a deed or obligatory instrument in writing whereby one doth bind himself to another to pay a sum of money or to do some other act." Any indebtedness, the payment of which is secured by a contract under seal, is a bonded indebtedness. This being, then, a bonded indebtedness, which confessedly is beyond the limit set out in section 7 of article 8, and also in section 5 of article 10, of our state constitution, to wit, 8 per cent. of the assessed value of the taxable property of the city of Charleston, is utterly null and void. To make our meaning perfectly clear, we will state the matter in detail. The city of Charleston has property listed for taxation which is about $18,000,000. It has already a bonded indebtedness of about $3,827,700, which is confessedly and actually in excess of 8 per cent. of all the said city's taxable property. Section 7 of article 8 of our state constitution provides, "No city or town in this state shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, * * *" while section 5 of article 10 of our constitution provides, "* * * The bonded debt of any county, township, school district, municipal corporation or political division or subdivision of this state shall never exceed eight per centum of the assessed value of all taxable property therein. And no county, township, municipal corporation or other political division of this state shall hereafter be authorized to increase its bonded indebtedness, if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per centum of the value of all taxable property therein, as ascertained by the valuation for state taxation." Hence, as the contract of the city of Charleston proposes to add to its bonded indebtedness the sum of $42,000 each year for fifty years next ensuing the date of the execution of said contract, while its bonded indebtedness is already more than 8 per cent. of its taxable property, it is clearly undertaking to make a contract in violation of the constitution of the state of South Carolina, and such contract is null and void.

2. But it is urged by the respondents that the power to create this debt and incur this liability beyond the municipal income of the current year is expressly given to the city of Charleston by the act of 1899. See 23 St. at Large, pp. 51, 52. The respondents overlook the fact that, even if this contract did not actually add to the bonded indebtedness of

the city of Charleston, the provision of section 7 of article 8 of our state constitution would present an insuperable barrier to the attempt by the general assembly of this state to clothe the city council of Charleston with any such power to pledge or dispose of the municipal income for an indefinite term of years, for it is there provided "* * * that this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained, or to be contained, in the taxes for the year when such certificates are issued and payable out of such taxes." This provision was evidently inserted in this section in order to enable a city council to make some definite provision for current indebtedness which it was intended should be paid from taxes when collected, but in anticipation of the collection of said taxes. Such a scheme would terminate with the year in which the taxes would be collected. It was not intended, nor did it do so, to clothe the city council with power by one contract to pledge $42,000 of each year's taxes for the period of 50 years next ensuing. The terms of the section are exhaustive of the power. The general assembly could not add to it, for the expression of the constitution whereby a municipal corporation is allowed to issue certificates of indebtedness in advance of the receipt of the taxes to pay such certificates is a negation of any power in a city government to do more than what is expressly contained in the grant of power heretofore recited as contained in such section of the constitution. It appears that its framers had in view the well-preserved distinction existing between what is known as "ordinary or current indebtedness," and what, on the other hand, is known as "extraordinary indebtedness"; for in section 11 of article 10 of the constitution, where the general assembly of this state was forbidden to add to the present bonded debt of the state without first obtaining a vote of the people of the state authorizing such increase, the constitution expressly authorizes the general assembly to create a debt "for the ordinary and current business of the state"; and in section 2 of this same article 10 the general assembly was directed to provide an annual tax "to defray the estimated expenses of the state for each year; and whenever it shall happen that the ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." This section 11 of article 10 of the state constitution provides that any extraordinary indebtedness of the state (that is, not ordinary) shall be contracted by loan on state bonds, in these words: "And any debt contracted by the state shall be by loan of state bonds. * * *" It is thus seen that, while the provisions of the state constitution gave latitude to the general assembly as to indebtedness for ordinary and current business, yet it

required such indebtedness wiped out by money received from taxation the year of, or the next year to, the creation of such indebtedness. So, in the matter of cities and towns, they were not allowed to create a bonded indebtedness beyond eight per cent. of their taxable values; yet they, too, were allowed to create an indebtedness in anticipation of the payment of the taxes to be collected during the year such indebtedness for ordinary or current purposes was created. As before remarked, this contract between the Charleston Light & Water Company and the city of Charleston is unconstitutional, and therefore null and void.

3. We might rest here, but, as some reference was made in the petition of John Fred. Peiper to the presence of three members of the city council of Charleston among the stockholders of the Charleston Light & Water Company, we will say that the high character of the three gentlemen in question would show that their presence in this contract on both sides, so to speak, was due to their great anxiety to promote the best interests of the public in the matter of a water supply, and not for any profit to themselves. Still it is our duty to say that their conduct is illegal. No trustee can, under the law, contract with himself in his individual character. Thomas v. Peake, 38 S. C. 440, 17 S. E. 45, 725; Turnipseed v. Sirrine, 60 S. C. 272, 38 S. E. 423.

We will not, because it is unnecessary, disturb the waters of Goose creek in this opinion.

It is the judgment of this court that the prayer of the petitioners be granted, and therefore that the contract between the Charleston Light & Water Company and the city council of Charleston, herein embodied, is declared to be beyond and without the power of said city council of Charleston to enter upon, agree to, and make, and that the said city council of Charleston, its successors, officers, agents, and employees, be perpetually enjoined and restrained from entering into or executing the said contract, or, if the same be already executed by them, from entering upon or performing any matters in the said contract undertaken, and by the said city of Charleston agreed to be performed, and that the Charleston Light & Water Company be perpetually enjoined and restrained from issuing, or undertaking to issue, any bonds or evidences of debt purporting to be issued in pursuance of said contract.

McIVER, C. J., and GARY and JONES, JJ., concur in the result.

MONROE WATERWORKS CO. *v.* CITY OF MONROE.

(*Supreme Court of Wisconsin, April 9, 1901.*)

[85 N. W. Rep. 685.]

Water Contract—Ultra Vires in Part—How Far a Defense.

The fact that a city's contract with a water company is ultra vires, in so far as it grants an exclusive privilege, is no defense to an action for hydrant rentals due thereunder.

Monroe Waterworks Co. *v.* City of Monroe

Same—Exempting Water Company from Taxation—What Amounts to.

Where a city contracts with a water company to pay for water a sum equal to all taxes levied on certain parts of the company's plant, the agreement is not invalid as an exemption from taxation; the contract contemplating the payment of taxes.

Same—Taxation—Separating Property and Franchises.

Where the contract between a city and a water company provides that a portion of the hydrant rentals shall be a sum equal to the amount of all taxes assessed on a certain part of the company's plant, and taxes are assessed against the property of the company, together with its franchises, at a lump sum, there can be no recovery under the contract, owing to the impossibility of separating the property in question from the franchises.

Same—Action to Recover Hydrant Rentals—Counterclaim—Waiver.

Where for several years a city paid a water company the hydrant rentals due under the contract, and made no complaint as to the character of the service rendered by the company, in an action by the company for hydrant rentals, the city was not entitled to recover by way of counterclaim for insufficient service at fires; the city's conduct having amounted to a waiver of any such counterclaim.

Same—Same—Appeal—When Counterclaim Permissible.

Laws 1882, c. 238 (Monroe City Charter) § 48, declares that where a claim against the city has been disallowed by the council, and an appeal taken, the same shall be tried in the same manner as appeals from justices; and Rev. St. 1898, § 3768, declares that in certain cases actions appealed from justice court shall be tried in the appellate court as if originally brought there: *held* that, on appeal from the decision of the city council, a counterclaim is permissible when the conditions are such that a new trial in the appellate court is permissible under the statute.

Same—Same—Counterclaim—Failure of Company to Maintain Adequate Pressure—Evidence.

Where a water company sued a city for hydrant rentals, and the city set up a counterclaim for inadequate service at fires, evidence of inadequate fire pressure at fires occurring more than six years prior to the presentment of the claim to the city, and also after the controversy had gotten into court, could not be sustained, as showing a habit, or custom, or course of conduct; it appearing from the defendant's bill of particulars that during a portion of the six years prior to the filing of the claim the protection furnished by the waterworks was sufficient.

Appeal from circuit court, Green county; B. F. Dunwiddie, Judge.

Action by the Monroe Waterworks Company against the city of Monroe. From a judgment in favor of defendant, plaintiff appeals. Reversed.

In the year 1889 the common council of the city of Monroe granted a franchise to construct and operate a system of waterworks in said city to one W. H. Wheeler, granting an exclusive right for a period of 20 years. The ordinance granting the franchise prescribed at length and with particularity the kind of plant that should be erected, the kind, size, and number of miles of pipe that should be used, the manner in which it should be laid, the number of hydrants for fire protection, and how they were to be located, with many other conditions deemed necessary for its installation. The grantee agreed to keep the hydrants supplied with water for fire service day and night, and keep them in good order. The city agreed to pay for such fire protection $4,500 in semiannual

installments on the 1st days of February and August of each year. The city was also to have the free use of hydrants for flushing gutters and sewers, and free water for public schools and other city buildings, for certain drinking fountains, and for sprinkling purposes. In consideration for such service the city also agreed "to pay each year to said grantee, in addition to the hydrant rentals herein specified, a sum equal to the amount of state, county, and city taxes which may be levied upon such portions of said waterworks plant as is located on the streets and public grounds." Certain rates of charges were fixed for private consumers. Tests for a water supply were to be made and approved by the city, and before the works were accepted the plant was required to meet certain conditions prescribed. The ordinance contained other details of no importance in this litigation. The ordinance was accepted by Wheeler, and afterwards the plaintiff corporation was organized, which succeeded to his rights. The system was duly built, tested, and accepted. The pumping station was located on certain lots owned by the company. The standpipe was located in the city park, and the pipes, hydrants, and fountains were distributed in the streets and public grounds. From year to year down to the time of the commencement of this action, the city has paid the semi-annual installments for hydrant rentals as they became due without protest. During the years 1890 to 1895, inclusive, the city levied taxes only on the real estate upon which the pumping station was located, the annual valuation being $4,000, except in the year 1894 the value was increased to $4,500, and in 1895 to $6,000. In 1898 the city assessed the entire system, including franchises, rights, privileges, real estate, pipes, hydrants, etc., at the gross sum of $30,000, against which a tax was levied amounting to $642.08, which sum the water company was required to, and did, pay. Thereafter, basing its right upon that portion of the ordinance above quoted, the plaintiff presented a claim to the city council, claiming that its real estate was about one-sixth of the whole value of the system of waterworks, and that the portion in the streets and public grounds was five-sixths, and demanding that the city pay in the sum of $535.05, as being the proper portion of the taxes levied as aforesaid. The claim was disallowed, and an appeal was taken to the circuit court. That court directed an issue to be made by complaint and answer. The plaintiff filed a complaint, setting out the facts substantially as stated. The answer contained sundry admissions and denials, with allegations that the stipulations in the ordinance regarding the payment of a sum by the city equivalent to the taxes on that part of its plant on the streets and public grounds was tantamount to and was an agreement to exempt said property from taxation, and therefore void; that it was impossible to determine or apportion the values of the different portions of said plant, but, on the contrary, the plant was entire and

inseparable and must be treated as an entirety for the purpose of taxation; that the attempt to grant an exclusive franchise was contrary to public policy and void. It then set up a counterclaim, claiming, among other things, that during the six years last past the plaintiff had neglected to provide modern appliances and to adopt proper means to secure direct fire pressure in case of fires, and had so mismanaged its works and neglected to keep its hydrants in order that at a number of fires mentioned the fire pressure was wholly inadequate, and the said system afforded no protection to the property of the city, and in consequence thereof property of the citizens of the city had been destroyed of the value of $20,000, for which they had no remedy under the laws of this state; that the standpipe was of inadequate capacity and not properly equipped or kept in repair, direct pressure was not secured until after great delay, and generally the plant was carelessly and negligently handled. There being no other system in the city, rents had been paid, although the value of the service rendered did not exceed $2,000 per year. Damages to the amount of $15,000 were demanded. A motion to strike out the counterclaim was denied. A reply was served, consisting of denials and an allegation of voluntary payment of rentals with full knowledge of the facts. A bill of particulars was filed by defendant, which set out in detail its grievances. The jury rendered the following special verdict: "(1) What is the relative value of that portion of the waterworks plant of the plaintiff located in the streets and public grounds of the defendant, as compared with the value of the whole of said waterworks plant? Answer. 83 per cent. (2) Did the plaintiff, during the six years prior to February 7, 1900, furnish to the city of Monroe such a supply of water and such pressure as were reasonably adequate for the extinguishment of fires, if properly used by the city? Answer. No. (3) In case your answer to the last question is 'No,' you may state what the difference is between the value of the supply of water and pressure actually furnished to the city by the plaintiff, and that which should have been furnished on the basis of the contract price, in order to afford reasonably adequate protection from fire. Answer. $326.40 yearly for six years,—$1,958.40." Plaintiff's motion for a new trial was denied, and defendant's motion for judgment was granted. Judgment was accordingly entered on defendant's counterclaim for $1,958.40 damages, besides costs, and the plaintiff's cause of action was dismissed. Plaintiff appeals.

Jackson & Jackson, P. J. Clawson, and M. G. Jeffries, for appellant.

Colin W. Wright and Jones & Stevens, for respondent.

BARDEEN, J. (after stating the facts). As regards the plaintiff's right of recovery, the record furnished no information as to the grounds upon which it was denied. The argument

by the defendant in this court is that the ordinance is void (1) because it purports to create an exclusive franchise for 20 years; (2) because it is in effect an agreement to exempt plaintiff's property from taxation; (3) because that part of it sued on is so indefinite and uncertain as to furnish no basis for a recovery.

1. The ordinance in question gives the plaintiff an exclusive right to erect, maintain, and operate a system of waterworks in the defendant city for a period of 20 years. We may concede, without so deciding, that as a general rule the legislature alone has the power to make exclusive grants of this character, and that this power does not exist in the city unless expressly granted to it by its charter or some law of the state. Our attention has not been called to any such grant of power, and we may assume that it does not exist. The city had authority from the legislature to grant a franchise to a person or corporation to furnish it and its inhabitants with water. If it had no right to make the grant exclusive, it was at most ultra vires. The plaintiff has accepted the grant. It has constructed an expensive system of waterworks. For over 8 years the city has been the recipient of substantial benefits thereunder, and from year to year has paid its rental dues. The exclusiveness of the right to use the streets was granted for the sole benefit of the water company. If it does not receive this benefit, the city loses nothing. Quoting from the opinion of Judge Sanborn in a similar case (Illinois Trust & Sav. Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518): "The grant of this exclusive right was neither immoral nor illegal. It was merely ultra vires. We know of no rule of law or morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond its powers. On the other hand, the true rule is, and ought to be, the converse of that proposition. It is that when a part of a divisible contract is ultra vires, but neither malum in se nor malum prohibitum, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void,"—citing Navigation Co. v. Winsor, 87 U. S. 64, 22 L. Ed. 315; Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Western Union Tel. Co. v. Burlington & S. W. R. Co. (C. C.) 11 Fed. 1; Saginaw Gaslight Co. v. City of Saginaw (C. C.) 28 Fed. 529. The supreme court of Iowa carry the rule so far as to say that the validity of an ordinance giving the exclusive privilege for a term of years of laying water pipes in the streets, etc., can be contested only by some other company or individual afterwards claiming such right. Grant v. City of Davenport, 36 Iowa, 396. Whatever the true rule may be, the discussion of the point at issue in the

case in 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, meets every argument urged here, and most clearly demonstrates that the city is in no position to avail itself of the objection urged.

2. Does the ordinance amount to an agreement to exempt the plaintiff's property from taxation? An agreement for immunity from taxation will not be recognized, unless couched in terms too plain to be mistaken. Chicago, B. & K. C. R. Co. v. Missouri, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 1135. Where, however, the agreement is express, and the intention evident, to exempt property and release it from tax burdens, it is void, and will not be enforced. Little Falls Electric & Water Co. v. City of Little Falls, 74 Minn. 197, 77 N. W. 40; State v. Hannibal & St. J. R. Co., 75 Mo. 208. Many other cases might be added, but the rule is so generally recognized that further citation is not necessary. The rule is equally well established that it is competent for a city and a company to agree that, as the price of services to be rendered, the city will pay a sum equal to the amount of municipal taxes to be levied. Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; Cartersville Improvement, Gas & Water Co. v. City of Cartersville (Ga.) 16 S. E. 25; Grant v. City of Davenport, 36 Iowa, 397. Of course, it must appear that the sum so stipulated to be paid is a fair and just allowance to compensate for the actual value of the services to be rendered, and that the stipulation is bona fide, and not in the nature of an evasion of the law against exemption from taxes. The stipulation in this case is not subject to this objection. The water company agrees to furnish water for flushing gutters and sewers; also for school and public buildings, drinking and display fountains, and for sprinkling streets in the business portion of the city. In consideration thereof, the city is to pay annually a sum equal to certain taxes to be levied. There is nothing in this arrangement that we can perceive suggesting any exemption from assessment or taxation. On the contrary, it expressly contemplates the levy of a tax, and provides merely that, in addition to hydrant rents, the city shall pay a varying sum for the other services mentioned. If the agreement is sufficiently definite to be enforced, no reason is apparent why the city should not live up to its agreement.

3. Is the part of the ordinance sued upon sufficiently definite that it may be enforced? The clause in question reads as follows: "The city agrees to pay each year to said grantee, in addition to the hydrant rentals herein stipulated, a sum equal to the amount of state, county, and city taxes which may be levied upon such portion of said waterworks plant as is located on the streets and public grounds." Up to the year 1898 taxes were levied only upon the real estate and pumping station, at a valuation varying from $4,000 to $6,000. That year the assessor assessed all the franchises,

rights, and privileges, real estate, machinery, standpipe, water mains, hydrants, fountains, and all other property of the company as an entirety, at a lump sum of $30,000. This was done, presumably, in pursuance of the law as established by this court in the cases of Yellow River Imp. Co. v. Wood County, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92, Fond du Lac Water Co. v. City of Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581, and State v. Anderson, 90 Wis. 550, 63 N. W. 746, which was later confirmed by distinct legislative enactment. Section 1037a, Rev. St. 1898. These cases recognized the fact that franchises are property, and possess a value capable of being estimated, and are liable to taxation in the place where the corporation does business, and may be assessed for that purpose as a part of the aggregate corporate property. That was done in this case, and no contest is made as to the practical plan adopted. The fact that such franchises and privileges are of substantial value, and were included in the aggregate valuation of plaintiff's property, does not seem to have been appreciated or considered on the trial of this case. Testimony was offered as to the relative value of that portion of the waterworks plant located in the streets and public grounds, as compared with the value of the whole plant, regardless of the value of plaintiff's franchises, and the jury found such relative value to be 83 per cent. It is upon this foundation that plaintiff insists upon a right of recovery. Obviously this contention cannot be sustained. Such a basis of division would be false and unjust. The original agreement was evidently based upon the theory that the company's property was divisible—separable—for the purposes of taxation. Under the present rule of assessment, no taxes are or can be separately levied on that portion of the plant situated in the streets. We have no right to say, or permit the plaintiff to say, that the intention was to require the city to pay according to the relative value of the different portions of the plant, independent of the franchise interest. The difficulty of arriving at any satisfactory basis of apportionment according to the terms of the ordinance, in view of the rule of assessment, seems insuperable. It arises from the difficulty of separating the property of the corporation from its franchises. This difficulty is noted and commented upon in Chicago, M. & St. P. Ry. Co. v. City of Milwaukee, 89 Wis. 506, 62 N. W. 417, and State v. Anderson, supra. To adopt the rule contended for would be to make for the parties a scheme they did not make for themselves. As at present advised, we see no basis furnished by the ordinance authorizing its enforcement as to the part in question. See Detroit Citizens' St. Ry. Co. v. Common Council (Mich.) 85 N. W. 96.

We now come to the question of the defendant's counterclaim. It is based entirely upon the alleged failure of the company to furnish adequate fire pressure in times of fires during the six years immediately preceding the commence-

ment of this action. The jury found that the difference in value between the supply furnished and that which should have been furnished was $326.40 for each year. The plaintiff urgently insists that under the circumstances in proof no recovery can or should be permitted on behalf of the city. This is based upon the admitted facts, among other things, that the plant was constructed according to the requirements of the ordinance and was accepted by the city, and that services had been continuously rendered and regularly paid for without objection or protest. The obligation of the company was to furnish the city with water, accompanied with the service and use of its plant in a particular way. Its duty required it to keep its plant in reasonably good repair, to use reasonable diligence in keeping its appliances and agencies in readiness for emergency use, and to furnish such fire pressure as might reasonably be expected from the character of the plant, size of pipes, and the like. The only complaint made against the company was that, in case of a few fires, instanced by the witnesses, there was some delay in securing fire pressure, and at times, in their opinion, the pressure was not sufficiently strong, or, as found by the jury, not "reasonably adequate for the extinguishment of fires." In other words, the ground of complaint arose from failure to render service in the way pointed out in the ordinance. The alleged delinquency arose, not from that portion of the service here sought to be enforced, but from past services which had been accepted and paid for in semiannual installments. The right of the city to recover is not based upon any loss or damage to city property, nor is it alleged or proven that it has suffered any direct pecuniary injury. Its claim is based entirely upon the alleged inadequacy of the service rendered. It is shown conclusively that the city knew of such imperfect service at the time so rendered, and also when called upon to pay the bills presented. It never gave official notice, or made any claim, that such services were not performed in accordance with the ordinance. Regularly each six months it paid the amount stipulated without protest, and as in full settlement of six months' service theretofore rendered. It knew that the company claimed full performance. The character of the service was such that, if notice had been given of the specific ground of complaint, it could easily have been remedied. The company was bound to reasonably diligent service. Notice that the city claimed lack of diligence would undoubtedly have spurred the company to greater promptness. If the pressure was not deemed adequate, a suggestion to that effect would have commanded immediate response. The machinery, appliances, and agencies in use by the company had been tested and accepted by the city. If the city claimed that other or better means should have been employed, ordinary good faith demanded that such claim should have been made known to the company. From year to year during the period mentioned the

company performed its service under the belief it had complied with its obligations, and each recurring six months the city paid in full therefor without protest and with full knowledge of the situation. If it be admitted, as is held in some of the cases elsewhere, that the city had a substantial claim for damages which it might enforce, still we do not see how it is now in a position to do so in this case. The facts show as clear and distinct a case of waiver as could well be imagined. "A waiver is the intentional relinquishment of a known right." 28 Am. & Eng. Enc. Law, 526. It may be proved by various species of evidence,—by declarations, by acts, or by forbearance to act. Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244. The notice or intention of an act, in most cases, is a matter of inference, to be deduced with more or less certainty from the external and visible acts and conduct of the party. It is to be ascertained and interpreted in the light of the accompanying circumstances of the particular transaction. Traynor v. Johnson, 1 Head, 51. It may be conceded that the furnishing of water in accordance with the conditions and requirements of the ordinance was a condition precedent to the right of the company to demand payment therefor. Where the service to be performed is continuous, and its proper performance is a condition precedent to a right of action, and the act as performed is defective and imperfect, if the adverse party takes no objection to the manner of its performance, but pays the stipulated price, he cannot afterwards be permitted to reclaim or rejuvenate the rights thus waived. Especially ought this to be true in a case for continuous service to be satisfied by periodical payments, where notice of the claim of defective performance would probably lead to a correction of the alleged defects in the future. This rule rests upon the ground that the party by his silence has misled his adversary, and, not having spoken when he ought, shall not be permitted to speak when he would. See Johnson v. Oppenheim, 55 N. Y. 280. The cases where the doctrine of waiver has been invoked are numerous and varied. In Vinegar Co. v. Meyer, 26 Ill. App. 564, a master credited his servant with full time and settled with him on that basis, giving a promissory note. Suit being brought on the note, the master sought to set off time lost by the servant. This right was denied on the ground, among others, that defendant had waived performance. This case is cited and approved by this court in Dickinson v. Plow Co., 101 Wis. 155, 76 N. W. 1108, where a counterclaim was sought to be enforced for time lost, after there had been a statement of account and a settlement between the parties. The counterclaim was disallowed. Another case somewhat more remote in its application is Raipe v. Gorrell, 105 Wis. 636, 81 N. W. 1009. A counterclaim for loss of time was denied enforcement, and the principle that, if one has paid money to another without mis-

take or fraud, he cannot reclaim it, was invoked and applied. Cases sustaining this rule are numerous, many of which are cited in the brief of plaintiff. The following in this state are in point: Van Buren v. Downing, 41 Wis. 122; Noyes v. State, 46 Wis. 250, 1 N. W. 1; Custin v. City of Viroqua, 67 Wis. 314, 30 N. W. 515. See Locke v. Williamson, 40 Wis. 377. Defendant's counterclaim in effect seeks to reclaim such parts of the sum it has paid for water service as it believes it was worth less than the stipulated price. It may be called "damages," or any other name of like import; yet the result is the same. It is nothing more nor less than a reclamation of a portion of the stipulated price, paid voluntarily, with full knowledge of the facts and under such circumstances as to lead the plaintiff to believe the transaction to be a settlement of its claims. Upon either of the grounds stated we are convinced that the defendant is now precluded from urging an affirmative demand against the plaintiff upon the alleged cause of action set up in the answer. In reaching this conclusion we have purposely omitted to consider whether the relations between the water company and city are such that the latter may or may not, on its own behalf, institute and maintain active proceedings based upon such relations. We have proceeded upon the assumption that, if it could, still it had shown no right to recovery. Our discussion is not to be considered either as an admission or denial of the right.

There are other minor questions urged against defendant's recovery. One is that a counterclaim is not permissible in cases appealed from city councils. Section 48, c. 238, Laws 1882 (defendant's charter), provides that, when a claim has been disallowed and an appeal taken, "such appeal shall be entered, tried, and determined in the same manner as appeals from justice of the peace," etc. Section 3768, Rev. St. 1898, provides that certain actions shall be tried in the appellate court as actions originally brought there. No good reason is perceived why a proper counterclaim may not be interposed in cases appealed from city councils, when the conditions are such that a new trial in the appellate court is permissible. Another ground of complaint is that evidence was admitted of inadequate fire pressure at fires occurring more than six years prior to the date from which recovery was sought, and also after the controversy had gotten into court. We have grave doubts of the admissibility of this evidence. The real issue was the manner and kind of service furnished during the period for which a recovery was claimed. Imperfect service or want of due diligence at other times would not necessarily sustain the cause of action sought to be enforced, and might be distinctly prejudicial to the other side. It cannot be justified on the ground of showing a habit or custom or course of conduct existing for a long time, because, according to the bill of particulars, there was a period from 1891 to 1895 that

no serious complaint was made. The other objections urged are not of sufficient importance to require attention. The judgment is reversed, and the cause is remanded for a new trial.

CITY OF AUSTIN *v.* BARTHOLOMEW *et al.*

NALLE *v.* CITY OF AUSTIN.

(Circuit Court of Appeals, Fifth Circuit, March 26, 1901.)

[107 Fed. Rep. 349.]

Appeal—Review—Decision on Former Appeal—Law of the Case.

The decision of a question on a former appeal is the law of the case on a subsequent appeal in the same case.

Municipal Corporations—Receiver of Water Company—Claim for Hydrants Furnished City.

The receiver of a water company is not entitled to claim on its behalf, from a city which it was to supply with water, payment for a specific number of hydrants, and at the same time demand payment for additional hydrants which were to be furnished free on condition that the hydrants first referred to were paid for.

Same—Charter Power—Right to Rent Hydrants of Water Company.

Austin City Charter, art. 6, § 7, authorizes the city "to construct waterworks; * * * to provide the city with water, * * * and to erect hydrants, fire plugs," etc.; and section 20 empowers the city "to provide for the prevention and extinguishment of fires," etc.: *held* to authorize it to rent hydrants of a water company for municipal purposes.

Same—Water Company—Assignment of Contract with City—Validity—Right to Question.

Where a city for more than eight years acquiesced to the fullest extent in the assignment by a water company of its rights and privileges under a contract with the city, and allowed the new company during such time to perform the contract of its assignor, it is too late for the city to question the legality of the assignment for the purpose of avoiding performance of the contract on its part.

Same—Implied Contracts.

A city, like an individual or private corporation, may bind itself by implied contracts.

Same—Obligations of New Company.

Where a water company has purchased the property, rights, contracts, privileges, and franchises of another company, and, with a city's consent, proceeded to carry out its predecessor's contract to supply the city with water, the obligations of the city and the new company are correlative, and the latter is as much required to furnish water to the city under the contract with the old company as the city is required to pay for it.

In Error to the Circuit Court of the United States for the Western District of Texas.

On April 13, 1882, the city of Austin entered into a contract with the City Water Company, which contract is the basis of this suit. That contract is set out in full in the statement of facts in the case of Bartholomew v. City of Austin, 29 C. C. A. 568, 85 Fed. 359, and it will consequently be referred to here when necessary without incumbering the statement of the case or the opinion with the entire contract. The City Water Company constructed its waterworks and complied

with its contract with the city of Austin, so far as the record shows, without complaint, until June 28, 1887, when the Austin Water, Light & Power Company was organized, and purchased and absorbed the City Water Company. After this latter date the Austin Water, Light & Power Company continued to carry out the contract with the city of Austin, as transferee and assignee of the City Water Company, and the city paid and it received the contract price for the hydrants provided in the contract. In the year 1895 the city of Austin completed the erection of waterworks of its own, and from and after the 31st day of December, 1895, refused to pay the water, light, and power company the rentals for hydrants as stipulated in the contract, or any part of the same. On the 10th day of July, 1893, Joseph Spence was appointed receiver of the Austin Water, Light & Power Company by the circuit court of the United States for the Western district of Texas, and said Joseph Spence was afterwards succeeded as such receiver by E. C. Bartholomew, who was in turn succeeded, after a brief period of joint receivership, by Joseph Nalle, the present receiver. The city having refused to pay rent, as stated, for the hydrants, Bartholomew, as receiver, on the 9th day of January, 1897, brought suit against the city of Austin to recover the rent of 100 hydrants at $100 each per annum, 42 hydrants at $50 each per annum, and 25 hydrants at $50 each per annum, for the year 1896. This case came on to be heard before the circuit court, when a demurrer to the plaintiff's declaration was sustained on the ground that the original contract between the City Water Company and the city of Austin created a monopoly, under the constitution of the state of Texas, and was consequently void, and no recovery could be had thereunder. This decision was brought by writ of error to the circuit court of appeals, and this court, in the case of Bartholomew v. City of Austin, above referred to, reversed the judgment of the court below and remanded the case. After the case was thus remanded the plaintiff filed his first amended original petition, in which he claimed the same rentals claimed in the original bill for the year 1896 for 1897 and 1898, and in addition thereto added a count or additional claim for general damages in the sum of $625,000 for breach of contract on the part of the city, in preventing him from supplying the inhabitants of the city with water. When the case as thus amended came on to be heard in the circuit court at the adjourned term in May, 1899, it resulted in a verdict and judgment for the plaintiff in the sum of $39,925. The amount of this verdict and judgment was for the rental of 100 hydrants for the years 1896, 1897, and 1898 at $100 each per year, and for the rental of 42 hydrants for the same period at $50 each per year. The court rejected by its rulings during the trial and in its charge the claim for the rental of 25 hydrants, and also for general damages for breach of contract on the part of the city, submitting to the jury the question of the right of the receiver to

recover for the 100 hydrants at $100 each per year, and the 42 hydrants at $50 each per year. The charge of the court, which largely raises the questions involved, was as follows: "Now, you gentlemen have been advised during the progress of the trial of the issues involved in this suit. You know it is a suit on a contract, and plaintiff seeks to recover on the contract. That contract is what we would call on the one side, on the part of the plaintiff, 'executory'; that is, to be executed from day to day, from time to time. It has been partially executed, but still, in some of its particulars, is executory on the part of the plaintiff. Now, there are three issues discussed by the gentlemen on either side of this case, and on these three issues I will now suggest to you what the views of the court are: (1) The court is of opinion that the Austin Water, Light & Power Company, who is plaintiff in this suit through its receiver, was the successor generally, by operation of law, of the City Water Company, and also successor to the burdens, mutualities and reciprocities of the contract between the city of Austin and the City Water Company, which preceded the coming into life of the Austin Water, Light & Power Company, and the successor of the City Water Company for the mutualities of the old company. The contention of the defendant is that, although these propositions be true, yet as matter of law the city has never consented to enter into and be bound by any reciprocities or mutualities of that contract. On that issue I charge you that the city is bound, and you will so find. (2) Passing from that issue to the second one, as to whether or not the plaintiff in this suit has alleged, and is bound by the allegations, that the contract has been breached by both sides, it is necessary for me to charge you on that point. It may be that in the mind of the city, or in the purpose of the city, in some degree, there was an effort to breach the contract. It may be, to some extent if not entirely, that the contract was breached; but that did not destroy the right of the plaintiff in this suit to go on with the contract from its standpoint, and perform its obligations and respond to its duties and recover on the contract. Therefore on that issue I charge you with the plaintiff. (3) Now, the third is the one undisposed of, because my view of the law may not be sufficient to dispose of it, and I will charge you on it. The third is whether or not the plaintiff company complied substantially with its obligations evidenced in the contract. On that issue there is some conflict in the statements of witnesses, and upon that issue you would be allowed to find one way or the other; and on that I charge you, in the line of plaintiff's requested charge, this: 'You are instructed, if you believe from the testimony that plaintiff has maintained during the years 1896, 1897, and 1898 the system of waterworks in his hands as receiver in a condition of efficiency, as to pressure and amount of water, equal to its condition when said plant was accepted by defendant as in compliance with said con-

tract, and was during said period reasonably equipped to furnish, and did during said time tender to the defendant, all the water called for by the contract, in substantial compliance with its terms, then you will find for the plaintiff the hydrant rentals sued for on 100 hydrants at rate of $100 per year per hydrant, payable semiannually, and on 42 hydrants at $50 per annum per hydrant, payable semiannually, for said years, with interest at the rate of 6 per cent. per annum; the amount of said hydrant rentals, with interest at 6 per cent. per annum, calculated to this day, being $———.' On the 25 hydrants claimed for under section 8 of contract, I charge you that you will find nothing one way or the other in your verdict. I have taken up the three issues that I thought proper to present to you as the law, and have directed a verdict for plaintiff on the first two issues, leaving to you the consideration of the third issue; that is, whether or not the company substantially complied with its obligations in relation to supplying and furnishing and keeping on hand the water it has contracted to furnish to those 142 hydrants. You remember the testimony on that issue, and you will find what your judgment may be on that issue of fact. If you find compliance, substantially, you will find for the plaintiff. If you find no compliance, substantially, you will find to the contrary. Measuring the testimony—weighing the testimony—on that issue, you will keep in mind all the time that a substantial compliance on the part of the plaintiff is sufficient to entitle it to recover. If you find for the plaintiff, you will find this: $100 on 100 hydrants for each of these years, with interest thereon. You will find next for 42 hydrants at $50 for each of these years, with interest thereon. Now, that calculation you can make by keeping this suggestion of the court in mind." Thereupon the city, having at the proper time reserved exceptions, sued out a writ of error; and the receiver, having also excepted in proper time, sued out a cross writ of error.

V. L. Brooks, D. W. Doom, and S. R. Fisher, for city of Austin.

T. M. Gregory, John D. Rouse, and Wm. Grant, for E. C. Bartholomew and Joseph Nalle.

Before SHELBY, Circuit Judge, and NEWMAN and TOULMIN, District Judges.

NEWMAN, District Judge, after stating the facts as above, delivered the opinion of the court.

The first and most important question for consideration in this case is that raised by the contention that the city, by the construction of waterworks of its own in 1895, violated the contract which it entered into with the City Water Company in 1882, to the wrong and damage of its successor, the Austin Water, Light & Power Company. The claim is that it was necessarily implied in the terms and provisions of the contract referred to that the city *would not* itself erect a system

of waterworks, and thereby, to a large extent, destroy the value of the property of the City Water Company. Reliance is placed largely, perhaps mainly, on the case of City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. Much stress is laid also on the recent case of Southwest Missouri Light Co. v. City of Joplin (decided by Judge Philips, in the circuit court of the United States for the Western district of Missouri in March, 1900) 101 Fed. 23. In this latter case the pertinent authorities are cited and reviewed, and in its reasoning and conclusions it is undeniably favorable to the contentions of the receiver in this case. In the case of City of Walla Walla v. Walla Walla Water Co., supra, there was an express stipulation that the city would not erect waterworks of its own, although it is true that the reasoning of the court and the conclusions reached are not based entirely on this stipulation. We think, however, that the recent case of Bienville Water-Supply Co. v. City of Mobile, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92, being later than the Walla Walla Case, and more like this case in its facts, is more pertinent here. In this latter case the court affirmed the judgment of the circuit court in dismissing a bill which set up on behalf of the Bienville Water-Supply Company against the city of Mobile substantially the same facts which are relied upon by the plaintiff here. The effect of this decision by the supreme court in the case of Bienville Water-Supply Co. v. City of Mobile is emphasized as authority in this case in favor of the right of the city of Austin to erect waterworks of its own by the opinion filed in the circuit court by Judge Toulmin (95 Fed. 539), which opinion was in review in the supreme court, and apparently fully approved. The syllabus of the opinion in the circuit court is as follows:

"A contract between a city and a water company, chartered and given the right to lay its mains in the streets of the city by an act of the legislature which merely bound the company to maintain a certain number of fire hydrants, for which the city agreed to pay a specified rental for a term of years, and fixed a maximum price, beyond which the company agreed it would not charge for water furnished for domestic use during the term, but which contained no grant of any privilege to the company, and no contract for furnishing water to the inhabitants of the city, nor agreement that the city should not do so, is not violated by the erection or purchase of waterworks by the city for the supplying of water to its inhabitants and for its own use, and affords no ground for an injunction to restrain the city from so doing in pursuance of authority contained in its charter; the city not having refused to pay the stipulated rentals."

But it is not necessary to further elaborate this question, as it is res judicata in this court. In the former opinion in this case (85 Fed. 359), by Judge Pardee, it is said:

"The contract on which this action is based is a grant and

privilege for a period of 20 years to the City Water Company to supply water to the city of Austin, and the inhabitants thereof, with the right of extension under certain named conditions. The grant is not in terms an exclusive one, and, so far as the language used is concerned, there is nothing to hinder the city of Austin from erecting other and competing works, nor from granting to others the right to use the streets, nor from contracting with others for the furnishing of more water, as the needs of the city may require. It is very well settled that in contracts with states or municipalities conferring powers, grants, or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred; all implications, doubts, and ambiguities being resolved against the grant or privilege claimed,"—citing Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71, 81, 14 L. Ed. 55; Rice v. Railroad Co., 1 Black, 358, 380, 17 L. Ed. 147; Bank v. Skelly, 1 Black, 436, 446, 17 L. Ed. 173; Stein v. Water-Supply Co., 141 U. S. 67, 80, 11 Sup. Ct. 892, 35 L. Ed. 622.

To the same effect is the decision of the supreme court of Texas in City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960.

We shall adhere to the former ruling of the court on this question, which disposes of the claim of the receiver for general damages against the city for breach of contract.

It is next contended on the part of the receiver that the court erred in refusing to allow him to recover for the 25 hydrants at $50 each. The second clause of the eighth section of the original contract between the city of Austin and the City Water Company and its assigns is relied upon as the basis for this claim of rental on the part of the receiver. It is as follows:

"The said city of Austin shall have the right to erect and connect twenty-five fire hydrants, with the main, at any time, under the provisions of this contract, at the expense of said water company, and use the same for the prevention and extinguishment of fires, free of charge: provided, always, that the city of Austin shall first pay a rental on the first one hundred (100) hydrants contemplated in this contract."

It is urged on behalf of the receiver that this provision was inserted in the contract for the purpose of inducing and insuring prompt payment of the rent for the 100 hydrants, as this was necessary to enable the water company to erect and maintain the 25 hydrants for which the city was to pay nothing. Hence it is insisted that payment of the rent of the 100 hydrants was a condition precedent to the right of the city to enjoy the free use of the other 25 hydrants. We are of opinion that the receiver cannot claim on behalf of the water company payment for the 100 hydrants, and at the same time demand payment for the 25 hydrants which were to be fur-

nished free on condition that the 100 hydrants were paid for. The receiver could very well demand payment for the 25 hydrants if he was not at the same time insisting on the contract price of the 100 hydrants. We cannot compel compliance with the terms of the contract, and at the same time require that to be done which was stipulated for in the event the contract was not complied with. We think the ruling of the court below on the demurrer to this item, and in disallowing the same in the charge to the jury, was correct.

We come next to the consideration of the exceptions of the city to the right of the plaintiff to recover the rental for 142 hydrants. The verdict in favor of the city was for 100 hydrants at $100 per annum each, and 42 hydrants at $50 per annum each, for the years 1896, 1897, and 1898, with interest at 6 per cent., aggregating $39,925. The 100 hydrants were expressly provided for in the contract, by section 6. The 42 hydrants were erected and put in under a provision of section 7 of the contract. These latter hydrants were to be erected as mains were extended, and were to be paid for at the price indicated.

It is first claimed on behalf of the city that it had no power to enter into the contract originally with the City Water Company. The charter of the city of Austin (article 6, § 7) gives the city authority "to construct waterworks, gas works, and street railroads within or beyond the city limits, or both; to provide the city with water and gas, and to erect hydrants, fire-plugs and pumps in the streets, to erect the necessary machinery, lamp posts, &c. for lighting the city within and beyond the limits of the city, for the convenience of the inhabitants of the city and the environments"; and the twentieth section of the same article empowers the city "to provide for the prevention and extinguishment of fires," etc. For present purposes it is only necessary to ascertain if the city had authority under these charter provisions to rent hydrants. After giving the city authority to construct waterworks, etc., within or beyond the city limits, or both, comes a semicolon; then the section proceeds: "to provide the city with water and gas, and to erect hydrants, fire-plugs, &c. in the streets"; and then, as if to emphasize that authority more strongly in the twentieth section it is authorized "to provide for the prevention and extinguishment of fires." Independently of the general provision of the Revised Statutes of the State of Texas (article 706), we think there can be no question that the charter itself gave the city ample authority to enter into this contract and to carry out the same, so far, certainly, as is material in the present case.

It is next contended for the city that the contract between the city and the City Water Company was not assignable, and that the Austin Water, Light & Power Company consequently was not authorized to execute the same, or to require per-

formance on the part of the city of the terms of the contract. Whatever may have been the merits of this contention, if made at the time of the transfer and sale by the City Water Company to the Austin Water, Light & Power Company, we think it is too late now for the city to raise this question. The sale and transfer was made in June, 1887, and from that time until the 31st of December, 1895, the city accepted performance of this contract from the new company and paid for the water without question. Thus for more than eight years the city acquiesced to the fullest extent in this assignment, and, having allowed the new company during all these years to perform the contract, it cannot now repudiate the new arrangement and claim that it is illegal. If there was any question about the power of the city to make the contract originally for the rent of the hydrants, there might be some question as to its power to impliedly agree to accept a new party to carry out with it the rental contract. But, assuming such authority to make the contract originally, the city, like an individual or a private corporation, may bind itself by implied contracts. Dill. Mun. Corp. (4th Ed.) §§ 451–459.

It is agreed as part of the facts in this case that:

"On the 22d of June, 1887, the Austin Water, Light & Power Company, also a domestic corporation of the state of Texas, was incorporated under the general laws of the state of Texas, to exist for a term of fifty years. The purpose of its incorporation was to supply water, electric light, and power to the inhabitants of the city of Austin and its vicinity, for public and private use." And further: "After the incorporation of the Austin Water, Light & Power Company, and after the establishment by the City Water Company of its said waterworks plant, the said City Water Company, on or about the 28th day of June, 1887, executed certain instruments purporting to sell, convey, transfer, set over, and deliver to the Austin Water, Light & Power Company its waterworks plant, and, all and singular, its property, rights, contracts, privileges, and franchises. That at all times since said date the Austin Water, Light & Power Company, its officers and agents, have exercised dominion and control over the waterworks plant of the City Water Company, and over, all and singular, the property, rights, contracts, privileges, and franchises of the City Water Company; and since said time the City Water Company has had no waterworks plant, equipment, or appliances wherewith to furnish water to the city of Austin or its inhabitants, other than the ones it undertook to convey as above set out."

It appears, therefore, that the City Water Company transferred to the Austin Water, Light & Power Company its contract with the city of Austin for the rental of hydrants, and that the city acquiesced in this transfer without question, so far as the record shows, and that during all this period, as found by the verdict of the jury, the Austin Water, Light &

Power Company complied substantially with its contract with the city to furnish the hydrants with water. It makes a clear case of consent on the part of the city to the transfer of the contract, and a consent which we think is binding. It is urged, however, that this contract is not one which could be enforced against the city, unless it could be also enforced against the water, light and power company, and that the company is not bound by, and could not be held to a compliance with, the contract. We do not think this is true. The new company purchased from the old company its property, rights, contracts, privileges, and franchises, and went forward at once to carry out the contract with the city. We see no reason whatever for the claim that the obligations of this transferee company and the city were not correlative. If, as we believe, under the facts in the case, the city can be required to pay for the water, we think the Austin Water, Light & Power Company could be required to furnish it. The case of Fergus Falls Water Co. v. City of Fergus Falls (C. C.) 65 Fed. 587, was a suit for the rent of hydrants, and is interesting in connection with the question raised here. One sentence in that decision is exceedingly appropriate, as follows: "The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome."

The contract between the city and the City Water Company gave the city the right at the expiration of 10 years thereafter to purchase the waterworks, and, after providing the method for bringing about such purchase, stipulated that, in case the city did not purchase the waterworks, "then all the rights and privileges of this contract granted to said City Water Company shall be extended to said company, its successors or assigns, for a further term of twenty years thereafter." It is urged on the one hand that this expression, "its successors or assigns," was used in the sense which indicated that there might be successors and assigns of the City Water Company at the time the city took advantage of this option, which would imply the understanding and agreement that the contract was assignable at any time. On the other hand, it is urged that this only contemplated that the new contract might be made with a successor or assigns, or that such new contract might be itself afterwards assignable. We think the right of the Austin Water, Light & Power Company to collect the hydrant rentals exists, for the reasons given above, without deciding this latter question, which we shall not undertake to discuss.

Other errors are assigned, which need not be considered, for the reason that the case is controlled and must be determined on the undisputed facts and the law applicable thereto, as has been indicated. The judgment of the circuit court was right, and should be affirmed.

BROWN *v.* CITY OF OWOSSO.

(*Supreme Court of Michigan, Feb. 27, 1901.*)

[85 N. W. Rep. 256.]

Personal Injury—Defective Sidewalks—Sufficiency of Complaint.

A notice by one injured by an alleged defect in a city street, which states that she was tripped by a loose plank on the sidewalk, which caused her to fall and to receive the injuries complained of, is a sufficient compliance with Comp. Laws, § 3173, requiring the notice to the city of such an injury to state the manner in which it occurred.

Same—Same—Notice of Injury—Sufficiency of Notice.

Under Comp. Laws, § 3173, requiring the notice of injuries received through the defective condition of city streets to substantially state that the person receiving the injury intends to hold the city liable for such damages as may have been sustained, a notice that the person injured believes she is entitled to $5,000 for the injuries so received is sufficient, in the absence of a request for a more specific notice.

Same—Notice of Claim—Estoppel of City Council to Reject.

Where the notice of an injury received from a defective sidewalk, required by Comp. Laws, § 3173, to state substantially the time when, and the place where, the injury took place, and the manner in which it occurred, and the extent thereof, and that the person injured intends to hold the city liable for damages, contains a reasonably definite statement of the circumstances, and that the injured person is entitled to certain damages, the city council cannot refuse to act thereon till after the time for filing notice, and then reject the claim for informality in the notice filed.

Error to circuit court, Shiawassee county; Stearns F. Smith, Judge.

Action by Minnie Brown against the city of Owosso for injuries received through a defect in a sidewalk of the defendant city. From a judgment in favor of the defendant, the plaintiff brings error. Reversed.

Selden S. Miner (Spaulding, Norton & Dooling, of counsel), for appellant.

Watson & Chapman, for appellee.

HOOKER, J. The plaintiff brought an action growing out of an injury received by her through a fall upon a board sidewalk in the city of Owosso. That city is incorporated under the general law, sections 3081 and 3173 of the Compiled Laws being involved in this cause. They are as follows:

"Sec. 3081. The council shall audit and allow all accounts chargeable against the city, but no account or claim or contract shall be received for audit or allowance, unless it shall be accompanied by a certificate of an officer of the corporation, or an affidavit of the person rendering it, to the effect that he verily believes that the services therein charged have been actually performed or the property delivered to the city, that the sums charged therefor are reasonable and just, and to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are endorsed or referred to in such account or claim; and every such account shall exhibit in detail all the items making

up the amount claimed and the true date of each. It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city for personal injuries or otherwise, that it has never been presented, certified to or verified as aforesaid, to the council for allowance."

"Sec. 3173. The council shall have supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks and public grounds within the city, and shall cause the same to be kept in repair, and free from nuisance. No city subject to the provisions of this act shall be liable in damages sustained by any person in such city either to his person or property by reason of street, sidewalk, crosswalk, or public highway, situated in such city, unless such person shall serve or cause to be served within sixty days after such injury shall have occurred, a notice in writing upon the clerk or deputy clerk of such city, which notice shall set forth substantially the time when and place where such injury took place, the manner in which it occurred and extent of such injury as far as the same has become known, and that the person receiving such injury intends to hold the city liable for such damages as may have been sustained by him."

The record discloses that the following notice was filed within 60 days: "Minnie Brown, being duly sworn, deposes and says that on Sunday evening, May 29th, 1898, about the hour of nine p. m., as she was returning to her home from the Baptist Church in the city of Owosso, and was passing along and was upon the sidewalk in front of lot one, block two, on Oliver street, in the city of Owosso, she was tripped up by a loose plank upon the sidewalk which passes along upon the south side of Oliver street, in said city. By reason of being tripped up by said plank, she fell upon her right knee and right side and hip, severely injuring her knee and her ankle, and injuring her right shoulder, right arm, and her right hip, and that portion of her right side in front and above the hip joint, and injuring herself internally, at and near that place. At the time she was pregnant with child, and her injuries were so great that it produced a miscarriage, and that for a long time her life was despaired of, and that she was compelled, in order to save her life, to employ two physicians and a nurse. That, although at the present time she is much improved, yet she is informed by her physicians, and so believes the truth to be, that her injuries are permanent. That said accident was caused without any negligence upon her part whatever, as she was passing along upon said sidewalk in a careful and prudent manner. That for her said injuries she believes she is entitled to the sum of five thousand dollars. She further says that said accident occurred as above set forth; that the sums charged therefor are reasonable and just; and that, to the best of her knowledge and belief, no set-off exists, nor payment has been made on account thereof,

except such as are indorsed or referred to in such account or claim. Minnie Brown. Subscribed and sworn to before me this 2d day of July, 1898. Clifford H. McCurdy, Notary Public." This notice was submitted to the common council at its next meeting, and the claim was referred to a special committee. Early in September, 1898, the committee reported in favor of disallowing the claim, giving no reason therefor. The 60 days had then expired. It is alleged that on April 10, 1899, the plaintiff filed her claim with the clerk, properly sworn to, and this was referred to a committee on claims and accounts, who recommended that it be not allowed. It was so ordered by the vote of the council.

After the opening statement by plaintiff's counsel, the defendant's counsel objected to the introduction of any testimony, and this was sustained, and the court directed a verdict in favor of the defendant. The notice appears in the declaration. Both parties treat the case as depending upon the notice and action of the council. Counsel for the defendant contend that the notice was insufficient, while plaintiff's counsel deny this, but allege that, if defective, the defect was waived by the council. The alleged flaws in the notice are (1) that the manner in which the accident occurred is not sufficiently set forth; (2) that it does not assert an intention to hold the city liable for such damages as she sustained.

Counsel contend that the notice shows no negligence upon the part of the city, and that it does not state that the walk was defective, or that one of its boards was loose, but that she was injured by falling over a loose plank lying upon the sidewalk. We think this a technically correct construction of the language, though most people would understand that the words "loose plank" referred to a plank of the walk which had become loosened. Had the words been transposed, so as to state that she had been tripped upon the sidewalk by a loose plank, it would have been a more definite statement, though even that would not have excluded the inference that the plank might not have been one that was not at any time a part of the walk. This notice is not a pleading, and we are of the opinion that the requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice, especially in view of the evident intention that a substantial statement should be sufficient, and the serious consequences of reliance upon a defective notice until after the expiration of the 60-day period.

Again, her statement that she believed herself entitled to $5,000 therefor was not the language used by the statute, but the only inference from the filing of this notice was that she was setting up a claim for $5,000 against the city based upon an injury caused by her falling over a loose board in its sidewalk. No doubt every councilman so understood it, and that would be sufficient were the paper a notice of a defense accompanying a plea. We are not prepared to say that the

council might not have required a more specific notice before taking action, but it did not.

It was forcibly urged that the council was under no obligation to consider the question until a proper notice was filed, and that it was incumbent upon it to point out defects. It may be that a notice that does not contain substantial averments in compliance with the statute, as where some statement was wholly wanting, would not impose any duty upon the council to consider it, and might justify it in simply disallowing the claim at its convenience. We do not pass upon that question, but we think where, as in this case, the notice is sufficiently specific to contain a reasonably definite statement of time, place, manner, and extent of the accident to apprise the council of the main facts, and that the injured person is entitled to specific damages by reason thereof, it is sufficient to set the council in motion, and relieve the plaintiff from the charge of noncompliance with the law as to notice. The cases cited are, as counsel claim, somewhat different from this, but there is a tendency shown to treat a notice as sufficient, though it be not technically accurate, when measured by the statute, strictly construed. Thus, in Germaine v. City of Muskegon, 105 Mich. 216, 63 N. W. 78, the plain intimation is given that, to avail itself of such an objection, the disallowance should have been based upon that defect. Inferentially, at least, it would seem to imply that this must be done seasonably, so as to permit a new notice, if possible. Any other inference would involve the conclusion that, after the expiration of the 60-day period, the rights of the city would depend upon the manner of stating its disallowance of a claim for a liability that had ceased to exist, if it had ever existed. The judgment is reversed, and a new trial ordered. The other justices concurred.

TATTAN *v.* CITY OF DETROIT.

(*Supreme Court of Michigan, Nov. 12, 1901.*)

[87 N. W. Rep. 894.]

Personal Injuries—Notice of Claim—Sufficiency.

Under the charter of the city of Detroit (chapter 11, § 46), as amended (Loc. Acts 1895, No. 463), requiring, previous to an action against the city for negligent injury, a written notice specifying the nature thereof, a notice of claim for damages "sustained by reason of personal injuries" fails to sufficiently specify the nature of the injury.

Same—Same—Statute Requiring, to Be Strictly Construed.

Detroit City Charter, c. 11, § 46, as amended (Loc. Acts 1895, No. 463), requiring written notice of claim for negligent injuries as a condition precedent for an action against the city, being in derogation of common right, should be strictly construed.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Tattan *v.* City of Detroit

Action by Catherine Tattan against the city of Detroit. Judgment for defendant, and plaintiff brings error. Affirmed.

Warner & Codd, for appellant.

P. J. M. Hally (Timothy E. Tarseny, of counsel), for appellee.

MONTGOMERY, C. J. This is an action for personal injuries. The sole question presented in the case is whether the plaintiff served a notice upon the corporation counsel such as is required by the amendment to the charter of the city of Detroit, being section 46 of chapter 11 of the charter, as amended. This section reads as follows: "No action shall be brought against said city, nor any of its boards, commissioners or officers, for any negligent injury, unless it be commenced within one year from the time when the injury was received, nor unless notice shall be given in writing, within three months from the time of such injury, to the head of the law department, or to his chief assistant, of the time, place and cause of such injury, and of the nature thereof. The provisions of this section shall not be a bar to a suit, however, for any injury for which there is now a lawful cause of action, but for every such injury suit shall be commenced within six months from the time when this act shall take effect." Loc. Acts 1895, No. 463. The injury to the plaintiff occurred on the 5th of July, 1897, and on the 17th of August, 1897, the following notice was served on the head of the law department: "Detroit, Aug. 17, 1897. Hon. Charles Flowers, Corporation Counsel, Detroit, Mich.—Sir: You are hereby notified that on the seventeenth day of August, 1897, I filed a claim against the city of Detroit for the sum of five thousand dollars ($5,000), and petitioned the common council of the said city to pay me the said sum, as a just compensation for damages sustained by me by reason of personal injuries received on July 5, 1897, by my falling on a defective sidewalk in the said city. Said defective sidewalk was on July 5, 1897, situated on the south side of Cherry street, between Sixth and Seventh streets, and extending from Seventh street to the first alley east of Seventh street. Yours, etc., Mrs. Michael Tattan, 15 Johnson Street, Detroit, Mich." There can be no doubt that this notice sufficiently described the time, place, and cause of the injury, but the learned circuit judge was of the opinion that the nature of the injury was not sufficiently specified. This statute is one in derogation of common right. It should not be construed with liberality against the right of an injured party to maintain an action against the city, but, on the other hand, should receive a reasonably strict construction. By other provisions of the charter it is incumbent upon an injured party to present his claim to the common council, and the case is then open to full investigation. This, as well as the notice to the head of the law department, must precede the institution of suit. As

was said by the court in Brown v. City of Owosso (Mich.) 85 N. W. 256, "The notice is not a pleading, and the requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice, especially in view of the evident intention that a substantial statement should be sufficient, and the serious consequences of reliance upon a defective notice until after the expiration of the sixty-day period." See, also, Wheeler v. City of Detroit (Mich.) 86 N. W. 822; Wilton v. City of Flint (Mich.) 87 N. W. 86. But, while the rule for construing this notice is thus liberal, we cannot ignore an express requirement of statute. The statute, in terms, requires that the nature of the injury shall be stated in this notice. Beyond the fact that it is an injury to the person, rather than to property, there is no attempt in this notice to state the nature of the injury at all. We are of the opinion that this is not a compliance with the statute. The case of Lord v. City of Saco, 87 Me. 231, 32 Atl. 887, is directly in point upon this question. See, also, Brown v. Town of Southbury, 53 Conn. 212, 1 Atl. 819.

The judgment will be affirmed. The other justices concurred.

WILTON *v.* CITY OF FLINT.

(*Supreme Court of Michigan, July 19, 1901.*)

[87 N. W. Rep. 86.]

Personal Injuries—Defective Sidewalk—Notice of Claim—Sufficiency.

Under Flint City Charter, § 42, requiring notice of an injury from a defective sidewalk to state substantially the time when, and place where, the injury took place, a notice stating that the injury sustained on a certain date was received on a defective sidewalk on the north side of C. street, in front of No. 326 W. C. street, is sufficient.

Same—Same—Declaration—Sufficiency.

A declaration for injuries sustained on a defective sidewalk, averring that the walk was originally constructed of cement, which had been taken up, leaving a depression, on either side of which were placed planks, which were old and warped, and describing with particularity the manner of the injury, sufficiently apprises the city of plaintiff's claim.

Same—Same—Contributory Negligence.

Where plaintiff, who was not aware of the condition of the sidewalk, was injured by a fall which occurred while he was trotting along in the dark with his hands in his overcoat pockets, it was for the jury whether he was negligent in so passing along the street.

Same—Same—Measure of Damages.

In an action for injuries occasioned by a defective sidewalk, the court may properly instruct that, if plaintiff is entitled to recover at all, he may recover for injuries received in the past, that which he endures at present, and which he is likely to endure in the future, so far as they are covered by the declaration.

Error to circuit court, Genesee county; Charles H. Wisner, Judge.

Action by Herbert Wilton against the city of Flint. From a judgment for plaintiff, defendant brings error. Affirmed.

Daniel Heims (Ed. S. Lee, of counsel), for appellant.
Black & Brown, for appellee.

LONG, J. This action was brought to recover damages for injuries received March 18, 1899, on a claimed defective sidewalk. Plaintiff filed a claim with the common council of the city on April 5, 1899, in which he set forth his injuries. This claim was disallowed, and on May 25, 1899, the present suit was commenced. At the commencement of the trial before the jury defendant objected to any testimony being given, for the reason that there was no claim filed with the council in conformity to the provisions of the charter; that neither the claim, affidavit attached thereto, nor the declaration gave the defendant any notice of the particular place on the sidewalk where the injury occurred; that defendant did not have notice of the particular defect. The court stated to counsel: "I think the paper shown me, which I understand is the one that is offered in evidence, is a sufficient compliance with section forty-two of the charter, and I therefore overrule the objection so far as that is concerned." The notice referred to states: "I hereby notify you that I have sustained injuries, and have a claim against the city of Flint for such injuries, received on the 18th day of March, 1899, on a defective sidewalk on the north side of Court street, in front of the residence of Dr. Rice, or nearly in front of the same, the place where such injury occurred being in front of the lot on which said residence is located, said residence being No. 326 West Court street, Third ward of city of Flint." The notice gives the time of day when the injury occurred, and then states: "My left foot struck against some plank or obstruction on said walk, and I was thrown with great violence upon said walk, by reason of which I was unable to rise from the place where I had fallen. * * * That said walk was out of repair, and naturally unsafe for travel. * * * That by reason of said fall I was severely wrenched, strained, and bruised. My right hip bone, as I am informed, was broken and dislocated from its socket. That I have sustained severe and painful injury to the spinal cord, * * * have lost the use and control of my lower limbs, and have become helpless. * * * That I claim damages from the city of Flint to the amount of $30,000, and have appointed Black & Brown, of Patterson Building, Flint, to represent me and act as my attorneys in all matters pertaining to this claim." This claim was sworn to by plaintiff, and duly served on the common council of the city.

Section 42 of the charter (Loc. Acts 1897, p. 575) referred to by the court below provides: "It shall be a sufficient defense in any court to any action or proceeding for the collection of any demand or claim against the city for personal injuries or otherwise that it has never been presented to the council for allowance," etc. This provision, when wholly set out, is almost identical with the provisions of the city of

Owosso, referred to in Brown v. City of Owosso (Mich.) 85 N. W. 256; and a fuller and more specific description of the place of the injury is set out in the notice in the present case than was there set out. It was held in that case that the notice was sufficiently specific to apprise the council of the claim made. We think the notice in the present case sufficient.

The declaration charges that the walk was originally constructed and built as a cement walk, and had been taken up in the fall of 1898, leaving a depression in the walk of from four to six inches below the surface of the adjoining lot; that planks from four to six inches wide had been placed on each side of such depression in said walk; that said planks were old, warped, and dished in shape, turning up at the ends, and were disconnected at the end of each plank; that some of the ends of the plank as thus placed flared upward, and arose above the level of said depression from two to three inches, causing the same to be unsafe. The third count describes the manner of the injury with particularity. We think the declaration sufficiently apprised the defendant of plaintiff's claim, and that the court was not in error in overruling the motion. The cause was fully tried before the jury, who returned a verdict in favor of plaintiff for $5,000.

It is contended that, under the plaintiff's own testimony, he was not entitled to recover. He testified substantially that he had lived in Flint over 20 years; that he was 65 years of age, but well and strong before the injury; that he left home on the morning of the injury about 5 or half past 5 o'clock; that it was dark, but there was some snow on the ground; that he was trotting along; that it was slushy and raining a little; that he had on a fur coat, and both hands in his breast pockets, way up high; that he kicked his foot, but did not fall from that, but partly recovered himself, and if he had had a good place to step could have done so, but his foot went through the walk or down between the boards. The witness continued: "I don't know which one. I don't know which way I fell, I fell so quick. I was walking quick. I don't known whether I fell forwards or backwards or sideways, but I had both hands in my pockets, and when I went to pick myself up I was lying up by the walk." We think it cannot be said that the court should have directed the verdict in favor of the defendant. It was a question for the jury to determine whether the plaintiff was guilty of contributory negligence in passing along this walk in the manner he did. It appears the plaintiff was not aware of the condition of the walk at that place at that time.

It is contended that the court was in error in instructing the jury as follows: "A person who receives an injury can have but one right of action. When he comes before a jury once, that is the end of his case; and therefore, if he is entitled to recover at all, he is entitled to recover for the injuries he has

received in the past, that which he endures at present, and that which he is likely to endure in the future, so far as they are covered in the declaration." It is claimed that this charge was misleading, as it would lead the jury to believe that, unless a judgment was rendered in his favor, his right of action would cease. The proofs show that the plaintiff was severely injured, and that he was still suffering from such injuries. We think the court was not in error in this charge. We have examined all the claimed errors, and find no error in the case. The judgment must be affirmed. The other justices concurred.

WENTINK *v.* BOARD OF CHOSEN FREEHOLDERS OF PASSAIC COUNTY.

(*Supreme Court of New Jersey, Feb. 25, 1901.*)

[48 Atl. Rep. 609.]

Municipal Contracts—Irregularity—Quantum Meruit—Benefits Received.*

Where a contract within the power of a public corporation is set aside for irregularity, there may be recovery, as on a quantum meruit, against such corporation for work and materials furnished under such contract before legal attack, irrespective of any benefit derived therefrom.

Same—Same—Same—Measure of Recovery.

In such a case, the recovery may include expenditure to secure such materials pending the proceedings attacking the contract.

Same—Measure of Recovery.

The measure of recovery should be in proportion to the contract price, but, in the absence of contrary proof, fair cost will be deemed an equivalent.

(Syllabus by the Court.)

Action by Adrian Wentink against the board of chosen freeholders of the county of Passaic. Case certified on special findings of fact. Judgment for plaintiff.

Special findings: On May 13, 1896, the Passaic county freeholders awarded a contract for the masonwork of a bridge, which it had legal power to build, to Stanley & Shire, the lowest bidders, with a proviso that the contractors should furnish a bond satisfactory to the director of the board. On June 2, 1896, the board passed a resolution which, after reciting that Stanley & Shire had failed to sign the contract awarded them or to furnish a satisfactory bond, awarded a contract for such masonwork to Adrian Wentink, the next lowest bidder, subject to the opinion of the counsel of the board on the legality of such action. The counsel being of opinion that the course adopted was legal, a formal contract was signed, and Wentink began work. On July 14, 1896, when he had reasonably expended $525 in the execution of the contract, Stanley & Shire procured and served upon

*See note appended to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. p. 740.

Wentink and the freeholders a rule to show cause why a certiorari should not issue to review the action of June 2, 1896, which rule directed that proceedings under the Wentink contract should be stayed. A writ was in due course allowed, and under it the contract was set aside. In the meantime Wentink had reasonably expended $75 in attempting to secure materials previously furnished, but the county derived no benefit from either expenditure. Had Wentink completed his contract, his clear profit would have been $1,500. Wentink brought suit for his expenditure and his profits. The cause was tried, by consent, without a jury, before Mr. Justice Dixon at the Passaic circuit, and comes before this court on special finding of the facts above stated, with alternative conclusions, as this court shall determine the law.

Argued November term, 1900, before DEPUE, C. J., and DIXON, GUMMERE, and COLLINS, JJ.

Eugene Emley, for plaintiff.
De Witt C. Bolton, for defendant.

COLLINS, J. It is unquestionable that the recitals of the resolution awarding a contract to the plaintiff, if legally established against derelict bidders, would have fully justified the action reprobated by the court. This is declared in the opinion read on the decision of the certiorari. The only reason for not upholding such action was that, being quasi judicial in its nature, it could not lawfully be taken without notice to Stanley & Shire, who would be directly affected thereby. Stanley v. Passaic Co., 60 N. J. Law, 392, 38 Atl. 181. There was therefore no lack of power to make the contract with the plaintiff. The fatal defect was in an irregular exercise of such power. It would be too much to hold every contractor with a public body to a scrutiny, at his peril, of the corporate proceedings. All that he need look to is the power to make the ostensible contract. Bigelow v. City of Perth Amboy, 25 N. J. Law, 297; Knapp v. City of Hoboken, 38 N. J. Law, 371; Tappan v. Long Branch Commission, 59 N. J. Law, 371, 35 Atl. 1070; Moore v. Mayor, etc., 73 N. Y. 238.

The question in this case, then, is as to what must befall one whose contract, through no fault of his own, is, by force of law, annulled while yet unperformed. Clearly, he cannot sue on the contract, for it has no legal existence. This disposes of any claim of the present plaintiff for profits. But, until set aside, the contract was, as between the parties to it, entirely valid, and its annulment subjected those parties to all just equities. Where there is a prevention of performance of a valid contract, through the fault of a defendant, the measure of the plaintiff's damages is generally, for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and, in respect to the work not done, such profit as he would have realized by doing it. Kehoe v. Borough of Rutherford, 56 N.

J. Law, 23, 27 Atl. 912. In the case in hand the performance of the contract was not prevented by the fault of the defendant, but by vis major. The making of the contract was, however, induced by such fault, and on its annulment the defendant should answer, as on a quantum meruit, for the work done thereunder. This obviates the difficulty existing in that class of cases where a blameless party is entitled to recover for what has been done or furnished under a contract, not legally enforceable, that the other party refuses to perform. In such cases recovery depends upon benefit, and perhaps is limited to benefit. Banker v. Henderson, 58 N. J. Law, 26, 32 Atl. 700. In such a case as the present, benefit is entirely aside.

The implied assumpsit on which we rest our decision will arise against a public corporation as well as against an individual or a private corporation. Dill. Mun. Corp. § 383; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153. The cases that bar recovery against a public corporation, on an implied assumpsit, rest either on a lack of power to make an express contract or a failure to exercise it. Swackhamer v. Town of Hackettstown, 37 N. J. Law, 191; New Jersey Car-Spring & Rubber Co. v. Jersey City (N. J. Err. & App.) 46 Atl. 649.

As to the measure of the quantum meruit for the work done, the contract rate should govern. In the absence of any contrary proof, fair cost will be deemed an equivalent. The present plaintiff is therefore entitled to recover on that basis, and, by parity of reasoning, he should be allowed his expenditure in attempting to secure the materials that had been furnished when his contract was stayed. That expense was a mere incident to the other. The plaintiff could not abandon his contract, because it was challenged. It was his duty to preserve the status of the work pending the litigation. His obligation to perform his contract was not removed until the final determination of the cause. It might be that he would be called on to perform it. He should, therefore, recover for all the expenditure and interests. The total, by the special finding, appears to be $730. Let judgment be entered accordingly.

STATE *ex rel.* COOPER *v.* SPRINGER *et al.*

(*Court of Errors and Appeals of New Jersey, March 4, 1901.*)

[48 Atl. Rep. 605.]

Statutes—Enacting Clause to Be Construed in Subordination to Title.

The enacting clauses of a statute must be construed in subordination to its title. It can have no legal effect beyond the scope of its title.

Municipal Indebtedness*—Power of Legislature to Compel Payment of Debt Contracted during Previous Illegal Existence.

It is competent for the legislature to make provision to constrain a

*See extensive note appended to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 721.

municipal corporation to take proceedings for the payment of debts contracted during its previous illegal existence.

Same—Same—Validity of Statute—Constitutional Law.

The act of March 24, 1899 (P. L. 1899, p. 534), under the title "An act relating to certain illegal borough governments, requiring the payment of their debts," cannot authorize the creation of a permanent borough, but it is constitutional for the purpose specified in its title. The authority apparently granted in excess of that in the enacting clauses must be exscinded from the enactment.

(Syllabus by the Court.)

Error to supreme court.

Application by the state, on the relation of Howard M. Cooper, for writ of mandamus to Edward W. Springer and others, members of the common council of the borough of Cape May Point. Judgment denying writ, and relator brings error. Reversed.

Norman Grey, for plaintiff in error.

Howard Carrow and D. J. Pancoast, for defendants in error.

VAN SYCKEL, J. Cooper, the relator, asks for a mandamus to compel the defendants to appoint a tax collector and a tax assessor to raise and pay moneys sufficient to discharge a judgment recovered by relator. In 1885, it was attempted to incorporate Cape May Point as a borough under "An act for the formation of borough governments in seaside resorts," approved March 29, 1878 (1 Gen. St. p. 254). A borough government was organized pursuant to said act, and, as such, contracted debts, including that of the relator. At November term, 1889, of the supreme court, the act was declared unconstitutional. State v. Borough of Somers Point, 52 N. J. Law, 32, 18 Atl. 694. In 1891 there was an attempt made to reorganize Cape May Point under "An act for the formation and government of boroughs," approved April 2, 1891 (1 Gen. St. p. 236). This act was also unconstitutional, and at November term, 1895, the said borough was dissolved on quo warranto, at the instance of the attorney general, by the judgment of the supreme court, since which time its officers have ceased to exercise any municipal functions. By "An act relating to boroughs and borough commissioners," approved April 21, 1896 (P. L. p. 339), the acts of 1878 and 1891 were repealed, and thereby every borough established under either of said acts, and which was then a de facto corporation exercising corporate powers, was created a borough, to be governed by the general borough act of April 5, 1878 (1 Gen. St. p. 179). This act of 1896 was held to be constitutional in Kennedy v. Borough of Belmar, 61 N. J. Law, 20, 38 Atl. 756, but it cannot apply to Cape May Point, because at the time of its enactment Cape May Point was not a borough de facto, exercising corporate powers, as it had been previously extinguished by quo warranto proceedings. On the 24th of March, 1899, the legislature passed an act entitled "An act relating to certain illegal borough governments, re-

quiring the payment of their debts" (P. L. 1899, p. 534). Under this law the application was made to the supreme court to compel the appropriate borough officers to raise money by taxation to pay the claim due to the relator. This application was denied by the supreme court on the ground that the title of the act disclosed no purpose to create a municipal government; that all that is distinctly expressed is the purpose to require the payment of the debts of illegal borough governments. This judgment of the supreme court is brought into this court for review by the writ of error in this case. 46 Atl. 589.

The first question presented is whether a writ of error will lie. The defendants rely upon the case of American Transp. & Nav. Co. v. New York, S. & W. R. Co., 59 N. J. Law, 159, 35 Atl. 1118. That was the case of a private corporation, and not within the act giving a writ of error to public corporations exercising governmental functions (2 Gen. St. p. 2002). This case is within that act, and is subject to review by writ of error. I fully agree with the opinion of the supreme court that the title of the act of 1899 is not broad enough to authorize the erection of a permanent municipal government in Cape May Point, but I do not understand that to be the purpose of this legislation, or that the act is necessarily faulty because of its title being imperfect. While the enacting clauses of the act, taken apart from its title, are broad enough to authorize the establishment of municipalities with all the attributes of borough governments, such is not its operation and effect under the title, which the constitution declares shall express its object. In Hendrickson v. Fries, 45 N. J. Law, 563, this court held "that under the provision of our constitution the title of a statute is not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law. It can have no effect with respect to any object that is not expressed in the title,"—citing Rader v. Union Tp., 39 N. J. Law, 509; Evernham v. Hulit, 45 N. J. Law, 53. In the latter case it was ruled that the act entitled "A further supplement to an act entitled 'An act constituting courts for the trial of small causes,'" passed March 17, 1882 (P. L. 1882, p. 137), applies to judgments recovered before justices of the peace in suits cognizable before a justice under the act to which it is a supplement, and to that extent is constitutional, although it is unconstitutional with respect to appeal in bastardy and desertion cases, for the reason that to that extent the object of the act is not expressed in the title. That the enacting clauses of a statute must be construed in subordination to its title is adjudged also in Dobbins v. Northampton Tp., 50 N. J. Law, 496, 14 Atl. 587, and in Allen v. Commissioners, 57 N. J. Law, 303, 31 Atl. 219. Applying this established rule of interpretation to this statute, the apparent power in the enacting clauses to create a permanent borough is exscinded, and its sole effect is to invest Cape May Point

with municipal power for the purpose of collecting taxes to pay the debts incurred under its previous illegal organization. That purpose is fully disclosed by the title of the act, and in that view it is constitutional, and without infirmity. The power of the legislature to make such provision for the payment of municipal debts is fully recognized in Rader v. Union Tp., 39 N. J. Law, 509. The act of 1899 furnishes appropriate machinery to that end. When the object stated in its title has been accomplished, its existence as a borough will terminate. Any attempt to exercise under this legislation a wider power can be restrained by the appropriate remedy. In reaching this conclusion the fact has not been overlooked that the act of March 24, 1899, applies only to the then existing boroughs of the class to which it relates. The case of Bennett v. Common Council, 55 N. J. Law, 72, 25 Atl. 113, and the several cases therein referred to, are instances where the class would, in the future, in the ordinary and regular course of events, be increased and added to. This case is not within the reason of the rule which condemned the legislation in those cases. The courts cannot, with proper respect for a co-ordinate branch of the state government, pronounce a statute to be infirm on the presumption that the legislature may, in the future, pass unconstitutional laws. In the case of Kennedy v. Borough of Belmar, supra, the act of April 21, 1896, which applied only to boroughs and borough commissions theretofore formed in good faith, was upheld as valid legislation. In my judgment, there should be a reversal in this case, and the award of a mandamus as applied for.

ADAMS *v.* CITY OF WATERVILLE.

(*Supreme Judicial Court of Maine, April 16, 1901.*)

[49 Atl. Rep. 1042.]

Municipal Indebtedness—Constitutional Limit*—Recovery for Work and Labor.

In an action against a municipality to recover for services performed, where the employment of the plaintiff by proper authority and his performance of the services are admitted, and where the defense set up is that the city could not create this liability under the constitution of this state, because of the fact that its debts and liabilities in the aggregate already exceeded 5 per centum of the last regular valuation of the city, exclusive of temporary loans to be paid out of money raised by taxation during the year in which they were made, the burden of proving this fact is upon the defendant.

Evidence—Finding of Fact.

Held, that the evidence in this case did not show this to be the fact, and that consequently a verdict for the plaintiff was properly ordered. (Official.)

Exceptions from supreme judicial court, Kennebec county.

*See note appended to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. p. 721.

Adams *v.* City of Waterville

Action by George G. Adams against the city of Waterville. Verdict directed for plaintiff, and defendant excepts. Exceptions overruled.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, FOGLER, and POWERS, JJ.

S. S. & F. E. Brown, for plaintiff.
D. P. Foster, City Sol., for defendant.

WISWELL, C. J. Action of assumpsit upon an account annexed to the writ, wherein the plaintiff sues to recover a balance due him for services performed by him as an architect in drawing and submitting plans for a proposed city hall, and for some other services in connection therewith. At the trial, after the evidence upon both sides was closed, the court ordered a verdict for the plaintiff. The case comes here upon the defendant's exception to this ruling.

It was not questioned that the plaintiff was duly employed in behalf of the city by competent authority, or that he performed the services sued for, and no question was raised as to the amount of his bill for such services. The only ground of defense is that, at the time this liability of the defendant was created by the employment of the plaintiff, or by his performance of the services, the indebtedness of the city of Waterville was already in excess of the 5 per centum of the city's valuation limited by the constitutional amendment.

It is unnecessary to consider whether or not, if the liability created by the plaintiff's employment and performance was to be paid for as soon as the services were performed, and was thus a cash transaction, it would come within the inhibition of the provision of the constitution, because the case does not show that this liability, in the aggregate with previous debts or liabilities, exceeded 5 per centum of the last regular valuation of the city. The burden of proving that this was the case, and that, therefore, the municipality could not create this liability, was clearly upon the defendant, as was decided by this court in Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141. This defense having been set up by the defendant, it was incumbent upon the defendant to prove by competent testimony that the city could not create this liability because of the fact that its debts or liabilities, in the aggregate with this liability, exclusive of debts or temporary loans made in anticipation of the collection of taxes, and "to be paid out of money raised by taxation during the year in which they were made," amounted to more than 5 per centum of the last regular valuation of the city.

This the defendant failed to prove. The plaintiff was employed on August 8, 1896. A witness called by the defendant testified that the bonded indebtedness of the city in August, 1897, was $205,000, and that the matured and unpaid coupons at that time amounted to $5,500. There was no testimony that during the year 1897 the city of Waterville had any other

indebtedness or liability of any kind. The same witness testified, in answer to a question, that in August, 1896, there were outstanding interest-bearing notes of the city amounting to $74,650, but there was no evidence that in 1896 the city had any other debt or liability than the amount of these outstanding notes. The last regular valuation of the city of Waterville prior to August, 1896, was $4,710,774, 5 per centum of which is $235,538.70. The valuation of the city for the year 1879 is not shown in the case. So far as the case shows, therefore, the city's indebtedness in 1896 did not equal 5 per centum of the valuation of the city for that year by a large amount, while the indebtedness of 1897 did not equal 5 per centum of the valuation of the preceding year by about $30,000.

If the inquiry in relation to the indebtedness of the city for these two different years, instead of as to the aggregate of such indebtedness at any one time, was accidental, still, so far as the case shows, the outstanding notes of the city in 1896 may have been for money borrowed in anticipation of the payment of taxes, and to be paid out of the taxes collected in that year; so that in that respect the defendant did not satisfy the burden of proof resting upon it to show that this liability, in the aggregate with other liabilities, not including money so borrowed for temporary purposes, was in excess of the constitutional limit.

Exceptions overruled.

CORE *v.* CITY OF NORFOLK.

(*Supreme Court of Appeals of Virginia, Feb. 7, 1901.*)

[37 S. E. Rep. 845.]

Opening Streets—Condemnation Proceedings—Bona Fide Effort to Agree on Terms as Condition Precedent.

Attempts of a city to get information from property owners as to the probable cost of opening a street, so as to enable the council to pass on the expediency of making the improvement, are not bona fide efforts to agree on terms of purchase, as required by Code, c. 46, § 1074, before condemnation proceedings will lie. The efforts to agree on terms must be made "after" the council has determined to make the improvement.

Error to corporation court of city of Norfolk. Action by the city of Norfolk against one Core. From a judgment for plaintiff, defendant brings error. Reversed.

Walke & Old, for plaintiff in error.

Walter H. Taylor, for defendant in error.

BUCHANAN, J. These proceedings were instituted under chapter 46 of the Code by the common and select councils of the city of Norfolk for the purpose of condemning certain lands of the plaintiff in error for its uses as a street.

By section 1074 of that chapter it is provided that, "if * * * the council of a city * * * cannot agree on the terms of purchase with those entitled to lands wanted" for its purposes, it may institute condemnation proceedings in the proper courts.

Under the provisions of that section the councils of the city of Norfolk had no authority to institute, and the court had no jurisdiction to entertain, any proceeding to condemn the lands wanted, until after the councils had made an attempt to purchase them from the plaintiff in error, and the parties had been unable to agree upon terms of purchase. This is conceded by counsel for the defendant in error, but, if it were not, it is well settled that such provisions are regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the courts can exercise their compulsory powers to deprive the owner of his land, but the party instituting such proceedings must show affirmatively such compliance. Cooley, Const. Lim. (6th Ed.) 648, 649; Lewis, Em. Dom. § 301; Mills, Em. Dom. § 105. See City of Charlottesville v. Maury, 96 Va. 383, 386, 31 S. E. 520; Painter v. St. Clair, 98 Va. --, 34 S. E. 989.

The plaintiff in error in the inception of the proceedings denied that the councils of the city had made any bona fide effort to agree upon the terms of purchase for his lands, and objected to the appointment of commissioners; but the court, after hearing evidence, overruled his objection. This action of the court is assigned as error.

It appears that at a meeting of the councils some days prior to the 4th of March, 1899, the following resolution was passed:

"Whereas, it may be deemed expedient by the councils of the city of Norfolk to open and extend Tripoli street from the northern side of Wolf street to the southern side of Freemason street, between Brewer and Granby streets, as shown on a map drawn by W. T. Brooke, City Engineer.

"And whereas, the councils are desirous of knowing at what price so much of the real estate in said city as is not offered by the owners thereof to be donated may be obtained, which will be necessary to extend, lay out, and open said street, in order that they may determine whether to acquire the same by purchase or by condemnation, if either be expedient:

"Therefore, be it resolved by the common and select councils of the city of Norfolk that the board of street, sewer, and drain commissioners are hereby instructed to find out who are the owners of the said property necessary to extend Tripoli street, as shown on said map, from the northern side of Wolf street to the southern side of Freemason street, between Brewer and Granby streets, and that they confer with such owners in regard to the city obtaining the necessary property either by purchase or donation.

"And that the said board are directed to report to the council, as soon as convenient, who are the owners of such property, and at what price it, or any portion thereof, may be obtained."

Pursuant to that resolution the board of street, sewer, and drain commissioners made the inquiries directed, and reported the result to the councils of the city. After securing that information the councils passed the following resolution:

"Whereas, it is deemed expedient by the councils of the

city of Norfolk to open Tripoli street 60 feet wide from Wolf street to Bute street, as shown on a map in the city engineer's office called 'Plan of Proposed Extension of Tripoli Street.'

"And whereas, the councils of the city of Norfolk cannot agree on the terms of purchase with those entitled to the land necessary to so open Tripoli street as aforesaid, except with Dr. Livius Lankford, R. A. Dodson, and C. M. Ferguson, for the lands owned by them, respectively:

"Therefore, be it resolved by the common and select councils of the city of Norfolk, a majority of the members elected to each council concurring, that the city of Norfolk, for the purpose of so opening Tripoli street as aforesaid, do proceed at once to institute condemnation proceedings for all the property described as follows."

After the councils had decided that it was expedient to open and extend Tripoli street, and had determined to acquire the lands wanted for that purpose, no effort was made to purchase the lands of the plaintiff in error.

The correspondence between the board of street, sewer, and drain commissioners and the plaintiff in error under the "resolution of expediency" is relied on to show that the councils had made an effort to purchase the lands of the plaintiff in error, and that they could not agree upon the terms of purchase. But that is clearly insufficient to show a compliance with the statute. At that time the councils had neither the right nor the desire to acquire the lands, for they had not yet determined to open and extend the street. The object of that correspondence was not to agree upon terms of purchase, but to get information as to the probable cost of opening and extending the street, so as to enable the councils to pass upon the expediency of making the improvement. It was the duty of the councils, after determining to open and extend the street, to make a bona fide effort to agree upon terms of purchase with the plaintiff in error for the lands wanted. Having failed to do this, the corporation court was without jurisdiction, and should have sustained the objection of the plaintiff in error to the appointment of commissioners, and dismissed the proceedings.

The judgment complained of must be reversed, and the proceedings be set aside, and this court will enter such order of dismissal as the corporation court ought to have entered.

STATE *ex rel.* BECKHAM *v.* TAYLOR.

(*Supreme Court of Tennessee, June 24, 1901.*)

[64 S. W. Rep. 766.]

Streets—Extent of City's Title Acquired by Dedication.

A city does not own the fee in land dedicated to its use as a street, but only a nontransferable easement therein, and hence a conveyance by the board of mayor and aldermen of a fee in a portion of a street passes no title.

Same—Sale of Street—Power of Mayor and Council to Convey Fee-Simple Title.

Shannon's Code, § 1915, subsec. 8, conferring power on the board of mayor and aldermen of municipal corporations to sell and dispose of streets and alleys if deemed expedient, relates only to such streets and alleys as the corporation owns as so much realty, and not to those in which it has a mere easement.

Same—Same—Abandonment—Reversion to Owner of Ultimate Fee.

Where the board of mayor and aldermen of a city executed a deed purporting to pass a fee in a street in which the city owned only an easement, the conveyance, though passing no title, was an abandonment of the city's right, so that the land reverted to the owner of the ultimate fee.

Same—Easement of City—Power of Mayor and Council to Abandon.*

Under Acts 1881, c. 167, § 1, authorizing the board of mayor and aldermen of Union City to "alter, abolish, widen, and establish streets and alleys," such board has power to abandon the city's easement in any part of a street.

Same—Trespass after Abandonment—Injunction—Interest of Relator.

Where a city has abandoned its easement in a street, it has no further interest therein, and a mere citizen, not the owner of the ultimate fee, cannot maintain injunction to prevent trespass.

Appeal from chancery court, Obion county; Jno. S. Cooper, Chancellor.

Bill by the state, on the relation of D. W. Beckham, against G. T. Taylor. From a decree granting an injunction, defendant appeals. Reversed.

Hamilton Parks and R. P. Whitesell, for appellant.

R. E. Maiden, Lannom & Stanfield, and J. W. Lewis, for appellee.

CALDWELL, J. This is a bill by the state of Tennessee, on relation of D. W. Beckham, to enjoin G. T. Taylor from erecting a business house on ground alleged to be a part of a public street. The chancellor granted the relief sought, and the defendant appealed.

In the year 1885, Gen. G. W. Gibbs, owner of the land, laid off and platted a town, which he called "Union City." He sold lots according to his plan on both sides of the numerous streets, including Washington avenue, and in 1867 the town so established, with certain additions, was incorporated by that name. Washington avenue was the broadest of all the streets, being 100 feet wide at every point from one end to the other. It runs east and west, and is intersected by several north and south streets, the easternmost of which is Depot street, and the next, to the westward 120 feet, is First street. Beck and Bransford owned a large part of the block of ground bounded by those two streets, Washington avenue, and its first parallel street on the south, some 500 feet distant. They abutted on the south side of Washington avenue 120 feet, the full width of the block, and had other lots southward. From the east, and opposite that block, near the

*See Douglass *v.* City Council of Montgomery, 1 Mun. Corp. Cas. 253, and note.

middle, Harrison street entered Depot street, and there terminated. Such was the situation for years. In 1884 Harrison street was extended through that block directly west to First street; and the width of Washington avenue, for the distance between Depot street and First street, was diminished in the manner, for the purposes and upon the considerations disclosed in the following deed, namely: "Know all men by these presents, that by virtue of the following ordinance of the mayor and aldermen of the corporation of Union City, Tennessee, passed Dec. 2, 1884, and the consideration therein expressed, the said Beck and Bransford having of this date conveyed to the mayor and aldermen of Union City, by their deed, the said right of way for Harrison street to First street, as therein set forth. Said ordinance is as follows: 'Council Room, Dec. 2, 1884. Board met in regular session. Present: Mayor Moore, Aldermen Bransford, Deitzel, Ownby, and Shoffner. Minutes read and adopted,' etc. 'On motion and second, the following ordinance was passed and ordered spread on the minutes, viz.: "Be it ordained by the board of mayor and aldermen of the corporation of Union City, that it is the manifest interest of the corporation that Harrison street be extended west to First street, and Beck and Bransford are the owners of the property through which said street would run, if so extended; and whereas, that portion of Washington avenue between First street and Depot street is wider than necessary, and Beck and Bransford are willing to exchange with the said corporation the right of way through their said property for a portion of the said Washington avenue: It is therefore ordered by the board that the following described portion of Washington avenue is hereby condemned, set aside and conveyed to the said Beck and Bransford, to wit: Beginning in the south line of Washington avenue at the intersection of the east line of First street, this point being the northwest corner of Beck and Bransford's furniture factory lot; runs thence north with the east line of First street 41 feet, to a stake; thence east 120 feet, to the west line of Depot street; thence south 41 feet, to the south line of Washington avenue; thence west 120 feet, to the beginning. In consideration of the transfer of the above property to Beck and Bransford, they have agreed and bound themselves to convey to the corporation of Union City through its mayor and aldermen the above mentioned right-of-way for the extension of Harrison street through to First street by the following bounds, to-wit: Beginning at the northwest corner of Frank Maney residence lot; thence north 41 feet; thence east 120 feet, to Depot street; thence south with Depot street 41 feet, to Maney's northeast corner; thence west 120 feet, to the beginning. And it is further ordered by the board of mayor and aldermen that when the said Beck and Bransford shall have executed their deed to the said right-of-way to the said corporation, that the mayor and recorder of this corpora-

tion are hereby authorized, empowered and instructed to make and execute to the said Beck and Bransford a deed in fee to that portion of Washington avenue being set forth and described above, such deed to contain the general covenants and warranty the right to hold and forever use and dispose of and warranty title," etc. "Be it further ordained, that this act take effect from and after its passage of this day and date. Jno. Barry, Recorder. J. M. Moore, Mayor." ' Therefore, in compliance with and in furtherance of said ordinance, that portion of Washington avenue as set forth and described in said ordinance is hereby conveyed to the said Beck and Bransford in fee, to them and their heirs and assigns, with covenant of general warranty, that the same is unincumbered, that the right herein exists to so convey, that the quiet and peaceful possession is guarantied, and that the title to the same be warranted to the said Beck and Bransford and their heirs and assigns by the said mayor and aldermen of Union City and their successors in office against the lawful claims of all persons whatsoever; and we further certify that the foregoing ordinance, as herein set forth, is a true and perfect copy of the original, as shown by the minute book of the said board of mayor and aldermen of Union City, Tennessee. Witness our signatures, this Dec. 4th, 1884. J. M. Moore, Mayor. Jno. Barry, Recorder."

The board of mayor and aldermen promptly extended Harrison street as indicated, and since that time the extension has been continuously regarded and used as a part of one of the public streets of the town. Beck and Bransford without delay erected a large brick building upon that part of Washington avenue conveyed to them, and they and their successors in title ever afterwards, and until this action was commenced, in September, 1899, held, used, claimed, and enjoyed the same as their own exclusive property. The defendant, Taylor, is the last vendee. At the time the bill was filed he had about completed the demolition and removal of the old building, with a view of replacing it with a new one at once. The charges on which he has been perpetually enjoined are, in substance and effect, that the ordinance and deed under and by which the board of mayor and aldermen undertook to convey a part of Washington avenue to Beck and Bransford were ultra vires, and void, and hence that neither they nor any of those claiming under or through them acquired any title whatever to that strip of ground; that it is still a part of a public street, and as such should be protected against the erection of the contemplated building, which could but be an obstruction to public travel upon one of the principal thoroughfares of the town, and therefore a nuisance to the entire community. In a very lengthy answer the defendant controverts those charges, affirms the validity of the assailed ordinance and deed, and also pleads estoppel and abandonment.

It is obvious, under our law, that the ordinance and deed in question were ineffective to pass title to any portion of Washington avenue to the intended vendees—First, because the corporation did not own the fee in the street; and, secondly, because the easement which it did own was not subject to sale and conveyance. The corporation had only the right to use this street for street purposes. That was the extent of the dedication, and the board had no authority to exceed its limits. The platting of the territory and sale of the lots by the original owner in the manner heretofore recited vested the streets as such, not otherwise, in the municipality, and at the same time passed to the respective lot purchasers the ultimate fee in the soil to the center of the streets on which they severally abutted. Hamilton Co. v. Rape, 101 Tenn. 225, 47 S. W. 416; Railroad Co. v. Bingham, 87 Tenn. 530, 11 S. W. 705, 4 L. R. A. 622; Smith v. Railroad Co., 87 Tenn. 630, 11 S. W. 709. By force of its character and the general law, the corporation, upon its organization, became endowed with the proprietorship of the streets, which it received in trust as easements for the convenience of the public. Humes v. Mayor, etc., 1 Humph. 403, 34 Am. Dec. 657; Mayor, etc., v. Brown, 9 Heisk. 1, 24 Am. Rep. 289; Railroad Co. v. Bingham, 87 Tenn. 530, 11 S. W. 705, 4 L. R. A. 622; Smith v. Railroad Co., 87 Tenn. 630, 11 S. W. 709. So the corporation had only an easement in Washington avenue, and that, from its nature, was incapable of alienation and passage to an individual. Hence, to repeat what has already been remarked, the ordinance and deed relied on by the defendant were inoperative, as to the fee, because the corporation did not own it, and, as to the easement, because it was not transferable. It is true, the amended charter (Acts 1881, c. 167, § 1), and also the general statute (Shannon's Code, § 1915, subsec. 8), confer on the board of mayor and aldermen power "to sell and dispose of them [streets and alleys] if deemed expedient," and that the board seems to have deemed this sale expedient; but that power relates alone to such streets and alleys as the corporation may in fact own as so much realty, and not to those in which it has a mere easement; otherwise the provision would be void for repugnancy to section 21 of article 1 of the constitution, in that its effect would be to permit the municipality to take the ultimate fee in the soil from the true owner without compensation, and pass it to its vendee.

There is another aspect of the case, however, that is not so favorable to the complainant. Although the corporation's attempted sale and conveyance were unauthorized in law, and ineffective, as such, to pass any title from itself to its vendees, its action in that connection was, nevertheless, in legal contemplation and in fact, an abandonment of its easement in so much of Washington avenue, and through that abandonment the strip of ground in question ceased to be a part of the

public street, and by operation of law reverted to the owner of the ultimate fee. By competent terms of the amended charter (Acts 1881, c. 167, § 1; Code Union City, p. 5, § 7) the board of mayor and aldermen of the town was clothed with plenary power "to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean and repair streets and alleys." In this instance, with all requisite formality, it extended Harrison street, and altered Washington avenue at the same time. The ordinance adopted expresses the judgment of the board with respect to the expediency of both changes, and distinctly defines the extent of each; the combined action being based on the twofold proposition "that it is to the manifest interest of the corporation that Harrison street be extended," as stated, and that "Washington avenue, between Depot street and First street, is wider than necessary" by 41 feet. After so reciting the judgment of the board upon the facts, the ordinance continues: "It is therefore ordered by the board that the following described portion of Washington avenue is hereby condemned, set aside and conveyed to Beck and Bransford, to wit" (describing the strip of ground here in dispute). That ordinance and the surrender thereunder to Beck and Bransford constituuted an abandonment of that portion of the street, and left open as a street, at that point for 120 feet, only the remaining 59 feet of the original width. The fact that the board deemed Washington avenue at that point and for that distance "wider than necessary" afforded a sufficient legal reason for making it narrower; and the action of the board, indicated by the other words of the ordinance "condemned," and "set aside" (which, in this connection, means the same as "vacated" or "excluded from the future limits of the street"), was within its power, being clearly embraced in each of the charter words "alter" and "abolish." The board first decided that the particular part of Washington avenue was "wider than necessary," and then vacated and sold the excess. The sale was unauthorized and invalid, the vacation authorized and valid. Payment of a consideration gave no virtue to the unauthorized sale, nor detracted anything from the force of the vacation. The legal effect of vacation is the same with or without compensation. It inevitably terminates the municipal easement, and causes a reverter to the owner of the ultimate fee, whoever he may be. This board had the power to determine for the municipality and the entire public how much of Washington avenue was needed for street purposes, and to reject the balance; and the courts, though feeling, as we do, that this change greatly impaired the beauty and symmetry of the town, are without jurisdiction to revise its judgment in that matter, or to compel it to maintain the street from one extremity to the other at its original width. Not only did the board presiding in 1884 condemn and set aside, or vacate, or reject, or abandon, or discontinue this part of the street as unnecessary for the

public use, but no succeeding board seems to have raised a dissent in any form, and the present one is shown to have declined to do so by even the slightest participation in this litigation. The corporation stands by its action, taken more than 15 years ago, and the suit proceeds with only a private citizen and individual property owner as relator. Authorities are abundant for the proposition that a municipal corporation, being the state's representative, may ordinarily vacate, discontinue, or abandon its easement in a street or part thereof, whenever, by its proper board, found to be unnecessary for public use. Dill. Mun. Corp. (4th Ed.) § 666; Elliott, Roads & S. (2d Ed.) § 871; Lewis, Em. Dom. § 134; Rand. Em. Dom. 409; Anderson v. Turbeville, 6 Cold. 150, 157; Moffitt v. Brainard (Iowa) 26 L. R. A. 828, note (s. c. 60 N. W. 226). But, of course, this does not mean that the rights of abutting owners affected by the change can be lawfully ignored, for such rights must in each case be reasonably preserved, or compensation paid for the injury done them. Elliott, Roads & S. §§ 871, 877; Lewis, Em. Dom. § 134; Moffitt v. Brainard (Iowa) 26 L. R. A. 828, note (s. c. 60 N. W. 226). The last observation, however, is of small moment to the relator, since his property does not abut on Washington avenue, but is situated on other streets,—Mary and Depot,—more than 500 feet away. Though not technically deraigned, the title of Beck and Bransford to the lot abutting on that part of Washington avenue vacated and surrendered to them is assumed throughout the record, and not disputed. But, whether they or some one else in fact owned that lot with the ultimate fee to the center of the street, the result of this litigation, so far as the complainant is concerned, must be the same, since that act of the corporation terminated its easement in the vacated part of the avenue, and left it no interest therein to be protected by the court's decree.

Let the decree below be reversed, the injunction dissolved, and the bill dismissed, for the reason that the territory involved was long since vacated, abandoned, and excluded from Washington avenue by the only tribunal having power to determine the requisite width of public streets.

STATE *ex rel.* BELT *v.* CITY OF ST. LOUIS.

(*Supreme Court of Missouri, Feb. 19, 1901.*)

[61 S. W. Rep. 658.]

Litter Receptacles in Streets—Contract for, Must Comply with Charter Requirements—Recommendation of Improvement Board—Letting to Lowest Bidder.

Under St. Louis City Charter, art. 6, § 27, declaring that the assembly shall have no power to contract for any public work or improvement, but the board of public improvements shall prepare and submit estimates, and under the direction of ordinance advertise and let contracts to the lowest bidder, City Ordinance 19,984, directing the board of

public improvements to erect and maintain boxes on the streets to serve as receptacles for litter, and to contract therefor, being a public work, was invalid, it not being recommended by the board, or passed on estimates submitted by them.

Same—Same—Contract to Be Made upon Recommendation of Public Improvement Board.

St. Louis City Charter, art. 6, § 17, provides that the board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all highways. Section 27 declares that the assembly shall have no power to contract for any public work, but the board shall submit estimates and let contracts. Section 28 enacts that "every ordinance requiring such work shall contain a specific appropriation from the revenue fund": *held*, that section 28 was simply another limitation on the assembly, and did not permit them to pass an ordinance requiring the board to make a contract for public work consisting of boxes erected on the street as receptacles for litter, merely because the cost therefor was borne by the contractor in return for the privilege of posting advertising on the boxes, so that no appropriation therefor was necessary; but such contract was controlled by sections 17 and 27, and could only be made under ordinance on recommendation and estimates by the board.

Same—Posting Advertisements Thereon—Subjecting Street to Private Use.*

St. Louis City Ordinance 19,984, requiring the board of public improvements to erect boxes on the streets as receptacles for litter, and to contract with a contractor to erect such boxes in consideration of the exclusive privilege of posting advertisements thereon, is invalid as an attempt to subject the public streets to a purely private use.

Same—Same—Mandamus—Will Not Lie to Compel Board to Enter into Contract under Invalid Ordinance.

St. Louis City Ordinance 19,984 required the board of public improvements to contract with a certain person or his assigns for the erection on the streets of boxes as receptacles for litter, on terms allowing such person the exclusive privilege of posting advertisements on such boxes; but the ordinance was not passed on any specifications submitted by the board, and none were provided by the ordinance: *held*, that mandamus would not lie to compel the board to make the contract, as the court would not specify the number, design, etc., of boxes to be erected.

Same—Same—Invalid Ordinance—Object Not Expressed in Title.

St. Louis City Ordinance 19,984, entitled "An ordinance authorizing, directing and empowering the board of public improvements to erect and maintain at suitable locations on the streets boxes or receptacles for the collection of litter, and to contract with B. or assigns to erect said boxes or receptacles without cost to the city," provided that, in consideration of the erection of said boxes by B., he was to be granted the exclusive privilege of posting advertisements thereon, without which privilege the contract would be worthless: *held*, that the ordinance was void, as not expressing the object in the title.

Sherwood and Marshall, JJ., dissenting.

In banc. Application for mandamus by the state, on the relation of Fred R. Belt, to compel the city of St. Louis and the board of public improvements to enter into a contract with the relator in pursuance of a city ordinance. Denied.

G. B. Webster, for relator.

H. A. Haeussler, A. B. Shepley, and Chas. S. Reber, for respondent.

GANTT, J. This is an original proceeding of mandamus instituted in this court to compel the board of public improve-

*See note at end of case.

ments of the city of St. Louis to enter into a contract with relator for the erection and maintenance for 10 years of boxes to be placed in the streets of said city, to be used by relator for advertising purposes, and by the city of St. Louis for the purpose of holding any waste paper that might be thrown on said streets. On the return of the writ respondents city of St. Louis and Emory S. Foster filed returns, alleging, among other matters, that they were not proper parties to the suit. On the same day the remaining respondents, the board of public improvements of St. Louis, filed a motion to quash the alternative writ for the reason that relator's petition failed to state facts which entitled him to any relief; thus raising at once the question as to the validity of the ordinance set forth in his petition. The ordinance which relator claims imposes a plain, legal duty on said board, which duty it has refused to perform, is as follows:

"19,984. An ordinance authorizing, directing and empowering the board of public improvements of the city of St. Louis to erect and maintain, at convenient and suitable locations upon the streets and public places of said city, boxes or receptacles for the collection, casting and temporary deposit therein of such waste paper or other litter as now are or are likely to be cast upon said streets or public places, and to contract with Fred R. Belt, or his assigns, to erect and maintain said boxes or receptacles, for the purposes aforesaid, without cost or expense to the city.

"Be it ordained by the municipal assembly of the city of St. Louis, as follows:

"Section 1. The board of public improvements of the city of St. Louis is hereby authorized, directed and empowered to erect and maintain, at such convenient and suitable locations, upon the streets and public places of said city, as may, from time to time, be designated by said board, suitable boxes or receptacles for the collection, casting and temporary deposit of such waste paper or other litter as now are or are likely to be cast upon the streets or public places of said city, and to provide and arrange for the cleaning and keeping clean of such boxes and receptacles, and the removal of such waste paper and other litter; and to accomplish the purposes aforesaid said board of public improvements is hereby authorized, directed and empowered to enter into a contract with Fred R. Belt, or his assigns, for the exclusive right of said Belt, or his assigns, to erect and maintain, at such convenient and suitable locations upon the streets and public places of said city as may be designated from time to time by said board, suitable boxes or receptacles for the collection, casting and temporary deposit therein of such waste paper or other litter as now are or are likely to be cast upon the streets or public places of said city, and to provide and arrange with said Belt, or his assigns, for

the cleaning and keeping clean of such boxes or receptacles, and the removal of such waste paper or other litter.

"Sec. 2. The contract with said Belt or his assigns is to be made for and during the full term of ten years from and after the execution of the contract.

"Sec. 3. It shall be specified in said contract with said Belt, or his assigns, that the said Belt or his assigns, during the term aforesaid, erect, renew and maintain said boxes or receptacles at all such locations upon any of the streets and public places of said city as may, from time to time, be designated by said board of public improvements, without cost to said city for the erection or maintenance of said boxes or receptacles, or for keeping said boxes and receptacles clean.

"Sec. 4. That for and in consideration and as full compensation to said Belt, or his assigns, for erecting, maintaining and keeping clean all said boxes or receptacles, said Belt, or assigns, are to have and possess all waste paper and other litter cast and deposited in said boxes or receptacles: and are also to have the exclusive right and privilege to place advertisements on such boxes or receptacles, for the benefit of himself or assigns: provided, however, that no advertisement which is of an immoral or disreputable character shall be placed thereon; and provided that all advertising signs shall be made of tin or other metal, and no bill or advertisement on paper is to be posted upon said boxes or receptacles; and provided, further, that no advertisement of any kind shall be placed on any of said boxes or receptacles until the same shall have first been submitted to and approved by the board of public improvements of said city.

"Sec. 5. In consideration of the granting of the privileges aforesaid to said Belt, or his assigns, said Belt, for himself and his assigns, agree, during the continuance of the contract provided for as aforesaid, to submit a quarterly statement to the register of the city of St. Louis, showing the amount collected in each quarter for the advertisements placed on said boxes or receptacles, and to pay in to the city treasurer of the city of St. Louis, at the end of each quarter, fifteen per cent. of the gross receipts received by the said Fred R. Belt, or his assigns, during the lifetime of the franchise granted by this ordinance.

"Sec. 6. Said Fred R. Belt, or his assigns, shall, in connection with said contract, give his or their bond in the penal sum of five thousand dollars, with two or more sureties, to be approved by the mayor and council, conditioned for the observance of all said terms, provisions and conditions, and for the prompt submission of said quarterly statement, and the prompt payment of all sums of money herein by him and his assigns agreed to be paid.

"Sec. 7. Where a remonstrance is filed by a majority of the residents of any block or blocks in the city against the erection

of any box or boxes, as described in this ordinance, then it shall be unlawful to place said box or boxes on said block or blocks.

"Sec. 8. If said Fred R. Belt, or his assigns, shall fail to make true and correct returns of receipts as aforesaid, or shall fail to keep said boxes in a sanitary condition to the satisfaction of the street commissioner, or shall fail to clean out said boxes daily, he shall forfeit all rights granted herein.

"Approved March 19, 1900."

The validity of the ordinance requiring "the board of public improvements" to enter into the contract with relator, Belt, for the exclusive right to erect and maintain boxes to be placed upon the streets and public places of St. Louis for the collection and temporary deposit of waste paper and other litter must be determined by the charter of St. Louis. So much of section 27 of article 6 of the charter as is pertinent to this inquiry is in these words: "The assembly shall have no power directly to contract for any public work or improvement or repairs thereof, contemplated by this charter, or to fix the price or rate therefor; but the board of public improvements shall, in all cases, except in case of necessary repairs requiring prompt attention, prepare and submit to the assembly estimates of cost of any proposed work, and, under the direction of the ordinance, shall advertise for bids as provided for purchases by the commissioner of supplies, and let out said work by contract to the lowest responsible bidder subject to the approval of the council. Any other mode of letting out work shall be held as illegal and void." This article of the charter has been considered by the St. Louis court of appeals in Cole v. Skrainka, 37 Mo. App. 427, in an opinion by Judge Rombauer, in which he says: "The board of public improvements of the city of St. Louis are the agents of the city in regard to all street improvements. All ordinances for such purposes must emanate from the board." Rev. St. 1879, p. 1608, §§ 14–16. "The assembly had no power to contract, either directly or indirectly, for any public work." Section 27, p. 1610, Rev. St. 1879. "The ordinances are all framed by the board. * * * It is an initial and necessary step of the contract," etc. Judge Bond dissented upon another point, and that case came to this court, and the opinion of Judge Rombauer was affirmed. Cole v. Skrainka, 105 Mo. 303, 16 S. W. 491; Verdin v. City of St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. In City of St. Louis v. Gleason, 89 Mo. 67, 14 S. W. 768, a condemnation proceeding under a charter provision akin to this came before this court, and the counsel for the property owners insisted that the judgment must be reversed, because "the ordinance failed to show that it was passed upon by the unanimous recommendation of the board of public improvements, or on the petition of the owners of the major part of the property fronting on the proposed street"; citing article 6, § 2, of the St. Louis

charter. This court unanimously ruled that the municipal assembly had no power to act, no jurisdiction over the subject-matter, until directed by the board of public improvements, or the owners of a major portion of the ground fronting on the proposed street. Until such action was taken by the board of public works or the owners of the ground, there was no authority in the assemby to pass the ordinance. By section 17 of the same article 6 it is provided that "the board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all streets, alleys and highways and for the construction of cross-walks, and no ordinance therefor shall be passed without such recommendations."

With this understanding, then, of the charter and the construction placed upon it by the courts, let us inquire, first, what is the purpose of Ordinance No. 19,984? Clearly, it is twofold: to clean the streets of waste paper or other litter, and to give Belt the exclusive right to use the boxes for advertising purposes for 10 years. The ordinance was not recommended by the board of public improvements, and they deny the power of the assembly to pass and enforce it. If the ordinance provides for public work, within the meaning of the charter, it must be held void. The cleaning of a public street is so obviously a public work that it requires no argument to make it more so. Unless the purpose was to rid the streets of an unseemly appearance by removing the loose paper and litter, no reason can be perceived why the assembly shall have entertained the matter at all. If such was the purpose of the ordinance, it involved a public duty and a public work, which the assembly sought to cast upon a public body, the board of public improvements. If the ordinance was not enacted to subserve a public purpose, the assembly had no power or authority to impose the duty it did on the board of public improvements, whose functions are public. But, as the charter required the board to recommend the ordinance, and prohibited the passage of an ordinance without its recommendation in the first instance, the ordinance was invalid for this, if no other, reason. Counsel for relator, however, insists that the assembly is forbidden to contract for public work only when the work is to be paid for out of the city treasury, because section 28 of article 6 provides that "every ordinance requiring such work to be done shall contain a specific appropriation from the revenue fund," etc.; and, as this ordinance does not contemplate the expenditure of public funds, sections 17 and 27 of article 6 do not apply to the ordinance in question. We do not so construe section 28 of article 6. In our opinion, it was simply another limitation upon the assembly, and not upon section 27. Section 27 expressly prohibits the assembly from directly contracting for "any public work contemplated by this charter," which necessarily includes the street cleaning mentioned in section 17. The purpose of the freeholders in thus restricting the assembly

is manifest and twofold. They sought to create a board whose experience and ability would especially fit it for the duty of contracting for a vast system of public improvements, and whose estimates should guide the assembly in entering upon them; and, secondly, to guard against extravagance by requiring that, before public work was ordered to be done, there should be expert estimates made thereof. The argument of counsel for relator is strikingly similar to that of counsel in State v. Barlow, 48 Mo. 17. In that case a contract had been awarded to one Henry for lighting, cleaning, and repairing the street lamps of St. Louis for one year. It was assigned to Dunn with the consent of the city, and extended from year to year. At the time the contract was awarded, the charter did not require public work to be let to the lowest bidder, but prior to the last renewal the charter was so amended. After the amendment the city entered into a new contract with one Zeider, and the comptroller, having signed Zeider's contract, refused to countersign Dunn's extension. Thereupon Dunn brought a proceeding for mandamus in this court to compel the comptroller to countersign his contract. It was admitted there (as it must be here) that, if Dunn's contract was for public work, it violated the amended charter. But it was insisted then, as it is now by relator, that the charter did not apply to that particular contract. The argument is reported thus: "The meaning of section 17, article 8, Amendment Charter, approved March 4, 1870, is obvious: (1) The council shall not contract directly, but may contract indirectly, for work indicated in that section, after plans, profiles, estimates, advertisements, and bids approved by the council. (2) But no work, improvement, or repairs mentioned in that section is to be let out after advertisements and bids, unless it be of nature to admit of plans, profiles, and estimates of costs. That is perfectly clear. Section 18 enforces the same view wherein it says every ordinance requiring such work shall contain a specific appropriation from the proper revenue or fund, based on an estimate of cost. Now, what is meant by such work? Evidently that of which profiles and plans may be made and submitted." This is precisely the same argument that is now made. Section 18 of the amendment of 1870 (now section 28) provides that every ordinance involving such work shall make an appropriation therefor, and requires plans and specifications to be prepared, and an estimate of the cost made. It was argued in that case that the contract did not contemplate public work, because the work to be done did not admit of plans and specifications, and that by section 18 only work that did so admit was public work. Here it is said that the contract does not involve public work, because the ordinance requiring it to be done does not contain an appropriation therefor, and that only work to be done under an ordinance so requiring is public work under the charter. This

court rejected the argument in Dunn's Case, and held that, although that particular contract did not call for plans, profiles, and estimates of cost, the spirit of the ordinance and the amended charter required specifications and competitive bids, and denied the assembly or city council the power to contract directly for such work. Counsel cite State v. City of St. Louis, 56 Mo. 277, but very candidly admit it is open to criticism, because it was ruled that the ordinance and amended charter required the city engineer to make the plans and estimates, and let to the lowest bidder, only when the work was to be done by the city, and paid out of the city treasury, and did not require such plans, specifications, and estimates, and competitive bidding when the work was done by ordinance and contract of the city, to be paid by property holders. This distinction—if it can be so denominated—condemns the whole decision. In either case it was clearly public work, and, if the principle of competitive bidding should ever be applied and enforced, it is when the city makes public improvements at the expense of the owners of private property. So, in this case, this provision of the charter in section 27—one of the most admirable and salutary in the charter—applies in full force. The cleaning of the streets had been especially confided to the board of public improvements. If deemed advisable to have boxes or receptacles for waste paper or litter, it was eminently proper that the board should specify the character, size, and material out of which they should be made, and an estimate of the number to be required, and the contract should be let to the lowest bidder, and without these essential prerequisites no valid ordinance could be passed.

But there is another view to be taken of this ordinance. It subjects the public streets to a purely private purpose, to wit, the advertising of individual business and enterprises. Can the city devote its streets to such a purpose? We hold that it cannot. The charter gives the city power "to regulate the use of the streets." Under this grant it may, it is true, not only regulate the travel thereon, but it may allow gas, water, and sewer pipes to be laid therein, and permit telegraph and telephone poles to be erected therein, because all of these uses are consistent with the use for which they are dedicated or condemned. Schopp v. City of St. Louis, 117 Mo. 136, 22 S. W. 898, 20 L. R. A. 783. But it has been held by this court that it has no power to lease out portions of the street for huckster stands and stalls. The "public highways belong from side to side and end to end to the public," and the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler, "and the abutting property owner has the right to the free and unobstructed passage to and from his property." Schopp v. City of St. Louis, 117 Mo. 136, 137, 22 S. W. 898, 20 L. R. A. 783; Sherlock v. Railway Co., 142 Mo. 172, 43 S. W. 629; Knapp, Stout & Co. v. St. Louis

Transfer Ry. Co., 126 Mo. 26, 28 S. W. 627; Schulenburg & Boeckeler Lumber Co. v. St. Louis, K. & N. W. R. Co., 129 Mo. 455, 31 S. W. 796. And it was held in Glaessner v. Association, 100 Mo. 508, 13 S. W. 707, that a franchise to lay a railroad track in a street must be for a public, and not for private, purposes. Referring now to the ordinance, it will be observed that it confers upon Belt the exclusive right to place advertisments on such boxes for the benefit of himself and his assigns. In a word, the city has attempted to farm out its sidewalks and streets to a private person for advertising. Belt is free to make his own charges for advertising. No power is reserved to the city, even if it were a purpose to which it could devote the streets, to regulate the charges for advertisements. The legislative authority of the city could not thus be delegated, nor could it abdicate its control over the public streets, held by it in trust for the public, and create a monopoly in favor of one advertiser. Matthews v. City of Alexandria, 68 Mo. 115; Cooley, Const. Lim. (6th Ed.) 247-253; Gale v. Village of Kalamazoo, 23 Mich. 344; City of Oakland v. Carpenter, 13 Cal. 540.

But it is said that it is no objection to a public franchise that its owner may derive a private gain therefrom. This is unquestionably true when the use is public, and the gain arises out of that use; such as street cars, telegraph and telephone lines. In this case, however, the pecuniary profits to Belt arise from a source wholly distinct from any public use. They will not flow naturally from his right to erect and maintain boxes for waste paper, but solely from a distinct privilege in which the public are not interested, to wit, his exclusive right to use the streets for advertising purposes, a purely private and collateral enterprise. We are clear that the streets cannot be devoted to such a private purpose.

With what sort of propriety or fairness can the city farm out to Belt and his assigns the right to erect a box on a sidewalk in front of a business house, and not only thus deprive the proprietor, who has been compelled to construct the sidewalk and pay for improving the street in front of his premises, of the free access, ingress, and egress from his store, but to advertise the goods of a rival in the same line of business? The question furnishes its own answer. The city had no such power.

We have considered the two paramount purposes of this ordinance separately, and our conclusion is that the cleaning of the streets is a public duty, required to be accomplished by public work, and the charter negatives the power of the assembly to directly contract therefor, but it must be first recommended by the board, as required by the charter. Second. The city has no power to let out the sidewalks and streets to a private person for advertising purposes, even though he should pay it a per cent. of the property; and the combining of these two illegal purposes in one ordinance does

not make it valid. The Julia Building Case, 88 Mo. 258, State v. Schweickhardt, 109 Mo. 496, 19 S. W. 47, and the Subway Case, 145 Mo. 551, 46 S. W. 981, have no bearing on the questions here decided. The Julia Building Case and the Subway Case were put upon the distinct ground that they were public uses, and the Schweickhardt Case involved only the validity of any ordinance granting him the privilege of selling refreshments in Forest Park. This court held that a park was a place devoted to amusement, comfort, and recreation of the public; that the power to regulate parks included the power to make all reasonable regulations to promote such objects.

2. This is a proceeding for a writ of mandamus to compel the board of public improvements to make a contract with Belt for the erection of boxes or receptacles in which to put waste paper and other litter on the streets. The relative duties of the board and Belt are not defined in the ordinance, save as to certain restrictions, but, as the board have been denied their charter privilege and duty of making the necessary specifications and estimates, how can this court proceed to make the contract for the parties by commanding the board to contract for a certain number of boxes of a certain dimension and of certain material. Suppose Mr. Belt desires the boxes large enough to properly advertise a circus, and the board should think such boxes would constitute an unsightly obstruction of the sidewalk, amounting to a nuisance to the merchant who does business in the abutting building, are we to determine it by our peremptory writ? We do not think the writ can be used to subserve such a purpose.

3. It remains only to consider the further contention that this is clearly a franchise legislation, and as thus construed it is not obnoxious to the objection that it attempts to grant a monopoly of the advertising business in the streets of St. Louis, or that it is a grant of an exclusive privilege. While its purpose was obviously to grant an exclusive privilege, and without this privilege the contract would be wholly undesirable and profitless, no intimation that such was its purpose is disclosed in its title, and it falls within the rule laid down by this court in City of Kansas City v. Payne, 71 Mo. 162, wherein it was aptly said, "The body of the bill expresses its object; the title disguises and conceals it." The city was, moreover, without authority, as already said, to grant such a franchise. The alternative writ must be held to have been improvidently granted, and it is therefore ordered quashed, and the proceeding dismissed, at the cost of relator.

BURGESS, C. J., and ROBINSON, BRACE, and VALLIANT, JJ., concur. SHERWOOD and MARSHALL, JJ., dissent.

MARSHALL, J. This is an original proceeding by mandamus to compel the board of public improvements of St.

Louis to enter into a contract with relator pursuant to the provisions of an ordinance of the city numbered 19,984. That ordinance, briefly stated, authorizes and directs the board of public improvements to erect and maintain at such convenient and suitable locations upon the streets as the board may designate suitable boxes or receptacles for the collection and temporary depositing of such waste paper or other litter as is or is likely to be cast upon the streets, and to provide for keeping such boxes clean, and for the removal of such deposits; and, to accomplish the purpose intended, the ordinance directs the board to enter into a contract for 10 years with relator to erect, maintain, and keep clean such boxes, and to remove such litter at the relator's expense, and without cost to the city at all. The consideration to the relator for such work, labor, and expense is that he shall have the right to place on such boxes such advertisements, made of tin or other metal, as might be approved by the board of public improvements, but not such as are of an immoral or disreputable character. The ordinance required relator to make quarterly statements of the amount he receives from such advertisements and to pay the city 15 per cent. of such gross receipts. The ordinance prohibits the erection of such boxes on any block or blocks if a majority of the residents of the block remonstrate against it. It also provides that the relator shall give a $5,000 bond to secure performance of the contract on his part, and for a forfeiture of his rights if he fails to make true and correct returns of receipts, or fails to keep the boxes in a sanitary condition, or fails to remove such deposits from such boxes daily. The defendants set up three grounds for refusing to enter into such a contract: (1) That the ordinance is void, because it requires the board of public improvements to make a contract with relator which involves public work; (2) that the ordinance is void because it undertakes to grant to relator the right to use the streets for a private purpose; and (3) that the ordinance is void because it contains more than one subject.

Every one will at once concede that, if all or any of these objections is well taken, the ordinance is void. If the ordinance involves any public work or improvement, or repairs thereof, it is void, for section 27 of article 6 of the city charter expressly prohibits the municipal assembly from directly contracting for such matters or from fixing the price or rate therefor, and requires the board of public improvements in all cases (except in case of necessary repairs requiring prompt attention) to prepare and submit to the assembly estimates of the cost of any proposed work, and, under the direction of the ordinance, to advertise for bids, and let out such work by contract to the lowest responsible bidder, subject to the approval of the council; and makes any other mode of letting out work illegal and void. Section 14 of article 6, prohibits the assembly from passing any ordinance for the construction or

reconstruction of any street, alley, or public highway unless such ordinance is recommended by the board of public improvements. Section 15, art. 6, provides that "all ordinances recommended by said board shall specify the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and the fund out of which it shall be paid, and shall be endorsed with the estimate of the cost thereof," etc. Section 17, art. 6, provides: "The board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all streets and highways, and for the construction of crosswalks, and no ordinance therefor shall be passed without such recommendations." From these charter provisions it is clear that the assembly has no power to pass any ordinance for the doing of any public work, or making any improvement or repairs thereof, or for cleaning streets, or constructing sidewalks, unless the ordinance is recommended by the board of public improvements. The reason for all which is manifest not only from the charter of the city, but also from the history of the evolution of that charter, and of similar provisions in the charters of other cities.

The board of public improvements is composed of persons specially selected because of their ability and skill to deal with such questions. The members of the assembly are not required to possess, and do not generally possess, such ability or skill. There are many features of protection preserved to the citizen before even the board of public improvements can recommend such ordinances. There must be notice and public hearings, opportunity to consent or object, given to the citizen before even the board can act. So, while the board is a check upon the assembly, the people themselves are a check upon the board. These provisions are wise and salutary. They afford the greatest opportunity of ascertaining, regarding, and protecting the rights of the people, and are safeguards against improper or jobbing contracts. It may be broadly and emphatically stated, therefore, that no contract for any kind, character, or species of public work, or improvements or repairs thereof, or for cleaning streets, is valid unless the ordinance authorizing it is recommended by the board of public improvements, after it has faithfully complied with all charter prerequisites to its action. This proposition cannot be stated too strongly or unequivocally. If, therefore, the ordinance before the court in this case contemplates, involves, or provides for the doing of any public work, or the making of any public improvement, or the cleaning of the streets, it falls within the condemnation of the rule announced, and is void. The crucial question, therefore, is, does the erection, maintenance, and keeping clean of boxes in which waste paper and litter may be deposited fall within the terms "public work," "improvements," or "street cleaning," as these words are used in the charter? The cases of Cole v. Skrainka, 37 Mo.

App. 427, and City of St. Louis v. Gleason, 89 Mo. 67, 14 S. W. 768, throw no light on the inquiry, for the ordinances questioned in both of those cases were recommended by the board of public improvements, and the attack was upon the alleged disregard of the board to obey the charter requirements as to its proceedings, and hence they did not involve the right of the assembly to pass an ordinance unless it was recommended by the board. The ordinance in the Cole Case was for the reconstruction of a street, which is clearly public work or improvement, and the ordinance in the Gleason Case was for the establishment of Benton street, which is clearly a public improvement, and such an ordinance is expressly required by section 2, article 6, to be recommended by the board of public improvements. The case of State v. Barlow, 48 Mo. 17, involved this question: Dunn had a contract with the city to light, clean, and keep in repair the street lamps, which had been made by the city engineer, and extended from time to time, and which was perfectly legal when made. The charter of the city was amended by the act of March 4, 1870, and it was then provided for the first time that the city council should have no power directly to contract for any public work or improvements, or repairs thereof, nor to fix the price or rate therefor, but that the city engineer should in all cases except in cases of necessary repairs prepare and submit to the council plans, profiles, and estimates of cost of any proposed work, and under the direction of ordinance should advertise for bids, and let out the work by contract to the lowest and best bidder, subject to the approval of the council. It will be observed that this provision is substantially the same as section 27 of article 6 of the present charter, except that the board of public improvements takes the place of the city engineer. After the act went into effect, the city contracted in the manner provided by the charter with one Lider to light, clean, and repair the street lamps. Thereupon Dunn brought mandamus to compel the city comptroller to approve an extension of his contract made by the city engineer on the 3d of January, 1871, for a year ending March 1, 1872. It was held that the amended charter superseded the ordinance regulation in force when the charter was enacted, and that the power given the city engineer by the ordinance to make such a contract was ipso facto taken away by the amendment to the charter. There can be no doubt that the lighting, cleaning, and repairing of the street lamps is public work, within the meaning of that term as used in the charter of 1870 and in the present charter of St. Louis, and hence the municipal assembly did not then have, and has not now, the power to directly contract therefor. These are all the cases that have been cited to show that the ordinance in question relates to public work, and it is too plain to admit of debate that they do not determine, or solve, or settle the question involved. This leaves this case without direct controlling or binding precedent

n the decisions of the courts of this state. In fact, no case rom this or any other jurisdiction has been cited which ıttempts to define whether placing such boxes for such pur-ɔose on the streets constitutes public work or improvements ɔr not. The solution of the problem must, therefore, be found n fundamental principles, or be reasoned out by analogy.

In considering the meaning of the terms "public works" ınd "improvements," used in section 27 of article 6, the pro-ɔisions of paragraph 2, § 26, art. 3, of the city charter must ılso be borne in mind. Those provisions are: "The mayor ınd assembly shall have power within the city by ordinance not inconsistent with the constitution or any law of this state, or of this charter, * * * to establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues; * * * to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof." Section 27 of article 6 and section 26 of article 3 are in pari materia, and must be construed together, and full force given to every part of each, if possible. It will thus be seen that, if the purpose of an ordinance relates to public work or improvements, the assembly cannot, under section 27, art. 6, legally pass the ordinance, unless it is recommended by the board of public improvements, and the work must be let by competitive bidding to the lowest responsible bidder; whereas, if the ordinance simply regulates a particular use of a street, the municipal assembly has full and sole power to deal with the matter, under section 26 of article 3, and the board of public improvements has nothing to do with it. The plain reason is that the board is constituted of experts as to the question of "the character of public work and improvements, its extent, the material to be used, the manner and general regulations under which it shall be executed," but the assembly is just as qualified as the board to properly and intelligently regulate the use of the streets. In other words, because of their special education and training, the board is given the power to determine, in the first place, the manner, method, character, extent, and plans to be observed in creating, doing, or making public work or improvements (in this case a street), but the assembly is authorized by the charter to regulate the use of the street after it is improved. The board deals in engineering or building problems, while the assembly deals with governmental questions or questions of proprietorship. An architect is better qualified to judge of the construction of a house than the owner, but the owner is probably better qualified than the architect to judge of the business question of what use the house shall be applied to after it is constructed. There is a practical, common sense, and generally accepted difference in meaning between a public improvement and a public use of a public improvement. This difference is recognized in section 26 of article 3, for the mayor and assembly are given power by ordinance not incon-

sistent with the other provisions of the charter to improve, construct, and keep in repair all streets, and to regulate the use thereof; thereby plainly contemplating that, if the street is to be improved, or constructed, or repaired, the provisions of section 27 of article 6 apply, and an ordinance therefor can only be passed when recommended by the board of public improvements, and the work thereby authorized can only be done by contract, let by competitive bidding; but, if the ordinance is simply to regulate the use of the street after it is improved or constructed, the assembly alone has power to deal with the question. This distinction is made more apparent if the ordinance should relate to the use of an unimproved street, for in such cases no engineering or expert skill is needed, and the question is purely a governmental or business one as to whether the use is a proper one. There is also in law and in common sense a well-defined difference between a public improvement and a public utility. Constructing or improving a street, an alley, or wharf, a sewer, a drain, a public highway of any kind, waterworks, gas works, and other like matters, constitute a public improvement, and all work done in relation to repairing, lighting, and cleaning streets is public work. Ordinances relating to such matters can only be passed upon the recommendation of the board of public improvements. But among the public utilities which the assembly may, without the recommendation of the board of public improvements, permit the streets to be used for may be mentioned, as illustrations merely, street cars, telegraph, telephone, electric light, heat and power, poles and wires, gas pipes, water pipes, subways, overhead or underground street-car wires, and the like. 2 Dill. Mun. Corp. (4th Ed.) § 680 et seq. In short, as is well stated by Judge Dillon (2 Dill. Mun. Corp. [4th Ed.] p. 844, § 703, note 1): "In the absence of special constitutional restrictions, and where property rights are not invaded, the power of the legislature over all streets and highways and public places, and their uses, is plenary." And the same learned author, in section 688, says: "The power of the public, or of the municipal authorities representing by delegated authority the public [as shown above, this power is expressly delegated to the assembly of St. Louis by section 26 of article 3] over streets is not confined to their use for the sole purpose of travel, but they may be used for many other purposes required by the public convenience. The uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to the latter, all the public requires is the easement of passage and its incidents, and hence the owner of the soil parts with this use only, retaining the soil, and, by virtue of this ownership, is entitled, except for purposes of repairs, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface; and he may maintain actions

against those who obstruct the road or interfere with his rights therein. But with respect to streets in populous places the public convenience requires more than the mere right to pass over and upon them." Illustrating the difference of the uses which a city may authorize of its streets, the author devotes 76 pages (pages 817–894) to the enumeration of uses which has been held legal and proper, all of which fall within the term "public utilities," and not one of which can be classified as "public work" or "improvements." It is true that in some degree every improvement is a public utility, and likewise every utility is a public improvement. Among lexicographers a distinction is made between a public improvement and a public utility, and by some a public utility is distinguished from a public use, and it is said, "Utility is somewhat more abstract and philosophical than usefulness or use, and is often employed to denote adoption to produce a valuable result, while usefulness denotes the actual production of such result." Stand. Dict., tit. "Utility." But no layman, lexicographer, or lawyer has ever failed to mark the difference between an improvement and a use of a street, and the instances above cited clearly define that difference to the judicial mind. It is manifest that this ordinance does not rest upon the power or duty to clean the streets, and, if it did, it would be void, under section 17 of article 6 of the charter, because such ordinances must be recommended by the board of public improvement. The purpose of the ordinance, and the practical utility or use to the public, is to prevent the streets from being littered by affording storekeepers and the general public a convenient and suitable place to deposit litter instead of sweeping it or throwing it upon the street, thereby making them dirty, and making it necessary for the city to go to the expense of cleaning them. The city charter requires all ordinances for cleaning the streets to be recommended by the board of public improvements, and that course is observed as to cleaning the streets. But, while a sidewalk is a part of a street, the city does not clean the sidewalks. It requires the abutting property owner to do that work. Rev. Ord. St. Louis, art. 9, c. 14, § 374. The city ordinance also makes it a misdemeanor for any person to deposit dirt or rubbish of any kind or description upon any street, alley, or public or private highway. Rev. Ord. St. Louis, § 375. Storekeepers, therefore, will be benefited by this ordinance by being afforded convenient and suitable receptacles for depositing the waste paper and litter that daily accumulates in their stores. This is itself no small or inconsiderable utility and saving to them, and therefore the use of the street for this purpose is a legitimate public use, and the power, under the city charter, is vested solely and exclusively in the assembly, and the board of public improvements has no control over such matters, or other ordinances authorizing such a use.

This ordinance, therefore, does not involve public work, and hence the first objection of the defendant is untenable.

2. It is argued that the use of the streets authorized by this ordinance is for a private purpose; that is, it is claimed that the ordinance authorizes the relator to place advertisements on the boxes, and hence the profit to the relator is the primary purpose of the ordinance, and, this being a matter of private gain, the use is private, and not public. The same objection can be made, and has been unsuccessfully made, to ordinances granting the use of streets to street-car lines, telegraph, telephone, electric light, heat and power lines, gas, water, and subway companies, and the like. All such companies are organized for private gain, and individuals get usually 95 per cent. (in some cases all) of the profits arising from the use of the streets for such purposes. Yet, because they subserve a public use,—constitute a public utility,—the use has uniformly been held public, and not private. The same objection as to advertisements can be made to street-car lines, for such companies derive a profit from permitting advertisements to be placed in their cars, and the city gets no part of the profits arising from such advertisements, whereas here the city gets 15 per cent. of the gross receipts. But the fact that the city gets all or any proportion or none of the profits arising from advertisements placed on such receptacles, or allowed by street-car companies to be placed in their cars, or by telegraph or telephone companies to be placed on their poles, does not in any manner even tend to determine the question of whether the receptacles or street-car lines or telegraph or telephone poles are or are not public utilities which make the use of the streets public, and not private. Neither does the question whether the primary and principal purpose of and inducement to the persons granted such franchises is for private gain, and the public profit or advantage is of only an insignificant and secondary nature, a fair or determining test to apply to the validity of such an ordinance; for these conditions are present in all cases of public utilities that are furnished by private persons at their own cost. The crucial and final test is, does the use—utility—subserve a public purpose; does it furnish a natural need of the city or its citizens; does it contribute to their comfort, prosperity, or happiness? If it does, it is public; otherwise not. The proportion between the public and the private benefit derived from the use is not a determining factor in the problem. If the public is benefited in any degree, the use is public, even though the individual who furnishes the small benefit to the public may be benefited many times as much as the public. The cases of Mathews v. City of Alexandria, 68 Mo. 115; Glasgow v. City of St. Louis, 87 Mo. 678; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130; Glaessner v. Association, 100 Mo. 508, 13 S. W. 707; Schopp v. City of St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783, and Berry-Horn Coal Co. v. Scruggs-McClure Coal

Co., 62 Mo. App. 93,—relied upon by the defendants, were all cases where the use of the streets was solely and exclusively for private purposes, and where the public derived not the slightest atom of benefit. Hence they do not sustain the objection to the validity of this ordinance, but, on the contrary, illustrate and illumine the differences here pointed out. And when those cases are read in connection with the cases of Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258; Atlantic & P. R. Co. v. City of St. Louis, 66 Mo. 228; Porter v. Railroad Co., 33 Mo. 128; and the multiplicity of cases cited by Judge Dillon (2 Dill. Mun. Corp. [4th Ed.] pp. 817–894) relating to allowable uses of a street by individuals or private corporations whose primary object is private gain, but which furnish a public utility in some modicum,—the conclusion is logically and legally irresistible that this ordinance falls within the latter class of cases, and is a legal exercise of the governmental power conferred by the charter upon the assembly of St. Louis, and that the purpose is public, notwithstanding 85 per cent. of the profits inures to a private person. It is urged, however, that it would enable the relator to place in front of a merchant's store an advertisement of his rival in business, and hence the ordinance is unfair. This might be a proper argument when made to the assembly against exercising its charter power in considering and adopting the ordinance, but, the power being vested in that body, the courts have no right to review it, or reverse its conclusions. But the objection at once fades away when the ordinance itself is examined, for section 3 vests the power in the board of public improvements to designate the location of all boxes, and section 4 prohibits the placing of any advertisement on the boxes "until the same shall have first been submitted to and approved by the board of public improvements of said city," and section 7 makes it unlawful to place any such receptacles on any block if a majority of the residents of the block object to it. These appear to be ample answers to the possible injury suggested of having a rival's business advertised in front of one's store.

3. There is no merit in the objection that the ordinance is void because it contains more than one subject. The purpose is single. The incidents are germane to the subject. The title expresses the object, and the body of the bill carries into effect the object expressed. The title is not a cloak to hide the object intended. The title is not required to be an analytical index to the body of the bill. Lynch v. Murphy, 119 Mo. 163, 24 S. W. 774. For these reasons I think the peremptory writ should be awarded.

SHERWOOD, J., concurs in my views.

NOTE.

Subjecting Street to Private Use.

In Schopp *v.* City of St. Louis, 117 Mo. 131, 22 S. W. Rep. 898, it was held that a power to regulate the use of streets, and to establish and

regulate markets, did not authorize an ordinance setting aside a portion of a certain street to be occupied by hucksters and their stands under a license from the city. Not only was it an infringement of the rights of the adjacent shop keeper, but it was an unlawful attempt to devote the street to other than proper street purposes. Said the court: "The entire street is for the use of the whole people, and cannot, in whole or in part, be devoted to the use of individual persons." It may be said, in general, that any attempt to devote the streets to other than proper street purposes is illegal and void. See McDonald *v.* Mayor of Newark, 42 N. J. Eq. 136, 7 Atl. Rep. 855; Townsend *et al. v.* Epstein, 6 Mun. Corp. Cas. 562, 49 Atl. Rep. 629.

WYGANT *v.* MCLAUCHLAN, Chief of Police.

(*Supreme Court of Oregon, May 4, 1901.*)

[64 Pac. Rep. 867.]

Burial within City Limits—Prohibition by Ordinance—When Unreasonable.

Under a charter authorizing a city to protect the health of the city and remove nuisances, and declare what shall constitute the same, the city council was not authorized to declare generally that the burial of a dead body in any portion of the city would constitute a nuisance, when such interment might be made in certain sections thereof without giving offense to any human sense or endangering the health of the community.

Same—Same—Same.

Under a city charter authorizing a city to provide for the health, cleanliness, peace, and good order of the city, and to prevent and remove nuisances, an ordinance prohibiting burials in certain territory of the city, distant more than half a mile from any inhabitants or public thoroughfare, being unreasonable, as applied to sparsely-inhabited portions of the city, and general in its operation, is invalid as to the whole, and falls in its entirety.

Appeal from circuit court, Multnomah county; Arthur L. Frazer, Judge.

Petition by Cass Wygant against D. M. McLauchlan, as chief of police of the city of Portland, for a writ of habeas corpus to secure the petitioner's release from imprisonment. From a judgment discharging the petitioner, defendant appeals. Affirmed.

The plaintiff was convicted in the municipal court of the city of Portland of a violation of City Ordinance No. 9,188, and sentenced to pay a fine of $35, in default of the payment of which he was committed to jail under a commitment issued, directed, and delivered to the defendant, McLauchlan, who is the chief of police. The complaint upon which the conviction was had charged the plaintiff with a violation of the ordinance by willfully and unlawfully interring and causing to be deposited a certain dead body within prohibited territory in the city of Portland, "thereby creating a nuisance," contrary to the ordinance, etc. The ordinance under which the complaint was drawn provides, by section 1, that it shall be unlawful, and it is declared a nuisance and misdemeanor, for any person or persons, at any time after the 1st day of April,

1895, to dig, or cause to be dug or opened, any grave, or to inter or deposit, or cause to be deposited, in such grave, any dead body, within the city of Portland, except within certain specified districts; and, by section 2, that no person or persons shall, after the day named, dig, or cause to be dug or opened, any grave, or cause to be deposited or interred in such grave any dead body, except in those portions of the city designated in section 1. Section 6 prescribes a penalty for a violation of the ordinance. The charter empowers the city to prevent the introduction of contagious diseases, etc., and "to provide for the health, cleanliness, ornament, peace, and good order of the city," and, by a subsequent clause, "to prevent and remove nuisances, and to declare what shall constitute the same." Section 32, subds. 6, 9. The plaintiff, being imprisoned, sued out a writ of habeas corpus, alleging that he is unlawfully restrained of his liberty by the defendant, to which the latter made return that he is lawfully detaining the plaintiff under and by virtue of the commitment to him issued and directed. The judgment being favorable to the plaintiff, the defendant appeals.

John K. Kollock and R. R. Duniway, for appellant.
Raleigh Stott, W. L. Boise, and Geo. C. Stout, for respondent.

WOLVERTON, J. (after stating the facts). The plaintiff bases his argument in support of the judgment of the circuit court upon the ground that Ordinance 9,188 is invalid, for the reason that the charter does not authorize the city of Portland to declare the burial of the dead within the city limits, outside of the excepted districts, to be a nuisance, or to punish persons for doing the acts thereby declared to be offenses against the city. It may be premised that a cemetery is not a nuisance, except conditions be present which corrupt or foul the atmosphere by unwholesome or noxious stenches, or impregnate the water of wells or springs in the vicinity by percolation through the soil, thereby endangering the public health; hence the authorities agree that it is not nor can it be regarded a nuisance per se. Wood, Nuis. § 6; 1 Dill. Mun. Corp. (4th Ed.) § 373; 5 Am. & Eng. Enc. Law (2d Ed.) 791; Kingsbury v. Flowers, 65 Ala. 479; Henry v. Trustees, 48 Ohio St. 674, 30 N. E. 1122; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191. And whether the act of depositing a dead body in its place of sepulture is the commission of a nuisance depends entirely upon its proximity to the habitations of the living and the manner in which it is accomplished. In so far as the language of the charter conferring power upon the city to declare what shall constitute a nuisance is involved by the contention, the case of Grossman v. City of Oakland, 30 Or. 478, 41 Pac. 5, 36 L. R. A. 593, is precisely in point. Within the scope of the doctrine there announced and settled, the city is not thereby authorized to declare that to be a nuisance

which is neither such per se nor under the common law, nor made so by statutory enactment. It would seem to follow, therefore, that the city council was not authorized to declare generally that to deposit a dead body in any portion on the inhibited district shall constitute a nuisance, when it is conceded, as here, that such an interment may be made in the usual way in some sections thereof, without giving offense to the senses of any human inhabitants, or endangering in the least measure the health of the community.

Defendant's counsel insist, however, that the authority requisite for excluding burials from within the city limits may be referable to the general police power incident to all municipal corporations, and, beyond this, it is urged that the words of the charter, "to provide for the health, cleanliness, ornament, peace, and good order of the city," are commensurate for the purpose. The power thus conferred is no doubt ample to authorize the city to adopt reasonable measures prescribing rules and regulations, as it respects the place and manner of burials within the city limits; but the city cannot arbitrarily prohibit them, unless such prohibition be a reasonable exercise of the power. The legislature, in its wisdom, may, by express delegation of authority, empower the city to adopt measures of a specified and defined character, and the exercise of such authority cannot be questioned on the ground of its unreasonableness. People v. Pratt, 129 N. Y. 68, 29 N. E. 7; Cronin v. People, 82 N. Y. 318; Coates v. Mayor, etc., 7 Cow. 585,—are illustrative of the principle. In the first, the authority delegated was "to make, modify, and repeal ordinances and by-laws to regulate the burial of the dead"; and it was held that the power to regulate was tantamount to the power to prohibit, the court referring to Cronin v. People, which involved the authority to prohibit the operation of slaughter houses in certain portions of the city of Albany as conclusive of the point. So, in the last case cited, the authority extended to making by-laws "for regulating * * * or preventing the interment of the dead" within the city, which language is so express and explicit as to leave no doubt touching the power to prohibit. But where the authority to adopt specific measures is referable merely to the general power, or where the authority to legislate with respect to a given subject is conferred and the mode of its exercise is not prescribed, there goes with it the condition that the exercise thereof, to be valid and efficacious, must be reasonable, and not oppressive. 1 Dill. Mun. Corp. (4th Ed.) § 328; Trenton Horse R. Co. v. Inhabitants of City of Trenton (N. J. Sup.) 20 Atl. 1076; Haynes v. Cape May, 50 N. J. Law, 55, 13 Atl. 231; Coal Float v. City of Jeffersonville, 112 Ind. 15, 13 N. E. 115; Mayor, etc., v. Radecke, 49 Md. 217; Tugman v. City of Chicago, 78 Ill. 405; Kirkham v. Russell, 76 Va. 956. It is for the court to determine, in view of the facts of each particular case as it arises, whether or not an ordinance is rea-

sonable. 17 Am. & Eng. Enc. Law, 248. The prevailing presumption, however, is in favor of its reasonableness, which must be overcome by legal and competent proof to the contrary before its invalidity can be declared. Trenton Horse R. Co. v. Inhabitants of City of Trenton, supra; Com. v. Patch, 97 Mass. 221; Van Hook v. City of Selma, 70 Ala. 361.

We are thus brought to the question whether the ordinance involved evinces a reasonable exercise of the general police power vested in the city, or of such as is attendant upon the power accorded to provide for the health, cleanliness, and good order thereof. The court may take judicial knowledge of the acts of incorporations and charters of municipal corporations, and as a logical consequence of the territorial limits of such muncipalities, especially where they are fixed and defined by the acts giving them life, or acts amendatory thereof. 17 Am. & Eng. Enc. Law (2d Ed.) 936, 938; Fauntleroy v. Hannibal, 1 Dill. 118, Fed. Cas. No. 4,691; Binkert v. Jansen, 94 Ill. 283; Hornberger v. State, 47 Neb. 40, 66 N. W. 23; De Baker v. Railway Co., 106 Cal. 257, 39 Pac. 610; City of Kansas City v. Smart, 128 Mo. 272, 30 S. W. 773.

Now, it is an admitted fact that there are considerable tracts of land, comprised within the limits of the city, which are sparsely inhabited. As was said by the court below, "there are within the corporate limits of the city of Portland several large tracts of land, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare." Under these conditions, it is assuredly not a reasonable regulation, as a police provision, or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance. If, however, as before indicated, the legislature had granted special and express power to exclude burials from within the city limits, the adoption of such an ordinance would be a legitimate exercise thereof, and no one could question its validity, yet, when the nature of the power delegated enjoins upon the city the duty of adopting such measures only as are reasonable, that becomes the measure and limit of the power, and any act in excess thereof is without legal efficacy. The ordinance being unreasonable as applied to those sparsely-inhabited portions of the city, and general in its territorial scope and operation, it is invalid as to the whole, and must fall in its entirety. As sustaining the conclusions here reached, see Austin v. Murray, 16 Pick. 121; Kneedler v. Borough of Norristown, 100 Pa. 368; Town of Lake View v. Rose Hill Cemetery Co., supra; Mayor, etc., v. Radecke, supra. This statement of the law is not impinged upon by the doctrine maintained in Pennsylvania R. Co. v. Mayor, etc., of City of Jersey City, 47 N. J. Law, 286; State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305; and

other cases cited by counsel. One of the primary essentials of a valid ordinance is that it must be general in its operation; that is, it must affect all persons alike, under like circumstances and conditions. 1 Dill. Mun. Corp. (4th Ed.) § 322. It may, and often does, become a question whether certain persons or corporations, acting in peculiar capacities or special emergencies, come within the legitimate purview or spirit of the ordinance, and such was the question presented and determined by the above cases. The ordinance in each case was general in its scope, affecting all persons alike, but in the first the business of the railroad concentered in a small compass, but had grown to such proportions that the ordinance became unreasonably embarrassing and burdensome, and it was held, therefore, that it should not be enforced against the company as to the particular locus in quo. So, in the latter case, the ordinance prohibited the driving of animals in the street at a rate of speed exceeding six miles an hour, and it was held that a fireman, acting in the discharge of his duties in hastening to the scene of a conflagration, did not come within the inhibition. The doctrine is operative in the establishment of an exception rather than that of a general rule, and can have no application in the case at bar.

Reliance is had upon the case of City of Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90, as being an adjudication sustaining the power of the city to exclude burials from within the city limits. The court there had under consideration the effect of an ordinance prohibiting the burial of the dead within the city, and consequently upon an estate conceded, for the purpose of the case, to have been vested in the municipality upon a condition subsequent as to the continued use and occupation thereof by it for cemetery purposes. The power to adopt the ordinance in that case seems to have been taken for granted, or, at least, it was not a matter of controversy in the course of the hearing. In announcing the opinion, Mr. Justice Strahan incidentally says: "That power was delegated by the state to the city of Portland under the general description of police power;" referring, we presume, to the power of prohibiting burials within the city limits. The learned justice then proceeded to an elaboration of the idea that every citizen holds his property subject to the proper exercise of the power, but the question whether the charter did or did not confer the power to adopt the ordinance was not mooted, so far as we are informed by the record, much less can it be said to have been decided. The idea of declaring the act of burial a nuisance, and the power commensurate to that particular purpose, does not seem to have been suggested at any time during the proceeding. The case is therefore not controlling as a precedent. If, however, it ever had any vitality in the direction claimed for it, it must be considered as overruled in its general scope by the subsequent case of Grossman v. City of Oakland. There will be an affirmance of the judgment.

HARRIS *et al. v.* CITY OF WATER VALLEY.

(Supreme Court of Mississippi, Feb. 11, 1901.)

[29 So. Rep. 401.]

License Fees—Governmental Powers—Surrender of Charter and Acceptance of General Law.

When a city elects to come under the operation of Code 1892, c. 93, regulating the incorporation of municipalities, and defining their powers, all power under its original charter, except as kept alive by the provisions of said chapter, are annulled, and thereafter the city's authority is limited by that chapter.

Appeal from circuit court, Yalobusha county; *Z.* M. Stephens, Judge.

Action by the city of Water Valley against Gid Harris and others. From a judgment for plaintiff, defendants appeal. Reversed.

Wilson & Brewer, for appellants.

Kimmons & Kimmons, for appellee.

TERRAL, J. The appellants Harris and White were prosecuted in March, 1900, for selling by retail within the city of Water Valley fresh meats, mutton, beef, and pork, etc., without a license from the city. They had a state license for carrying on a meat market, which, in the city of Water Valley, a city of less than 5,000 inhabitants, is fixed at $5, and they offered the city authorities $2.50 for a city license, which latter sum the city refused to receive, but demanded $20 license fee. That city, previous to the adoption of the Annotated Code, exercised its prerogatives under a charter which authorized it to fix at its discretion the amount of the license to be paid for selling fresh meats within the city; and in Porter v. City of Water Valley, 70 Miss. 560, 12 South. 828, it is held that a license fee like the one in question was a valid exercise of municipal authority. But since the adoption of chapter 93, on municipalities, of the Code of 1892, the city of Water Valley has elected to come under the provisions thereof, and, by its provisions the old charter of the city is annulled, and Porter v. City of Water Valley is inapplicable. Under the privilege license law in force in 1900, meat markets are licensed by the state to be conducted in cities of less than 5,000 inhabitants at a fee of $5; and municipalities, under section 2972, can only levy for the city license a fee not exceeding one-half of the state license tax. When the city of Water Valley came under the operation of chapter 93 of the Code of 1892, all of power under its original charter, except as kept alive by the provisions of that chapter, was annulled, and after such time its authority is limited by that chapter. Town of Greenwood v. Delta Bank, 75 Miss. 162, 21 South. 747; Borries v. City of Biloxi (decided at this term) 29 South. —. The judgment of the circuit court is reversed, and the case is remanded.

STATE *v.* TYRRELL.

(*Supreme Court of Errors of Connecticut, Dec 18, 1900.*)

[47 Atl. Rep. 686.]

Food Ordinance*—Sale of Milk—License—Validity of Ordinance Regulating Matter Covered by General Statute.

Waterbury city charter forbids the board of aldermen to pass any ordinance on any matter regulated by public general statute. Gen. St. 1888, §§ 2658-2664, and Pub. Acts 1895, c. 235, provide full regulations as to adulteration of milk: *held*, that a city ordinance forbidding the sale of impure milk, and requiring, among other things, that all milk venders should obtain a license, was void, as beyond the power of the city council to enact.

Same—Violation of—Prosecution—Sufficiency of Information.

An information charging that defendant, being in the business of selling milk, unlawfully exposed milk for sale, did sell milk, had milk in his possession with intent to sell, delivered milk for sale, and delivered milk for consumption, without obtaining a license therefor, but not charging that defendant carried on the business by means of a vehicle, does not charge a violation of an ordinance requiring milk venders to obtain a license, and providing that such license should be issued only in the name of the owner of the vehicle by means of which the business was carried on, and should state the place of business of the licensee and the number of vehicles used in his business, and that the name of the licensee should be placed on each vehicle, since the obvious intent of the ordinance was to require a license only from milk venders who transacted their business by means of vehicles.

Appeal from district court of Waterbury; George H. Cowell, Judge.

Information against Fred. A. Tyrrell for violating a city ordinance. From a judgment sustaining a demurrer to the information, the state appeals. Affirmed.

This was an information charging the violation of a city ordinance of the city of Waterbury. The defendant was first prosecuted in the city court, and appeals to the district court in and for the district of Waterbury. The information was in five counts. The first one is this: "That on the 16th day of March, 1899, at said city and town of Waterbury, within said district, Fred. A. Tyrrell, now of said Waterbury, being then in the business of selling and delivering milk in the said city of Waterbury, with force and arms did then and there, as a part of said business of selling and delivering milk in said city of Waterbury as aforesaid, unlawfully offer and expose for sale certain milk without first having obtained from the board of health of said city of Waterbury a license so to do, against the peace, of evil example, and contrary to the ordinance of said city of Waterbury in such case made and provided." The other counts are identical with this one, save that in the second one the unlawful act is, did "sell certain milk"; in the third, "have in his possession with intent to sell"; in the fourth, "deliver for sale certain milk"; and in the fifth, "deliver for consumption certain milk." The

*See notes on Municipal Regulation of Food Stuffs at end of case.

ordinance of the city is, in substance, set out in the case of State v. Gallagher, 72 Conn. 605, 45 Atl. 430. The defendant demurred to the information. The court sustained the demurrer, and the state has appealed. There is really but one assignment of error,—that the court erred in sustaining the defendant's demurrer.

Nathaniel R. Bronson, Pros. Atty., for the State.
Albert P. Bradstreet, for appellee.

ANDREWS, C. J. (after stating the facts). There is no error. The information is insufficient. Judging the ordinance of the city of Waterbury, set forth in the statement, by its words, we should be led to believe that the purpose of the board of aldermen in passing it was to prevent the sale and consumption in that city of impure or adulterated milk. To accomplish that purpose, the ordinance is intelligent, consecutive, and adapted to the end in view. But the charter of the city forbids the board of aldermen to enact any ordinance upon any matter which is or shall hereafter be regulated by any public statute, or the power to regulate which has been or shall be conferred upon any other authority by any public statute. The General Statutes of 1888 (sections 2658, 2664, inclusive) provide full regulations in respect to adulteration of milk, as also does chapter 235 of the Public Acts of 1895. If, then, the purpose of the aldermen was to regulate the sale of impure milk in Waterbury, it would appear that the ordinance was in excess of their power to enact. So we must suppose that they had some other purpose in mind. What that other purpose was, does not, perhaps, very clearly appear. Nor is it material now to inquire what it was. If all the milk that is brought into the city for sale was known to be pure, it would seem that the aldermen would have no occasion, even if they had the authority to do so, to pass an ordinance requiring a license fee from the seller, or to subject him to a rigorous and offensive inspection. We have, however, no occasion to decide this. Granting that the ordinance is not invalid (which we do for the purpose of this case), we think the demurrer was properly sustained. In every criminal information all the facts must be alleged which are necessary to show the defendant's guilt. If all such facts are not alleged, then the information is insufficient. In testing the sufficiency of any such information, no fact is supposed to exist except such as appears in it either by direct averment or by necessary implication. In the information before us the defendant is charged with the doing of certain things "without first having obtained from the board of health of said city of Waterbury a license so to do." Now, upon the facts set forth in the complaint (and the court is not informed of any others), if the defendant had applied to the board of health of Waterbury for a license, that board could not have issued one to him. The fourth section of the ordinance enacts that the license provided for by the

ordinance shall be issued only in the name of the owners of the vehicles by means of which the business is carried on. But this defendant was not the owner of any vehicle at all. If he had applied to the board of health for a license, that board would have been obliged to refuse him one. This case comes almost literally within the language used by this court in the said case of State v. Gallagher; that is, that the complaint does not set forth the conditions which show that it was the duty of the defendant to obtain a license, nor those conditions which would enable him to obtain one if he applied. There is no error. The other judges concurred.

NOTES.

MUNICIPAL REGULATION OF FOOD STUFFS.

I. Selling Unwholesome Food an Offence at Common Law.
II. Municipal Authority to Regulate.
  A. Generally.
    1. Decaying Fruits and Vegetables—Use of Colored Netting.
    2. Well on Baker's Premises—Power to Prohibit.
    3. Bread—Power to Fix Weight and Price.
    4. Milk.
      (a) Power to Fix Standard of Adulteration.
      (aa) Power to Adopt Standard Different from That Fixed by Statute.
      (b) Power to Prohibit Sale of Milk Produced from Feeding Distillery Slops.
  B. Inspection.
    1. Inspection of Milk.
      (a) Tuberculin Test.
    2. Inspection of Meat.
    3. Power to Inspect Not to Be Used as Subterfuge to Tax.
    4. Power to Take Samples.
    5. Summary Destruction of Unwholesome Articles.
  C. Regulation of Time and Place.
    1. Ordinance Must Not Be in Restraint of Trade.
    2. Ordinance Must Be Fair and Impartial.
      (a) Sale of Groceries in Dry-Goods Store.
      (b) Discrimination between Dealers in Different Sections of City.
      (c) Discrimination in Favor of Shop Keepers.
      (d) Prohibiting Sales at Depots and Wharves.
      (e) Prohibiting Sale of Vegetables by Butcher in Public Market.
    3. Power to Prohibit Sales Outside of Public Market.
      (a) At Private Markets or Established Places of Dealing.
      (aa) When Public Market Is Maintained by Private Individual.
      (aaa) Sale within Market Limits—What Constitutes.
      (b) Hawking and Peddling Outside of Market.
      (bb) Farmers Selling Their Own Produce.
    4. Slaughter Houses—Power to Control Location.
      (a) In General.
      (b) Public Slaughter Houses—Exclusive Privileges.
  D. Power to License Food Dealers.
    1. Whether Power to Regulate Confers Power to License.
    2. Where Sale of Article Licensed Is Made Unlawful by Statute.
    3. License Power Not to Be Used as Subterfuge to Tax.

Notes

4. Discrimination—Ordinance Must Be Fair and Impartial.
5. Nonresidents—Farmers Selling Their Own Produce.
   (a) In General.
   (b) Milk Wagon of Nonresident.
   (c) Nonresident Butchers.
   (d) Farmer Retailing Rice from Wagon Not a Peddler.

E. Health Boards—Power to Enact Food Regulations.

I. SELLING UNWHOLESOME FOOD AN OFFENCE AT COMMON LAW.

The selling of impure or unwholesome food, or taking to market with intent to sell, unwholesome meat or other article intended for use as human food, is an indictable offence at common law; for example, the sale of bread in which alum or other harmful ingredients have been mixed, or bread insufficiently baked and mixed with dirt or filth, or bread made from inferior wheat: Treeve's Case, 2 East P. C. 821; Burnby *v.* Bollett, 16 M. & W. 644; Rex *v.* Dixon, 3 M. & S. 11; Reg. *v.* Baldock, 2 Chitty's Crim. Law 556; or meat which is tainted or diseased or otherwise unfit for human food. Reg. *v.* Stevenson, 3 F. & F. 106; Queen *v.* Jarvis, 3 F. & F. 108; Shillito *v.* Thompson, L. R. 1, Q. B. Div. 12. Each single act of exposure of such articles for sale is a distinct offence. Hartly, In re, 31 L. J. M. C. 232. But knowledge of the unwholesome quality of the thing offered, or the means of knowledge, is an essential element of the offence. Regina *v.* Stevenson, 3 F. & F. 106; Queen *v.* Jarvis, 3 F. & F. 108; Hunter *v.* State, 1 Head (Tenn.) 160, 73 Am. Dec. 164; State *v.* Norton, 2 Ired. (N. Car.) 40; State *v.* Smith, 3 Hawks (N. Car.) 378. And the seller must have sold it with the intent that it should be used as human food, or with knowledge that it would be used as such. Regina *v.* Crawley, 3 F. & F. 109; Rex *v.* Haynes, 4 M. & S. 214.

II. MUNICIPAL AUTHORITY TO REGULATE.

A. GENERALLY.

In the exercise of their police power, possibly all of the states have enacted statutes tending to protect the public from the sale of unwholesome food stuffs; and so extensive has been this legislation, that there is scarcely an article of ordinary diet which has not been subjected to some kind of regulation or restriction. The sale of food products being far greater in the populous cities than in other localities, and the competition sharper, the probabilities of adulteration and the facilities therefor have become correspondingly greater; so that there is scarcely a town of any size that does not possess charter authority to regulate by ordinance the sale of food stuffs within its limits. In construing these ordinances, it frequently becomes necessary to decide between conflicting propositions of law as to which shall prevail; and the different views taken by different courts in such cases have led to a great lack of uniformity in the decisions. So that as to deducing any general principle from the decisions, about the most that can be said is, that such ordinances must be within the charter powers of the corporation; they must be reasonable and not in restraint of trade; and they must have been enacted in good faith to attain the object set forth, and not as a mere subterfuge to attain some other purpose, such as the raising of revenue or the stifling of competition. Thus, where the only authority conferred by the charter is the power to regulate the vending of meats, a conviction for selling putrid eggs cannot be sustained under an ordinance forbidding the sale of unwholesome meats and other provisions. Mayor of Rochester *v.* Road, Hill & Denio (N. Y.) Suppl. 146. And where the ordinance is penal in its nature, the complaint must be so framed as to charge an offence under the ordinance. Thus, where the ordinance provides that all persons *engaged in the business of selling milk* shall procure a license, under penalty in case of failure to do so, a complaint charging the defendant with selling, or having in his possession with intent to sell milk, without having procured a license as re-

Notes

quired by the ordinance, should also allege that he is a dealer engaged in the business of selling milk, since the ordinance applies only to dealers. State *v.* Gallagher, 72 Conn. 605, 45 Atl. Rep. 430. And so if the ordinance makes the guilty knowledge of the unwholesome character of the thing sold an element of the offence, such knowledge should be alleged. Under most of the ordinances and statutes, however, knowledge of the adulteration, or fraudulent intent, is not an element of the offence. State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344; State *v.* Groves, 15 R. I. 208, 2 Atl. Rep. 384; People *v.* West, 106 N. Y. 293, 60 Am. Rep. 452. In People *v.* Brill (Mich.), 78 N. W. Rep. 1013, the defendant was charged with violation of an ordinance making it an offence to sell or offer for sale any unwholesome article of food or provisions, whether the same was done knowingly or not. But subsequent to the enactment of that ordinance, and before the commission of the offence alleged against the defendant, the city received a new charter which authorized the common council to punish persons who ***knowingly*** sold such articles or provisions. It was held that the provision in the new charter superseded the existing ordinance, and no other having been enacted in its place, the defendant was entitled to go scot free.

1. Decaying Fruits and Vegetables—Use of Colored Netting.

An ordinance prohibiting the keeping on hand of decaying fruits and vegetables for sale is a valid exercise of the police power. Caldwell *v.* Alton, 33 Ill. 416, 85 Am. Dec. 282. But an ordinance which makes it unlawful to sell or offer for sale fruit covered with colored netting or other material having a tendency to conceal the true color or quality of the article offered for sale, is void because unreasonable and oppressive. Frost *v.* City of Chicago, 178 Ill. 250, 52 N. E. Rep. 869. It was not claimed in this case that the colored material had any deleterious effect on the fruit, but its use was forbidden on the ground that it gave to the fruit beneath it a finer tint, thereby making it appear of better quality than it really was. But the court held that it was natural and not unlawful for dealers to put up goods in an attractive form, and that if the city could forbid the use of the colored netting, it might with equal propriety forbid the use of wrappings tinted to correspond with the articles they contained, or the sale of fruit wrapped in tin foil and which the buyer never sees until it is unwrapped.

2. Well on Baker's Premises—Power to Prohibit.

In State *v.* Schlemmer, 42 La. Ann. 1166, 8 So. Rep. 307, a charter provision empowering and requiring the common council to enact and enforce such ordinances as might be necessary to maintain the city's health and cleanliness, was held sufficient to authorize an ordinance prohibiting the use of well water in the making of bread intended for sale, and requiring the filling of all wells on premises where bread was made for sale, and forbidding the future excavation, digging, construction, or maintenance of wells on such premises.

3. Bread—Power to Fix Weight and Price.

Bread is an article of general consumption, and fraud, by means of short-weight loaves, is constantly practiced on the individual consumer, who in the majority of instances buys by the single loaf, or at most, but a few loaves at a time. Owing to the insignificant amount involved, no single consumer is likely to resort to litigation because of the fraud or deceit. But while the loss to each individual consumer is comparatively insignificant, yet in the thousands of daily sales in a large city it counts up largely in favor of the dealers. On this ground it is held that ordinances fixing the weight and price of bread offered for sale are proper police regulations. Thus, an ordinance which prescribed that all bread should be baked in one, two, and four pound loaves, and no other, was held to be a valid regulation. People *v.* Wagner, 86 Mich. 594, 24 Am. St. Rep. 141. And in Mayor of Mobile *v.* Yuille, 3 Ala. 137 (1841), 36 Am. Dec. 441, a charter provision conferring power upon the city to regulate the assize of bread, was held to authorize an ordinance which provided that no person should engage in the business of a baker without a license and the payment of a fee of twenty dollars, and that all

Notes

bread baked should be of good and wholesome flour, and that its weight and price should be in conformity with a proclamation to be issued by the mayor from time to time, regulating the weight and price according to the price of flour at the time of the proclamation. And see also, Friend *v.* Washington City, 2 Cranch C. C. 19, Fed. Cas. No. 5,121, where the defendant was tried under an ordinance containing very similar provisions, but was discharged because it appeared that the mayor had failed to make the required proclamation fixing the price. As somewhat akin to the foregoing, it may be mentioned that ordinances requiring all hay and grain offered for sale within the limits of a city in quantities exceeding a specified amount, to be weighed on public scales maintained by the city, for which weighing a small fee was charged, have been held to be within the police power. City of St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. Rep. 291.

4. Milk.—(a) Power to Fix Standard of Adulteration.

The sale of milk has long been a favorite subject of police regulation by both statute and ordinance; the all too prevalent practice of adding water to give it bulk, and the use of salycilic, boracic, and other injurious acids and compounds to kill fermentation and prevent its becoming sour, even in the most torrid weather, calling for the most stringent measures. Accordingly, the state or city may fix a standard of adulteration, and declare all milk falling below such standard to be adulterated, impure, or unwholesome within the meaning of the statute or ordinance, and prohibit the sale thereof, notwithstanding it may be in the same condition as when taken from the cow, free from all foreign matter, including water. Thus, in an oft-cited case, it was shown that the milk sold by the defendant contained more than eighty-eight per cent. of water. It was shown in defence that the milk was in the same condition as when taken from the cow, nothing having been added, and nothing taken from; and upon this showing the defendant asked for his discharge, upon the ground that the law was unconstitutional, in that it deprived the owners of cows of the use of the milk which the cows might yield. But the court of appeals thought otherwise, and in the dissenting opinion of Learned, J., of the lower court, adopted by the court of appeals as its own, we find the following: "But it is urged by the defendant that this statute may prevent the sale of milk which is in fact pure and unmixed with water. What determined the legislature to fix this standard, we do not know. But it may be supposed that different kinds of food produce different degrees of richness of milk; and it may be known to the legislature that certain kinds of food, the softened and innutritious grain, left after the production of ale or grape sugar, will cause a great flow of watery milk; and it may be known to the legislature that this watery milk, supplied as food to children, cheats them with the appearance of nourishment and deprives them of that nutritious food which they need. It may be known to legislators, then, that milk below the standard which they fix by this law is unsuitable for food, and should not be sold. At any rate, it is a matter for the legislature." People *v.* Cipperly, 101 N. Y. 634, 4 N. E. Rep. 107.

As sustaining the same proposition, see State *v.* Campbell, 64 N. H. 402, 10 Am. St. Rep. 419; Commonwealth *v.* Evans, 132 Mass. 11: State *v.* Newton, 45 N. J. L. 463; Com. *v.* Farren, 91 Mass. 489; Com. *v.* Waite, 93 Mass. 264; Com. *v.* Bowers, 140 Mass. 483, 5 N. E. Rep. 469; Com. *v.* Keenan, 139 Mass. 193, 29 N. E. Rep. 477; State *v.* Groves, 15 R. I. 208, 2 Atl. Rep. 384. Nor is such a statute unconstitutional as establishing a rule of evidence and making it conclusive of the guilt of the accused, since it is not the fraudulent intent, or the addition of water or other foreign matter, which constitutes the offence, but the selling of milk which is so poor in quality as to fall below the required standard. State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

(aa) Power to Adopt Standard Different from That Fixed by Statute.

In Louisiana it is held that a charter power to enact and enforce such ordinances as may be necessary to prevent the sale of unwholesome or adulterated food, not only authorizes the city council to fix a standard of

adulteration for milk, but that in the exercise of such power the council may adopt a different standard from that already fixed by the state law. State *v.* Fourcade, 45 La. Ann. 717, 13 So. Rep. 187; State *v.* Dupaquier, 46 La. Ann. 577, 49 Am. St. Rep. 334; State *v.* Stone, 46 La. Ann. 147; State *v.* Labatut, 39 La. Ann. 514, 2 So. Rep. 550. Doubtless such an ordinance would be held valid in all those jurisdictions where the doctrine prevails that the same act may constitute distinct crimes against the state and municipality. See in this connection, Polinsky *v.* People, 73 N. Y 65; Kansas City *v.* Cook, 38 Mo. App. 660. In the principal case the ordinance fixing a standard of adulteration, and prohibiting the sale of milk falling below it, was held invalid because it contravened a charter provision which expressly prohibited the city from enacting ordinances upon matters already regulated by statute.

(b) Power to Prohibit Sale of Milk Produced from Feeding Distillery Slops.

It is a matter of common knowledge that fermented and softened grain, from which most of the nutritious elements have been abstracted, and other distillery slops, when used as a dairy food, produce a great flow of watery milk of inferior quality. Hence, it is a reasonable exercise of its police power for a city to prohibit by ordinance the sale of such milk within its limits. People *v.* Cipperly, 101 N. Y. 634, 4 N. E. Rep. 107; Johnson *v.* Simonton, 43 Cal. 242.

B. INSPECTION.

I. Inspection of Milk.

A statutory authority "to provide for the inspection of milk and of dairy herds kept for the production of milk within corporate limits, and to issue licenses for the sale of milk within city limits, and to regulate the same, and to authorize the board of health to enforce all laws and ordinances relating to the production and sale of milk within such city, and to appoint such inspectors as may be necessary," etc.,—is sufficient to authorize the city council to require every applicant for license to sell milk to state specifically the source from whence he obtains his milk, and to file a request for the inspection of the animals and premises, whether within or without the city limits, and whether owned by himself or another. And upon the failure of the applicant to comply with such requirements, or upon the refusal of the owner of the animals and premises to permit such inspection, they may refuse to issue the license. Such an ordinance is not void on the ground that it operates exterritorially, since it provides for the inspection of only those herds producing milk intended for sale within the city, which inspection is wholly voluntary on the part of the owner, because if he does not wish to sell his milk for consumption within the city, he need not submit to the inspection. State *v.* Nelson, 66 Minn. 166, 61 Am. St. Rep. 399, 68 N. W. Rep. 1066.

(a) Tuberculin Test.

So, under the charter provision mentioned in the preceding paragraph, the ordinance providing for the inspection of the animals as a condition precedent to the issuing of a license to sell milk within the city, may prescribe that the vetenarian making the inspection shall use what is commonly known as the "tuberculin test" as a diagnostic agency for the detection of tuberculosis in such animal. The uncertainty of such test does not render the ordinance void as being unreasonable or oppressive, the court saying, in answer to such objections: "The objection is urged that the ordinance is oppressive and unreasonable, in that it requires every dairy herd whose milk is desired to be sold within the city to be subjected to the 'tuberculin test,' which it is claimed is uncertain in its results and deleterious to the health of the animals. At the present stage of scientific research on this subject it may be a debatable question whether this test has been fully proven, or how far it is, as yet, merely experimental. There is ample evidence in this case that it is now the generally accepted theory that the presence of consumption, or tuberculosis, in animals can be detected by this test; also that this is what is called a 'germ disease,' which may be con-

Notes

tracted by eating the flesh or drinking the milk of a tuberculous animal. Upon the evidence we could not say that this provision of the ordinance is oppressive, or that it has not a reasonable tendency to prevent the sale of unwholesome milk within the city." State *v.* Nelson, 66 Minn. 166, 61 Am. St. Rep. 399, 68 N. W. Rep. 1066.

2. Inspection of Meat.

Power to erect and maintain a public slaughter house, and to compel all dealers in fresh meats to have their animals inspected and slaughtered there, and to compel the inspection and approval of all fresh meats offered for sale within the city, is not conferred by a charter authority to prohibit slaughter houses within the city, and to regulate, cleanse and abate the same, together with all other noxious and unwholesome trades and employments. Huesing *v.* City of Rock Island, 128 Ill. 465, 15 Am. St. Rep. 129. But under a general statutory authority to preserve and pass all health and sanitary ordinances necessary and incident to proper local sanitation, it is competent for the council to forbid the sale, or offering for sale, of any meat which has not been inspected and tagged by the board of inspectors; and a reasonable fee may be charged for each inspection. The existence of a state law requiring the ante mortem inspection of all animals intended for human food, and the payment of a small fee for each animal inspected, does not invalidate the ordinance. City of New Orleans *v.* Lozes, 51 La. Ann. 1172, 25 So. Rep. 979.

3. Power to Inspect Not to Be Used as Subterfuge to Tax.

But while the power to inspect may authorize the imposition of a reasonable charge to defray the expense of such inspection and supervision, it is not to be used as a subterfuge for raising revenue for general municipal purposes. Thus, a general law authorizing city councils to provide by ordinance for the inspection of milk, dairies, and dairy herds, and to issue licenses for the sale of milk, does not confer power to charge a fee of fifty cents for each animal inspected; and a fortiori is this true where dairymen are required to pay a license fee of one dollar under a statute which provides that no ordinance shall conflict therewith; since an ordinance which requires an additional fee, practically destroys the privilege of selling granted by the state license, and to that extent annuls the statute. City of St. Paul *v.* Peck (Minn.), 81 N. W. Rep. 389.

4. Power to Take Samples.

When the nature of the article is such that it can be inspected by means of tests applied to small quantities thereof, as in the case of milk, for instance, a power to authorize the taking of samples will be implied. Such a power, of course, is to be exercised within strict reason; no more is to be taken than is necessary for the purpose in hand; any abuse will amount to a deprivation of private property and render the ordinance invalid. But under no circumstances, it is believed, would such an ordinance be unconstitutional as compelling the owner of the thing to be inspected, to give evidence against himself, or as establishing a rule of evidence and making it conclusive of the guilt of the accused. State *v.* Dupaquier, 46 La. Ann. 577, 15 So. Rep. 502, 49 Am. St. Rep. 334; State *v.* Stone, 46 La. Ann. 147, 15 So. Rep. 11.

5. Summary Destruction of Unwholesome Articles.

Whether the legislature, or the city council acting under a power to regulate the sale of food products and provide for the inspection thereof, can order the summary destruction of such as fall below a prescribed standard, or are otherwise ascertained to be unwholesome, is a question upon which the courts are not entirely agreed. In Mayor of Mobile *v.* Yuille, 3 Ala. 137 (1841), 36 Am. Dec. 441, an ordinance which provided that all bread found to be deficient in either quantity or quality should be seized and condemned to the poor, was held to be a valid exercise of the police power, and authorized by a charter provision conferring power upon the city to regulate the assize of bread. In Deems *v.* Mayor of Baltimore, 80 Md. 164, 45 Am. St. Rep. 339, the inspector stopped the complainant's wagon upon the street, and tested his milk with an

instrument known as a "lactometer" and with "litmus" paper, and finding it to fall below the required standard as shown by such tests, he then and there poured the entire lot into the gutter. The ordinance authorizing such summary destruction was held to be a valid exercise of the police power, the court saying that there was a difference between the taking of private property for public use, and the destruction of property which has become a public nuisance, or a menace to the public health, citing Mugler *v.* Kansas, 123 U. S. 623. But that case is hardly in point, from the fact that there the destruction of the inhibited article was authorized only after it had been passed upon by a court of competent jurisdiction. In Blazier *v.* Miller, 10 Hun (N. Y.) 435, an ordinance authorizing the inspector to destroy milk falling below the prescribed standard was sustained on the ground that the destruction of the offending thing was necessary to prevent the imminent danger to life and health which would result from the use of impure milk. In Fath *v.* Koeppel (Wis.), 39 N. W. Rep. 539, an inspector of meats and fish, acting under a charter provision authorizing him to inspect all fish offered for sale within the city, and to condemn and destroy such as were unfit for human food, was held to be a judicial officer, and therefore not responsible to the owner of sound fish condemned and destroyed through error of judgment. Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3, while not arising under a food ordinance, is a case involving the same principle. In that case it was held that the board of health, acting under statutory authority, was not liable for ordering the summary removal of brush which the plaintiff and others had placed in the bed of a navigable river for the purpose of growing oysters. It appeared that for several months the village had been sorely afflicted with the contagious diseases, diphtheria and scarlet fever, and after much investigation, both by the local board and by experts, they had finally hit upon the brush in question as the source of the contagion. And although the epidemic had ceased its ravages (because of the approach of cold weather) at the time of the actual destruction of the brush, and the oysters growing thereon, the court held that the board was acting in the exercise of its judicial discretion, and was liable for no error of judgment. In Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. Rep. 783, it appeared that the defendant, acting in the capacity of health commissioner and under the supposed authority of a municipal ordinance, had ordered the summary destruction of the plaintiff's ice, upon the ground that, according to the report of the bacteriologist of the board of health, it contained germs dangerous to health. It was held, that the ordinance authorizing the health commissioner to order the summary destruction of substances intended for human food or drink whenever satisfied that their consumption might be injurious to public health, was not intended to authorize the summary destruction of such substances except under most extraordinary circumstances, when the danger to health and life was so imminent and so great, that it could not await the slow process of judicial investigation and determination. The court was further of the opinion that the danger attending the use of the plaintiff's ice, as shown by the facts in evidence, was not of such character, and that he was entitled to have the matter passed upon by a regularly organized tribunal.

It appears from the foregoing cases that where the use of the unwholesome article is attended by great and imminent danger to human life, an ordinance directing its summary destruction will be sustained, or probably an injunction will lie to restrain its sale; but otherwise, justice and constitutional principle would seem to entitle the owner of the alleged injurious article to his day in court. See also, in this connection, Health Dept. of New York City *v.* Purdon, 99 N. Y. 237, 52 Am. Rep. 22.

C. REGULATION OF TIME AND PLACE.

1. Ordinance Must Not Be in Restraint of Trade.

Where the nature of the article is such that the business of dealing therein calls for constant supervision and frequent inspection, or where

Notes

the public health or safety demands that its sale be restricted as to time or place, it is proper that power should be conferred upon the municipal authorities to pass ordinances for that purpose. It is possible that in some instances the general police power of the city or a general welfare clause of a municipal charter may be sufficient to authorize the passage of such ordinances; but, as a matter of fact, such authority is usually conferred, either expressly, or is held to be warranted by a power "to regulate," or a power to "license and regulate," etc. But where the article is such that the business of dealing therein was considered useful and legitimate at common law, any restriction thereof is in derogation of common right, and the power to impose must, in general, be expressly conferred, and will be strictly construed. And in any case the ordinance must be reasonable; for regulation does not mean restraint, or total prohibition. In Porter *v.* City of Water Valley, 70 Miss. 560, 12 So. Rep. 828, a charter power to regulate the vending of meats brought to the city for sale, and to license, tax, and regulate butchers, was held to authorize an ordinance prohibiting the retailing of meats between 4 P. M. and 9 A. M. except by persons duly licensed therefor. But in Helena *v.* Dwyer, 64 Ark. 424, 62 Am. St. Rep. 206, a statute conferring power to regulate any trade or business of a dangerons tendency to the morals, health, or safety of the city, was held insufficient to warrant an ordinance making it unlawful to sell or offer for sale any fresh pork within municipal limits between the first days of June and October of each year; the court saying, that fresh pork, if sound, was a useful article of food, and the ordinance was void as tending to impose an unreasonable and unlawful restraint upon a useful and legitimate business. But in Village of Buffalo *v.* Webster, 10 Wend. (N. Y. 1833) 99, a similar ordinance forbidding the hawking about or peddling of fresh meats, or its sale at any place outside the limits of the public market, during certain months, was held to be valid.

2. Ordinance Must Be Fair and Impartial.

All ordinances must be fair and impartial, and general in their operation. Equal protection of the law is a favorite principle in our jurisprudence, and any special or unwarranted discrimination, or any unjust or oppressive interference, will render the ordinance void.

(a) Sale of Groceries in Dry-Goods Store.

Thus, in Chicago *v.* Netcher, 183 Ill. 104, 75 Am. St. Rep. 93, the common council, under a charter authority to "regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same," passed an ordinance forbidding the sale of the articles enumerated in any store where dry-goods, clothing, jewelry, or drugs were sold. It was held to be not only an unjust and oppressive discrimination, but unconstitutional, for the reason that the right to sell or barter property is a necessary incident of ownership, and to deprive the owner of the right to expose for sale, and sell his property, is to deprive him of his property by taking away one of the incidents of ownership.

(b) Discrimination between Dealers in Different Sections of City.

In City of St. Louis *v.* Spiegel, 90 Mo. 587, 2 S. W. Rep. 839, an ordinance which provided that the keepers of meat shops within the old city limits might *deliver* meats by wagon or otherwise, and that the keepers of meat shops within the limits of the new additions to the city might send out wagons to *sell* meats, was held invalid as making an unjust discrimination.

(c) Discrimination in Favor of Shop Keepers.

As regards statutes, it is well settled that the motives prompting the legislature to their enactment are free from judicial inquiry; but as concerning the motives of city councils in the passage of ordinances, it is probable that the rule does not apply to its full extent. "Municipal bodies," says Judge Dillon (1 Dill. Mun. Corp. [4th Ed.] § 311), "like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage, or to the injury of others. We suppose it to be a sound proposition,

Notes

that their acts, whether in the form of resolutions or ordinances, *may be impeached for fraud* at the instance of persons injured thereby." At any rate, there is nothing better settled than that courts may inquire into the reasonableness of ordinances according to their nature and effect; and in this indirect way, whatever may be their ostensible purpose, the courts may get at the real motive of the municipal legislative body, and defeat its object. For example, in Chaddock *v.* Day, 75 Mich. 527, 13 Am. St. Rep. 468, the city council, under a pretense of regulating the sale of meat, passed an ordinance prohibiting the hawking or peddling about the streets, or the sale upon the streets, of any fresh meats in less quantity than one quarter without having first obtained a license therefor, for which license a fee of ten dollars per month was charged, payable in advance. The town had no public market, so that clearly it was not intended as a police measure to confine the sale of fresh meats to some one locality where they could be inspected. The sole object, evidently, was to prohibit the selling of meats on the streets in order to favor the interests of those engaged in selling fresh meats in shops. Accordingly it was held to be invalid, as class legislation and in restraint of trade. See also, Hughes *v.* Recorder's Court, 75 Mich. 574, 13 Am. St. Rep. 475.

(d) Prohibiting Sales at Depots and Wharves.

In State *v.* Davidson, 50 La. Ann. 1297, 69 Am. St. Rep. 478, an ordinance of the city of New Orleans which prohibited the sales of fruits, vegetables, market produce, and other perishable merchandise at depots, freight yards, cars on the track, wharves, landings, and levees, was held to be a valid police regulation and not in contravention of any constitutional provision, either state or federal; but in Spellman *v.* City of New Orleans, 45 Fed. Rep. 3, upon a bill filed in the federal court to restrain its enforcement upon constitutional grounds, it was held to be an unconstitutional interference with interstate commerce, the court saying that it was not in aid of the prevention of any public harm, or the promotion of any public good, such as the obstruction of streets or the blocking of crossings, or the protection of the public health, but, on the contrary, seemed to have no other purpose than to hinder competition between nonresident shippers and dealers in certain perishable articles, and the resident licensed dealers in the same. And in Georgia Packing Co. *v.* Mayor, etc., of Macon, 60 Fed. Rep. 774, an ordinance of the city of Macon, the practical effect of which was to work a discrimination in favor of home raised meats, was held unconstitutional for the same reason, notwithstanding it had formerly been held to be constitutional by the state supreme court in Henry *v.* Mayor of Macon, 91 Ga. 268, 18 S. E. Rep. 143.

(e) Prohibiting Sale of Vegetables by Butcher in Public Market.

But where one ordinance provides that a meat shop keeper's license shall entitle him to sell meat, fish, fowl, fruits, and vegetables, and another ordinance provides that the inner portion of all market houses shall be set aside for butcher's stalls, and that no fruits or vegetables shall be sold therein, but that the stands and stalls outside the market house may be used for the sale of poultry, game, fish, fruits, vegetables, and other marketable articles, *except fresh meat*, the first ordinance is not void for discrimination, in that it gives to butchers doing business at places other than the market house the right to sell vegetables, but denies it to those occupying stands or stalls at the market house, since the discrimination, if any, is contained in the second ordinance; and the second ordinance is not void for discrimination, since no one is compelled to sell his meats at the market house, but if he chooses to do so, he voluntarily subjects himself to the rules and regulations of the market house, and if a discrimination is thus created, it is by his voluntary act, and not by any provision of the ordinance. City of St. Louis *v.* Freivogel (Mo.), 8 S. W. Rep. 715. See also, New Orleans *v.* Graffina, 52 La. Ann. 1082, 27 So. Rep. 590.

3. Power to Prohibit Sales Outside of Public Market.

In regard to the power of a municipal corporation to prohibit the sale

Notes

of marketable articles at places other than the public market, there seems to be much diversity of opinion as to whether such power must be expressly conferred, or whether it can be implied from such expressions as "power to establish and regulate," or "power to establish and regulate markets, and the vending of marketable articles"; and if it is to be implied from such expressions, then to what extent,—whether the prohibition shall be total, or only within certain limits, or during certain hours.

(a) At Private Markets or Established Places of Dealing.

In Louisiana and several other states a power to establish and regulate markets and the vending of marketable articles is held sufficient to authorize the prohibition of private markets within specified distances of public markets, or the sale of marketable articles at any established place of dealing within market limits, or even within city limits, when there is a public market. Natal *v.* State of Louisiana, 139 U. S. 621, 11 Sup. Ct. Rep. 636; New Orleans *v.* Graffina, 52 La. Ann. 1082, 78 Am. St. Rep. 387; State *v.* Namias, 49 La. Ann. 618, 62 Am. St. Rep. 657; Municipality *v.* Cutting, 4 La. Ann. 335; Morano *v.* New Orleans, 2 La. 217; Blanchard *v.* Ivers, 40 Fla. 117, 24 So. Rep. 66; Atkins *v.* Philips, 26 Fla. 281, 8 So. Rep. 429; Town Council of Winnsboro *v.* Smart, 11 Rich. (S. Car.) 551; State *v.* Pendegrass, 106 N. Car. 664, 10 S. E. Rep. 1002; St. Louis *v.* Jackson, 25 Mo. 37. If the city has power to enact such ordinances, they are not invalid as impairing the vested rights of one who has gone to great expense in fitting up a place with refrigerators and other conveniences for the sale of such articles prior to the passage of the ordinance. Newson *v.* City of Galveston (Tex.), 7 L. R. A. 797; Ex parte Byrd, 84 Ala. 17, 5 Am. St. Rep. 328.

In other states the courts take the view that the power to prohibit, either totally or partially, must be expressly conferred; and in Georgia it is held that the legislature cannot, even by the most express terms, authorize the total prohibition of the sale of marketable articles outside of the public market. Bethune *v.* Hughes, 28 Ga. 560 (1859), 73 Am. Dec. 789; Henry *v.* Mayor, etc., of Macon, 91 Ga. 268, 18 S. E. Rep. 143. In Caldwell *v.* City of Alton, 33 Ill. 421 (1864), 85 Am. Dec. 282, the defendant was a merchant conducting a regular grocery store at a point outside the market limits. Among other things, he bought and sold vegetables, keeping them as a part of his regular stock in trade. Under a charter power to establish and regulate markets, the city established a market and prohibited the sale of vegetables at any place outside of market limits during market hours. It was held that market regulations could not be made to operate beyond market limits, and in the course of its opinion, the court took occasion to say: "If the city can by ordinance restrain a merchant from selling his goods outside of the market limits during a portion of each day, it might, with the same propriety, require all flour to be sold on a particular lot, all high wines on another, and vegetables and grain on another. No one will deny that such regulations would be in restraint of trade and therefore void." But see Bloomington *v.* Wall, 46 Ill. 489 (1868), where it was intimated that an ordinance which fixed reasonable market hours, and prohibited sales outside the market during those hours only, leaving dealers free to sell during the remainder of the day, would probably be unobjectionable. In St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89, the ordinance was so framed as to give the city a complete monopoly of the business which it purported to regulate. It declared, in effect, that any person wishing to sell meat by retail must sell it in one of the stalls of the public market, and pay, in advance, such rent as the council might choose to charge; nor was there any provision made that the city should provide sufficient stalls for all applicants. There was a provision to the effect that the council might, in their discretion, grant a license for the sale of meat elsewhere in the city; but the defendant's application for such license had been refused, and, as was admitted by counsel for the city, for the express purpose of compelling him to rent a stall in the market. It was held that such an ordinance was unreasonable and in derogation of common right, and could not be sustained under a power

Notes

to establish and regulate markets, or to license and regulate the sale of meat. It is likewise the doctrine of the English courts that the grant of a market, without more, does not imply power to exclude all persons from selling marketable articles elsewhere during market hours. Mayor of Macelsfield *v.* Chapman, 12 Mees. & W. 18; Grant on Corp. 176.

It will be observed that a majority of the cases holding that a power to prohibit sale outside of market or market limits might be derived by intendment or implication from a power to establish and regulate, were cases arising in cities of the far south, Mobile, New Orleans, Galveston, where the climatic conditions are such that animal and vegetable matters rapidly deteriorate, menacing the public health, not only through danger of eating unwholesome food, but with the danger of epidemic as well; so that, as was said in New Orleans *v.* Stafford, 27 La. Ann. 417, 21 Am. Rep. 563, it is imperative that the markets be so situated that they may at all times be under the strictest surveillance. And herein probably lies the true distinction, namely, that where the climatic conditions are such, or where the nature of the article is such that the protection of the public health demands that the business of dealing therein be subjected to constant supervision and inspection, as in the case of oysters, for instance, whose tendency to putrefaction is well known, a power to regulate will be given a liberal construction, and ordinances confining the sale thereof to markets or other places where it can be more effectually supervised and controlled, will be sustained; but where the articles are such that the business of dealing therein was recognized as legitimate and useful and a matter of common right at common law, and its nature and the climatic conditions of the place in which it is sold are such that the public health does not demand such stringent protection, then the power must be express.

(aa) When Public Market Is Maintained by Private Individual.

In Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80, a contract whereby the municipality agreed with a private individual that he should build a market house and put it in possession of the city, and that the city should let the stalls to vendors at a rent to be agreed upon by the city and the owner, for a period of ten years, and turn the rents over to him, the city further binding itself not to establish, or permit the establishment of any other market during such period, was held void as an attempt to bargain away the police power, the court saying that the city could not preclude itself from establishing markets whenever they might be thought desirable, or from abolishing them when found undesirable. And in City of Davenport *v.* Kelly, 7 Iowa 104 (1858), an express charter power to establish public markets and prohibit the sale of marketable articles elsewhere, was held not to authorize the delegation to a private person of the exclusive privilege of erecting a market and letting stalls to those who might wish to sell. But in Le Claire *v.* City of Davenport, 13 Iowa 210, it was held that an ordinance granting such a privilege might be sustained if the rent of the stalls and the general supervision and regulation of the market were left to the control of the city.

(aaa) Sale within Market Limits—What Constitutes.

As to what constitutes a sale within market limits, it was held in State *v.* Wernwag, 116 N. Car. 1061, 21 S. E. Rep. 683, where the ordinance prohibited the sale of fresh meats without a license within a radius of three miles of the courthouse, except at the public market, that a butcher, who kept a shop without the limits, but who delivered meat in response to a telephone order to a hotel within the limits, was guilty of a violation of the ordinance, under the rule that where it is a part of the contract of sale that the seller shall deliver the property sold at some specified place, the title and risk to remain in the seller until the transference is at an end, the sale takes place only when the goods are delivered at the agreed place.

(b) Hawking and Peddling Outside of Market.

Hawkers and peddlers have always been considered peculiarly subject to police regulation; hence, powers to establish and regulate markets

Notes

and the vending of marketable articles, and ordinances prohibiting the sale of marketable articles outside of the public market, are, as a rule, construed with more liberality when applied to hawkers and peddlers. Thus, in Ex parte Canto, 21 Tex. App. 61, 17 S. W. Rep. 155, it was said that while a power to establish and regulate markets would not authorize the corporation to prohibit entirely the sale of meats outside of the public market, yet it did authorize a by-law forbidding the hawking about or selling of meats by retail except at the public market, and within certain limits about the same. And in Bush *v.* Seabury, 8 Johns. (N. Y.) 418 (1811), it was held that under a power to regulate public markets the city might absolutely prohibit the peddling of fresh meats about the streets during certain seasons, or its sale at any place other than the public market. In Shelton *v.* Mayor of Mobile, 30 Ala. 540, 68 Am. Dec. 143, an ordinance prohibiting the hawking or peddling of any marketable articles about the streets was held to be valid, although it appeared that there were but two public markets in the city, and that the city extended from one to two miles in different directions from the markets, making it extremely inconvenient, if not impossible, for some of the inhabitants to supply themselves at the public markets. It may be mentioned, however, that in that case there was an express charter authority to prohibit the sale of marketable articles at places other than the public market.

Power to establish and regulate markets, however, does not authorize an ordinance prohibiting hawking and peddling unless a market has in fact been established, the court saying in one case, that an ordinance prohibiting hawking and peddling could not be deemed a market regulation when there was no market to regulate; and as the ordinance in question seemed to have been passed solely in the interest of butchers selling in shops, it was declared invalid. Burlington *v.* Dankwardt (Iowa), 34 N. W. Rep. 801.

And where there is express power given to prohibit the sale of marketable articles at other places than the public market during market hours, it will not be extended to authorize an ordinance forbidding the hawking and peddling of such articles, not only during market hours, but at all hours, as well, without having first obtained a license and paid a fee of twenty-five dollars. Such a power must not be used in a colorable manner for the purpose of taxation. State, Farnsworth *v.* Mun. Ct. of St. Paul, 32 Minn. 329, 20 N. W. Rep. 243; City of St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462.

Nor does a charter power to regulate markets and prevent huckstering therein, authorize the common council to declare arbitrarily that all persons, not farmers or butchers, who shall offer for sale in the market any meats, vegetables, provisions, groceries, wares, or other commodities whatsoever, not of his own produce or manufacture, shall be deemed hucksters, and impose a tax upon them as such. The word huckster is a word of limited signification, and the mayor and council have no power to extend it so as to include those who are not, in fact, hucksters. Mays *v.* Cincinnati, 1 Ohio St. 270.

(bb) Farmers Selling Their Own Produce.

As regards farmers and gardners peddling their own produce about city streets, it cannot be said that there is any general rule making an exception in their favor, further than that the selling of farm products when and where the producer may see fit, being a matter of common right, any ordinance in derogation thereof will be given a strict construction. Where the power is given to prohibit hawking and peddling outside the public market, ordinances passed in pursuance thereof may be made to apply to farmers and gardners as well as to others, even though the farmer do but exchange a leg of mutton for a pound of tea at a grocer's. Village of Buffalo *v.* Webster, 10 Wend. (N. Y. 1833) 99; State *v.* Sarradat, 46 La. Ann. 700, 15 So. Rep. 87; State *v.* Fried, 46 La. Ann. 1418, 15 So. Rep. 88; Morano *v.* Mayor, 2 La. Ann. 217.

In other courts, however, ordinances which have the effect of depriving farmers and gardners of the right to sell products of their own growing when and where they please, have been looked upon with great

Notes

disfavor. Thus, in Bethune *v.* Hughes, 28 Ga. 560, 73 Am. Dec. 789, several times cited already, an ordinance prohibiting sales outside the market house before and during market hours was held not to be authorized by a power to regulate markets, although there was a proviso that the mayor and council might authorize such sales by license; and Lumpkin, J., adverting to the inadvisability and injustice of such legislation, said: "And they (the legislature) will hesitate long before they will knowingly compel decent poor women and boys to attend at the market place, to mingle with the rabble that often assembles there, in order to sell a few pounds of butter, or a few vegetables; before they will coerce poor men who bring in poultry and eggs on their load of wood, to wait for hours before they can return to their labors, remaining around the market exposed to the weather; or, indeed, before they will restrict any person in this land of liberty, from selling his cotton, corn, wheat, beef, pork, chickens, or anything else, when he pleases, where he pleases, and to whomsoever he pleases."

Ordinances which discriminate against farmers selling their own produce and in favor of other dealers, will most certainly be declared void, no matter what the charter power under which they were passed. Thus in City of St. Paul *v.* Traegar, 25 Minn. 248, 33 Am. Rep. 462, an ordinance which prohibited "every farmer, gardner, or person producing vegetables" from selling the same upon or along the streets without having first paid twenty-five dollars for a license, which license granted the privilege of selling only after ten o'clock of the forenoon of each day, was held invalid. In Hughes *v.* Recorder's Court of the City of Detroit, 75 Mich. 574, 13 Am. St. Rep. 475, the plaintiff sought a writ of prohibition to prevent the city from prosecuting him for violating an ordinance which prohibited the sale of any article at the principal city market except from stalls or stands leased or occupied by the sellers, and which confined farmers and gardners with their vehicles and produce to two smaller markets in remote parts of the city. The practical effect of the ordinance was to deprive the growers of market produce from selling at first hand to the consumers who came to buy at the principal market, and to compel those consumers to buy at second hand from the holders of stalls in that market. Plainly the sole intent and purpose was to protect the interests of the "middle-men" selling from stalls in the principal market. The ordinance was held invalid, and the writ granted with a suggestion on the part of the court that it was meant to be obeyed. Any ordinance which is intended to prevent dealers in staple commodities, residing without the city limits, from supplying their customers within the city, is in restraint of trade and invalid. Com. *v.* Hepper, 22 Pa. Co. Ct. Rep. 630.

But an ordinance which provides that all farmers and gardners, selling or offering for sale, from wagons, carts, or other vehicles, within the corporate limits, any articles of produce, etc., shall occupy and stand with such wagons, vehicles, etc., within prescribed market limits, and no where else,—is not intended to prohibit the persons described from selling their produce through the city, or from casually stopping their wagons for the purpose of making a sale; but it is intended to prohibit the standing of a wagon or other vehicle in the street for the purpose of selling, and with no intention to move until all the produce is sold, and as such it is a reasonable and valid regulation. People *v.* Keir, 78 Mich. 98.

4. Slaughter Houses—Power to Control Location.—(a) In General.

The power of municipal corporations to control the location of slaughter houses, and to regulate, cleanse, and abate the same, is more properly referable to the head of nuisances, and for that reason it will be disposed of in a very brief manner in this connection. In general, it may be said, that owing to the nature of the business, and the difficulty of preventing its becoming a nuisance *per se*, power is pretty generally conferred upon corporate authorities to confine the business of slaughtering animals for human food to prescribed limits, or to prohibit it within city limits altogether. Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564; Mil-

Notes

waukee *v.* Gross, 21 Wis. 241, 91 Am. Dec. 472; Huesing *v.* City of Rock Island, 128 Ill. 465, 15 Am. St. Rep. 129. But a power to determine the location of slaughter houses will not be construed as authorizing the corporate authorities to prohibit single acts of slaughtering on private premises for the owner's use, unless the same is in fact a nuisance. Wreford *v.* People, 14 Mich. 41. But if authorized, the common council may prohibit single acts of slaughtering within city limits, whether the same be done by residents or nonresidents. Pierce *v.* Bartram, Cowp. (Eng.) 269.

(b) Public Slaughter Houses—Exclusive Privileges.

In the exercise of its police power, the legislature may grant to a private corporation the right to have all animals intended for food in a certain city inspected at their stock yards, and slaughtered at their slaughter house, or it may authorize the city to erect and maintain a public slaughter house, and to compel the inspection and slaughtering of all animals intended for food within the city at that place. Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Milwaukee *v.* Gross, 21 Wis. 241, 91 Am. Dec. 472. But when the legislature has granted such a privilege to a private corporation, it cannot bind either itself or a future legislature to refrain from granting a similar privilege to others, because it cannot bargain away the police power of the state. Butchers' Union, etc., Co. *v.* Crescent City, etc., Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652. Nor can a municipal corporation, without express legislative authority, compel the inspection and slaughtering of all animals intended for food within its limits at a public slaughter house maintained either by itself or by private individuals. Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Huesing *v.* City of Rock Island, 128 Ill. 465, 15 Am. St. Rep. 129.

D. POWER TO LICENSE FOOD DEALERS.

1. Whether Power to Regulate Confers Power to License.

Whether a power to license is to be inferred from a power to regulate depends in some measure upon the nature of the article sold, and often times upon other charter provisions which are to be read in connection therewith. If the business in which the dealer is engaged would be considered useful and legitimate in the absence of ordinance, then it is held by many courts that the requirement of a license, being in derogation of common right, cannot be sustained under an implied power. And if there is a separate charter provision enumerating the various kinds of business, trades, occupations and professions for which a license may be required, then under the principle of *expressio unius* the power to license any other is excluded. And even an express power to license, without more, is not to be used as a subterfuge to tax; *a fortiori* is this true where the means of raising revenue are otherwise distinctly prescribed. In State *v.* Smith, 67 Conn. 541, 52 Am. St. Rep. 301, 35 Atl. Rep. 506, a charter authority to "license cartmen, truckmen, hackmen, butchers, bakers, and petty grocers or hucksters, and common victuallers," under such restrictions as the common council might deem necessary and proper to the health of the city, was held insufficient to authorize an ordinance requiring every one who wished to sell milk of any kind within the city to first procure a license; the court saying that the right to license that which was ordinarily a useful and lawful business, and thereby restrict the number of those who might wish to engage in it, could not be conferred by any doubtful implication. In Gray *v.* Mayor of Wilmington, 2 Mary (Del.) 257, 43 Atl. Rep. 94, a power to provide against the adulteration of milk or cream sold, or bought to be sold, and for the proper inspection of the same, was held not to authorize an ordinance requiring a license to sell the same. And a statute authorizing the trustees of a village to make such prudential by-laws, rules, and regulations relative to hucksters and keepers of small shops wherein food stuffs are sold, as may be necessary and proper, does not confer power to require hucksters and petty grocers to procure and pay for a license, for such an ordinance is in restraint of trade and con-

Notes

trary to the general principles of the laws. Dunham & Daniels *v.* Trustees of the Village of Rochester (N. Y. 1826), 5 Cow. 462. But in St. Johnsbury *v.* Thompson, 59 Vt. 301, 59 Am. Rep. 731, a precisely similar provision was held to confer power to license and charge a license fee. In State, Farnsworth *v.* Mun. Ct. of St. Paul, 32 Minn. 329, 20 N. W. Rep. 243, a power to prohibit the sale of vegetables and farm produce at places other than the public market during market hours, was held insufficient to authorize an ordinance prohibiting the vending of such articles during market hours and all other hours, without first procuring a license.

2. Where Sale of Article Licensed Is Made Unlawful by Statute.

Even an express power to license will not authorize the city to license that which is made unlawful by statute. Thus in Haines *v.* People (Colo.), 43 Pac. Rep. 1047, there was a statute making the sale of oleomargarine unlawful unless it was stamped and labelled in a prescribed manner. Another statute conferred upon the common council of the city of Denver the *exclusive* power to license and regulate all lawful occupations, business places, trades, etc., within the city: *held*, that under the power conferred, the city could license the sale of oleomargarine only when the same was lawful,—that is, when the packages were stamped and marked in the prescribed manner.

3. License Power Not to Be Used as Subterfuge to Tax.

In other cases the power to regulate has been construed with more liberality and has been held to authorize ordinances requiring dealers in food stuffs to procure licenses, and pay small fees therefor. St. Johnsbury *v.* Thompson, 59 Vt. 301, 59 Am. Rep. 731; City of Cincinnati *v.* Buckingham, 10 Ohio 257; Nightingale, In re, 11 Pick. (Mass.) 168 (1831). But in no case is a power to regulate or a power to license to be exercised in a colorable manner for the purpose of raising revenue. Thus a power to regulate the sale of fresh meat does not authorize the council to require all persons wishing to sell by retail outside of the public market to pay a license fee of ten dollars per month, or even twenty-five dollars per year. City of St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89; St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462; State, Farnsworth *v.* Mun. Ct. of St. Paul, 32 Minn. 329, 20 N. W. Rep. 243. Nor does a power to establish and regulate markets confer authority to impose a license fee of one hundred dollars upon persons wishing to sell fish in the market. State *v.* Rowe (Md.), 20 Atl. Rep. 179. So an ordinance imposing a tax upon every load of supplies carried to a public market is not a valid exercise of the police power. State *v.* Blaser, 36 La. Ann. 363. Nor does authority to prevent huckstering in the public market authorize the exacting of a license fee from such persons, especially when the charter has prescribed another and specific mode of raising revenue for municipal expenses. Mays *v.* Cincinnati, 1 Ohio St. 273 (1853). So the business of selling lemonade, ice cream, cakes, pies, cheese, nuts, fruits, and similar edibles from temporary stands is at least legitimate, if not useful, and authority to require a license of persons engaged in such selling is not conferred by a general power to enact and enforce all such ordinances, rules, and by-laws "for the government and good order of the village, for the suppression of vice, for the prevention of fires, for the benefit of trade and commerce, and for the health thereof, as might be deemed expedient." Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

So under a general law authorizing city councils to provide by ordinance for the inspection of milk, dairies, and dairy herds kept for the production of milk within city limits, and to issue licenses for the sale of milk therein, the council has no power to charge an inspection fee of fifty cents for each animal inspected, the statute itself requiring dairymen to pay a fee of one dollar for a state license, and providing that no ordinance shall conflict therewith. City of St. Paul *v.* Peck (Minn.), 81 N. W. Rep. 389.

But where the fee is not grossly disproportionate to the cost of inspection and regulation, and the ordinance appears to be a bona fide enactment to protect public health and promote the general welfare, it has

Notes

been held in a number of cases that the courts will not be astute to find reasons for setting it aside. Thus in People, Larrabee *v.* Mulholland, 82 N. Y. 324, an ordinance declaring that it should be unlawful for any person to peddle or deliver milk without having procured a license and paid a fee of not less than five nor more than ten dollars for each vehicle used for the purpose, was held not to be invalid; the license and license fee being only a means of regulation and control, and not for purposes of revenue. And in Littlefield *v.* State, 42 Neb. 223, 28 L. R. A. 588, an ordinance imposing a license fee of ten dollars upon each wagon delivering milk within the corporate limits, was held to be a valid regulation although the fund derived from such fees was directed to be applied to public school purposes; the cost of inspection and regulation being provided for out of a special fund created by setting apart a portion of the general city levy. See also, Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. Rep. 260; Packing Co. *v.* Chicago, 88 Ill. 221, to the effect that such an ordinance is not invalid because the license fee is in excess of what is strictly required to meet the expense incident to necessary and legitimate supervision and inspection. In Atkins *v.* Philips, 26 Fla. 281, 8 So. Rep. 429, a charter power to regulate the vending of meat, fish, fruits, poultry and vegetables, and to establish and regulate markets, was held to authorize an ordinance imposing a monthly license fee of five dollars upon all dealers selling such articles outside of market limits, it being shown by actual calculation that the fund derived from such fees was but little in excess of the actual cost of inspection. In Blanchard *v.* Ivers, 40 Fla. 117, 24 So. Rep. 66; City of Jacksonville *v.* Ledwith, 26 Fla. 163, 23 Am. St. Rep. 558, and Ash *v.* People, 11 Mich. 347 (1863), precisely similar ordinances were sustained on the ground that the five dollars per month was no more than was reasonably required to defray the cost of inspection. In City of Cincinnati *v.* Buckingham, 10 Ohio 257, a fee of twenty-five cents per day imposed upon each person occupying a stall in the public market was held to be authorized by a power to license and regulate.

4. Discrimination—Ordinance Must Be Fair and Impartial.

Ordinances licensing the sale of food products must, like all other ordinances, be fair and impartial; no unjust or purely arbitrary discrimination against classes or individuals will be tolerated. Thus in Kansas City *v.* Grush, 151 Mo. 128, 52 S. W. Rep. 286, an ordinance which singled out produce merchants and required them to pay a special license fee of fifty dollars in addition to their ad valorem tax, which license fee was not required of other merchants, was held to be invalid as imposing an unequal burden upon the merchants taxed. And in Ga. Packing Co. *v.* Mayor, etc., of Macon, 60 Fed. Rep. 774, an ordinance which permitted producers to sell meat of their own raising when and where they pleased without license, but required the payment of a license fee by all others, was held to be invalid as discriminating against interstate commerce, for while it ostensibly operated alike upon all producers selling meat of their own raising, yet in the nature of things, only the meat growers in the vicinity could avail themselves of the privilege; hence, it prevented dealers in meat grown in other states from competing with dealers in home-grown meat. In Vosse *v.* City of Memphis, 9 Lea (Tenn.) 294, it was held that meat dealers who had paid for a license which properly included the right to sell game and fish, could not be required to pay an additional fee because of a subsequent ordinance placing dealers in fish and game in a separate class. In re Nightingale, 11 Pick. (Mass.) 168 (1831), an ordinance which provided "that no inhabitant of the city of Boston, or of any town in the vicinity thereof, not offering for sale the produce of his own farm, * * * * should, without license from the clerk of Faneuil Hall market, be suffered to occupy any stand with cart, sleigh, or otherwise for the purpose of vending commodities," in certain named streets, etc., was held not to be void for discrimination. But an ordinance which requires a license of dealers who sell more than twenty quarts of milk per day, and exempts those who sell less, is invalid; *a*

Notes

fortiori where there is a charter provision forbidding the council to exempt any person from the operation of any municipal ordinance or regulation. Gray *v.* Mayor of Wilmington, 2 Mary (Del.) 257, 43 Atl. Rep. 94.

In Walsh *v.* City of Denver, 11 Colo. App. 523, 53 Pac. Rep. 458, where the power to license and regulate the sale of meat was required to be exercised by the common council, or by the fire and police board, it was held that the granting of licenses could not be made to depend upon the approval of the health commissioner, for the reason that the discretionary powers of the council could not be delegated to an individual, and because an ordinance which makes the rights of individuals to engage in any business to depend upon the caprice or whim of any one person, is violative of the fourteenth amendment of the federal constitution as denying the equal protection of the laws. But in People, Larrabee *v.* Mulholland, 82 N. Y. 324, an ordinance authorizing the mayor to grant licenses for the sale of milk to only such persons as in his judgment should appear proper and best calculated to secure to the inhabitants of the city pure and wholesome milk, and prohibiting its sale by any others, was held valid.

5. Nonresidents—Farmers Selling Their Own Produce.—(a) In General.

As regards the power to require a license of farmers or other nonresidents selling their own produce within city limits, the legislature may undoubtedly confer such power; but whether it has been conferred in a specific case, or whether a particular individual comes within the terms of an ordinance passed in pursuance of such power, is a different matter. In Kip *v.* City of Patterson, 26 N. J. L. 298 (1855), it was held that the power to impose a license fee upon vendors of country produce must be express. And in City of St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462, a charter power to establish public markets and make rules and regulations for the government of the same, and to restrain all persons from interrupting or interfering with the due observance of such rules and regulations, was held insufficient to authorize an ordinance requiring "every farmer, gardener, or person producing vegetables," who wished to sell the same along the city streets, to first procure a license and pay a fee of twenty-five dollars. This ordinance was expressly held to be void as to a farmer living outside of the city and raising and selling his own produce.

(b) Milk Wagon of Nonresident.

In Mason *v.* City of Cumberland (Md.), 48 Atl. Rep. 136, under a power to "license, tax, and regulate wheeled vehicles," the city passed an ordinance which made it unlawful to drive over the streets any milk wagon or other vehicle without having obtained a license therefor. Another section made it unlawful to peddle any goods, wares, or merchandise in or along the streets without a license therefor, and defined who should be considered a peddler under the ordinance; but to this section there was an exception in favor of farmers selling the products of their own farms. The defendant, who resided outside of the city, was arrested while driving a wagon from which he supplied his customers in the city with milk obtained solely from the cows upon his own farm. It was held that under the ordinance he must take out a license, since the exception in favor of farmers selling their own produce applied only to the license required of peddlers, whereas there was no exception to the section requiring milk wagons to be licensed. See also, Tomlinson *v.* City of Indianapolis (Ind.), 43 N. E. Rep. 9, where a power "to regulate the use of streets and alleys by vehicles," and "to license, tax, and regulate wheeled vehicles," was held to authorize an ordinance requiring a nonresident gardener to procure a license for the wagon which he used to bring his vegetables to a stand which he occupied in the city.

(c) Nonresident Butchers.

In Frommer *v.* City of Richmond, 31 Gratt. 646, 31 Am. Rep. 746, a power to require the "owners or keepers of wagons, drays, and carts using them in the city" to take out a license and pay a license fee, was held to cover the case of a butcher who resided without the city, and

Notes

killed and prepared his meats at his country place, and who used his wagon only for the purpose of hauling them to and from his stall in the city market. To the same effect, see Sledd *v.* Commonwealth, 19 Gratt. 813.

And where a municipal ordinance forbidding the sale of fresh meats without a license, contained an exception in favor of farmers selling meat produced upon their own farms or premises, it was held that a butcher who sold sheep fattened on his own farm could not claim the benefit of the exception where the farm was conducted as a mere auxiliary to his shop in the city. Trustees of Rochester *v.* Pettinger, 17 Wend. (N. Y. 1837) 265.

In City Council of Camden *v.* Roberts, 55 S. Car. 374, 33 S. E. Rep. 456, there was a statute which provided that no city should exact a license fee of persons selling, or offering for sale, any fresh beef (and other articles specified) produced or grown by the vendor, excepting regular butchers who should keep a regular butcher's stall or market house within the corporate limits. Another section provided that any farmer or stock-raiser might sell beef or other meats within the corporate limits without license or charge for so doing. The defendant had been the proprietor of a regular meat shop within the corporate limits, but had discontinued it several months prior to the time of the alleged offence, and at that time he was residing without the city on a small farm, on which he raised twenty acres of corn. He made a practice of buying cattle, keeping them a while on the farm, and then butchering them and selling the meat in the city. It was held that under the first section of the statute mentioned, he did not "grow or produce" an animal which he purchased and kept on his farm for two years before butchering; nor was he a "farmer or stock-raiser" within the contemplation of the second section.

(d) Farmer Retailing Rice from Wagon Not a Peddler.

In Roy, Mayor, *v.* Schuff, 51 La. Ann. 86, 24 So. Rep. 788, an ordinance exacting a license fee of peddlers was held not to include a farmer who traveled in a small wagon and sold rice of his own growing in small quantities. A peddler was defined to be one whose chief business was that of a trader, and who went from place to place selling small wares which he had purchased; whereas, the farmer was not a trader, but was simply carrying out the purpose he had in view in making his crop, namely, to sell it in whatever manner should seem to him the most advantageous, whether by wholesale or retail.

E. HEALTH BOARDS—POWER TO ENACT FOOD REGULATIONS.

A health board is the creature of statute, or duly-authorized ordinance, and can exercise the powers conferred and no others. But the legislature, in the exercise of its constitutional authority, may confer upon such boards the power to enact ordinances regulating such matters as food, slaughter houses, nuisances, and, in general, anything pertaining to the general sanitation and health of the city; and such ordinances have the force of law within the districts over which their authority extends. Thus in Polinsky *v.* People, 73 N. Y. 65, it was held that under an authority to enact sanitary ordinances for the better security of life and health, the board might prohibit and punish by fine and imprisonment the bringing of impure or adulterated milk into the city for the purpose of sale, notwithstanding there was a general statute prohibiting the sale of impure milk and making it punishable by fine only. See also, Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; Health Dept. of New York City *v.* Purdon, 99 N. Y. 237, 52 Am. Rep. 22; Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3. But in every instance their power must be traceable as coming from the legislature, for the city council, cannot, without legislative authority, delegate its discretionary powers to others; as, for example, making the right to a license for the sale of fresh meats to depend upon the approval of the health commissioner. Walsh *v.* City of Denver, 11 Colo. App. 523, 53 Pac. Rep. 458.

Cross References.

In regard to the constitutionality of meat inspection laws, see note appended to City of New Orleans *v.* Lozes, 2 Mun. Corp. Cas. 263. Upon the general subject of municipal control and regulation of markets, including the power to prohibit sales elsewhere, see notes appended to City of New Orleans *v.* Kientz, 3 Mun. Corp. Cas. 341, and City of New Orleans *v.* Faber, 5 Mun. Corp. Cas. 413.

CITY OF NEW ORLEANS *v.* VIDALAT.*

(Supreme Court of Louisiana, March 5, 1901.)

[29 So. Rep. 533.]

Markets†—Public and Private—Ordinance—Validity.

The ordinance of the New Orleans city council, No. 312, N. C. S., adopted under the authority of Act No. 34 of 1900, in prohibiting private markets within 3,200 feet of the public markets, violates none of the provisions of the state or federal constitutions which are here invoked.

Same—Food Ordinance—Validity—Police Power.

It is within the police power and legislative discretion of the city of New Orleans, under said act of the general assembly, to require certain food commodities to be sold only in the public markets; and the fact that the ordinance in question may have the effect of compelling dealers in such commodities to go into the public markets, or else to go out of business, does not affect the validity of the ordinance.

Same—Power of City to Authorize Private Persons to Build and Collect Revenues.

It is competent for the city, under existing law, to authorize persons to build markets, and to collect the revenues thereof for a fixed period, in consideration of their conveying the property to the city; such markets to be under the control of the city, and to be in all respects governed by the regulations applicable to other public markets.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; Andrew P. Marmouget, Judge.

S. Vidalat was convicted of violating an ordinance of the city of New Orleans, and appeals. Affirmed.

E. Howard McCaleb, Emile J. Meral, and E. H. McCaleb, Jr., for appellant.

Samuel L. Gilmore, City Atty., and H. Garland Dupre, Asst. City Atty., for appellee.

MONROE, J. The questions presented in this case are included in those considered and determined in the case entitled City of New Orleans v. Faber, 105 La. —, 29 South. 507, this day decided. For the reasons assigned in that case, therefore, it is ordered, adjudged, and decreed that the verdict and sentence herein appealed from be, and the same are hereby, affirmed.

---

*For former opinion, see 5 Mun. Corp. Cas. 413, and note appended.

†Upon the general subject of municipal regulation and control of markets, public and private, including power to prohibit sales elsewhere, or private markets within specified limits, see notes appended to City of New Orleans *v.* Kientz, 3 Mun. Corp. Cas. 341; City of New Orleans *v.* Faber, 5 Mun. Corp. Cas. 413; State *v.* Tyrrell, ante, p. 426.

MASON *v.* MAYOR, ETC., OF CITY OF CUMBERLAND.

(*Court of Appeals of Maryland, Jan. 18, 1901.*)

[48 Atl. Rep. 136.]

Vehicles—Power to Tax—Milk Wagon of Nonresident*—Case at Bar.

An ordinance provided that it should be unlawful to drive over the streets of the city any milk wagon or other vehicle without first having obtained a license therefor. The ordinance also made it unlawful to peddle any goods, wares, or merchandise in or along the streets of the city without a license; following this paragraph with a definition of who should be deemed a peddler, and with the proviso that the section should not apply to farmers selling the products of their own farms. The defendant resided outside the city, and was arrested while driving a milk wagon in which he had nothing but milk from cows kept on his farm, which he was selling to his customers in the city: *held*, that he was required by the ordinance to take out a license for driving the milk wagon on the streets, and was not excepted by the proviso, which related only to the license required to be taken as a peddler.

Same—Power to Tax Vehicle Owned by Nonresident.

Under Acts 1898, c. 158, which authorized the city to license, tax, and regulate wheeled vehicles, an ordinance making it unlawful for any person to drive over the streets of the city any carriage, wagon, or other vehicle, without first obtaining a license therefor, is valid, though it exacts the same license fee from nonresident owners of vehicles, who habitually use the streets, that is required of residents; as there is no express inhibition on the legislature to confer such a power on a municipal corporation, and the act conferring the power to exact the license does not restrict it to be exercised only in respect to those residing within the corporate limits.

Same—Same—Police Regulation—Constitutional Law.

Under Bill of Rights, art. 15, providing that fines, duties, or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community; and Acts 1898, c. 158, authorizing the city of Cumberland to license, tax, and regulate wheeled vehicles, provided the funds derived from all licenses shall be applied only to the maintenance and repair of streets and alleys,—an ordinance making it unlawful for any person to drive over the streets of the city any carriage or other vehicle without first having obtained a license therefor, and fixing a license fee, and providing that the funds derived from the license shall be applied only to the maintenance of streets and alleys, is authorized and valid, either for the purpose of revenue or as a police regulation.

Same—Same—Reasonableness of License Fee.

Where a city is authorized by its charter to license, tax, and regulate wheeled vehicles, provided the funds derived from all licenses shall be applied only to the maintenance of streets and alleys, the corporation is primarily the judge of what is a reasonable charge for a license in an ordinance requiring a license for all carriages and other vehicles used on the city streets, the funds derived therefrom to be used as provided in its charter; and an ordinance fixing the license fee for a one-horse wagon at $2.50 for one year was not unreasonable.

Appeal from circuit court, Allegany county.

Action by Joseph E. Mason against the mayor and city council of Cumberland to restrain defendant from enforcing a street license ordinance, and to have the ordinance declared void. From a decree refusing the injunction and dismissing the bill, plaintiff appeals. Affirmed.

*See note appended to State *v.* Tyrrell, ante, p. 426, subhead D, 5.

Mason *v.* Mayor, etc., of City of Cumberland

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Ferdinand Williams, Finley C. Henderson, De Warren H. Reynolds, and Benj. A. Richmond, for appellant.

Albert A. Doub, for appellee.

JONES, J. This is an appeal from the circuit court for Allegany county, in equity, and from an order of that court refusing an injunction, and dismissing the bill of the appellant filed by him, asking the injunction to restrain the mayor and city council of Cumberland from enforcing against him one of the ordinances of the said corporation, and to have the said ordinance declared void.

The ordinance sought to be enjoined and nullified was passed in pursuance of the powers conferred upon the said corporation by Acts 1898, c. 158, which, among other powers conferred, authorized the corporation "to license, tax and regulate wheeled vehicles, provided that the funds derived from all license shall be applied only to the maintenance and repair of streets and alleys." Authority was also given the corporation "to levy and collect a tax on the assessable property of said city for the general purposes of said corporation, not exceeding in any one year fifty cents on each hundred dollars worth of said assessable property," and "to levy and collect such a tax on the assessable property of said city as may be necessary to pay the interest on the city bonds, and to provide a sinking fund for the redemption thereof at maturity."

The ordinance which is attacked in this proceeding appears in the City Code of Cumberland under the head of "License," and provides, among other things, that "it shall be unlawful for any person, persons, company or corporation to drive or use over the streets, lanes or alleys in said city any carriage, buggy, trap, wagon, automobile or other vehicle of any kind or description for pleasure, or for the transportation of passengers, or for the hauling of goods, wares and merchandise, or for use in any business of any kind or description, provided that the funds derived from the licenses for the same shall be applied only to the maintenance of streets and alleys; or to peddle any goods, wares or merchandise whatsoever by wholesale or retail in or along the streets or alleys of said city,"—following this last language with a description or definition of who should be deemed a "peddler," and with the proviso "that this section shall not apply to drummers selling goods by sample to resident merchants, nor to farmers selling or offering for sale the products of their own farms,"—or "to drive or use over the streets, lanes or alleys in said city any milk wagon," etc., "without first having obtained a license therefor from the city clerk, as hereinafter provided." The ordinance then proceeds to fix and prescribe the rates or charges for the various licenses required thereby to be taken out, and among them the license fixed "for each one-horse

wagon" is $2.50. The appellant's bill alleges that he is a citizen of Allegany county, owning and operating a large farm beyond the limits of said city, and that in pursuance of his business of selling his "farm products in Cumberland" he "was driving with a wheeled vehicle" over a named street in said city, "and while so driving said vehicle, which was a one-horse wagon loaded exclusively with the products of said farm, and having no license from the city of Cumberland," he was arrested and taken into custody, and before a justice of the peace, and tried and fined under a charge of violating the ordinance aforesaid by so driving upon the streets of said city without having a license as prescribed by said ordinance. Against threatened repetition of this interference with his driving upon the streets of the city of Cumberland, as described, without first taking out a license as the ordinance, which has been recited, requires, he asks the injunction, and as reason therefor alleges that the said ordinance "is null and void," and that the said corporation "has no lawful right to pass or enforce the same, and that said ordinance is not in pursuance of the defendant's charter, and that such exercise of power is against the bill of rights and constitution of Maryland."

This last-mentioned allegation states the main proposition to be passed upon here. There are other allegations in the bill besides those recited, but all that could raise any questions for consideration were denied in the defendant's answer, and no stress seems to have been laid upon them, and no proof was offered in regard to them. The proof is contained in an agreed statement of facts to the effect that at the time the appellant was arrested he was driving a milk wagon, in which he had nothing but milk from his dairy, which he was selling to his customers in said city, which milk came from cows kept on his farm; that the city of Cumberland is the only practical market for his farm products, and that to get to the next market, some 15 miles distant from his farm, he would have to pass over the streets of Cumberland, but no effort has been made to enforce the aforesaid ordinance against persons merely passing or driving through said city to other points beyond the city limits, or against persons who do not habitually drive over said streets; that he was arrested as alleged in his bill, and that at the time of his arrest he had no license from the city of Cumberland and no tag affixed to his wagon.

It appears from this state of allegation and proof that the appellant falls directly within one of the classes of persons required by the ordinance in question to take out a license according to its reading, unless he is excepted from its operation by the proviso that has been quoted in connection with the provision of the ordinance requiring a license for peddlers. It seems obvious, however, that this proviso, from its position in the ordinance and the connection in which it occurs,

was only meant, in so far as it relates to farmers, to provide they should not, under the circumstances mentioned therein, be considered within the class of those denominated "peddlers," and to be required to take out a license in that character. Nor is it any valid objection to the ordinance, if not otherwise invalid, that it is made to apply to all persons using the streets of the city as the appellant was, without respect to residence within the city limits.

There is no express inhibition upon the legislature to confer such a power upon a municipal corporation, and here the charter of the city of Cumberland confers the general power to exact the license in question, and does not restrict it to be exercised only in respect to those residing within the limits of the corporation. No unjust or unfair discrimination is made in exacting of all enjoying the same privilege (in this instance the use of the streets) that they should be subject alike to a regulation which imposes some burden connected with the privilege. The rulings in the cases cited by the appellee's counsel of Frommer v. City of Richmond, 31 Grat. 646, and of Tomlinson v. City of Indianapolis, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413, are directly in point on this question, and express views which commend them to approval. The last-named case arose under a charter conferring a power precisely like the one here being considered, and the fact there, as to the residence of the party complaining, just the same as it is here. The court there said: "The only contention, in truth, which can be plausibly urged against the ordinance, is that it charges those who drive upon the streets, but live outside the city limits, the same license fees charged against those residing in the city, and we do not think the ordinance can for that reason be held invalid." The common council, as we have seen, is given by the statute power to pass ordinances to regulate the use of streets and alleys by vehicles. This provision would, of itself, be sufficient authority to sustain the ordinance. The power to regulate implies the power to license and to exact a reasonable fee for such license. But the statute further expressly provides that "the common council may pass ordinances to license, tax and regulate wheeled vehicles." Then, after alluding to the fee charged, and saying there is no objection to such a conclusion, because "some revenue is derived from the fees collected, or that such revenue is applied to the repair of the streets," the opinion proceeds to say that, "no discrimination having been made against the appellant on account of his residing outside the city limits, we have been unable to discover any good reason why he should not pay a license for his vehicle as well as any other person making like use of the streets of the city. Indeed, he is at an advantage compared with the city resident. He has paid no tax to improve the streets, and yet he uses them day after day in his business, quite the same as a resident. It is, manifestly, but just that, not having paid to

improve the streets, he should at least pay the same license for using them as is paid by those who have themselves paid their share of improving the streets. If this ordinance favors any one, it is the nonresident." To the same effect is the expression of views in the case in 31 Grat., in which there was the same fact that the party objecting to the paying of the license fee was a nonresident.

The main proposition affirmed by the appellant is that the ordinance is invalid because it is an attempt on the part of the corporation to exercise the taxing power in a manner not authorized by its charter, and repugnant to our bill of rights and the constitution of the state. The bill of rights provides, in connection with its declaration of the rule by which taxes are to be laid, that "fines, duties and taxes may properly be imposed or laid with a political view for the good government and benefit of the community." Article 15. The exercise of the power here indicated is legitimate either for the purpose of revenue or as a police regulation. Germania v. State, 7 Md. 1.

It does not seem necessary in this case to go into an inquiry as to what power the appellee corporation has as to taxation. It cannot be doubted that the legislature had the power to confer on the corporation the authority "to license" and "to regulate" the use of vehicles on the streets of the city, and to impose in so doing a reasonable charge or fee, and there is little doubt that this power has been in very clear terms conferred by its charter on the city of Cumberland. The power professedly exercised by the city under the ordinance in question here was to license these vehicles, and the charge imposed is a license fee. The only question is whether the charge as made is such a one as is reasonable, and such as not to indicate an abuse of the power. Vansant v. Stage Co., 59 Md. 330. This case was relied upon by the appellant, but it is not perceived how it supports his contention. It involved the construction of the act of assembly of 1880 (Acts 1880, c. 69) giving the mayor and common council of the city of Baltimore power "to license and regulate all carriages and other vehicles owned and used within the city," the revenue derived from such licenses to be applied to the paving of the public highways, and an ordinance passed in pursuance thereof. Under this power, the city, on the 28th of April, 1882, passed an ordinance imposing a license tax upon vehicles used in the city, and placed the charge of $75 as an original license on omnibuses. The appellee in that case, being owner of a line of omnibuses, refused to pay this charge, and tendered renewal license fees for its omnibuses for which it had taken out licenses for the previous year, under an ordinance then existing, at the rate prescribed by that ordinance, and, for three new omnibuses, tendered the rate charged in the new ordinance "for a hackney coach, cab, buggy, wagon or other four-wheel pleasure carriage kept for hire," and, upon being

refused licenses upon such tender, sued out a mandamus, which was granted by the lower court, to compel the issue of the license upon the tender made. This court, passing upon the case upon appeal, fully recognized the validity of a reasonable charge for license by affirming the judgment of the lower court in granting the mandamus, and only treated the charge made in the ordinance against the appellee and other owners of omnibuses as void because the court found—First, that no power to levy this amount or any amount upon vehicles of any description as a tax by the city was given by Acts 1880, c. 69; and, secondly, that it appeared clearly from a construction of the ordinance that the charge against owners of omnibuses was charged as a tax, and therefore was invalid, if for no other reason for the want of power conferred upon the city to levy any such tax; thirdly, that it was an excessive and unreasonable charge under the power to license, and was not valid as a license fee. The case, therefore, virtually turned upon the charge for license being unreasonable and excessive. As we have seen, the charge to the appellant here professed to be for a license which the corporation of Cumberland had the clear power to charge. Two dollars and a half would not seem to be an excessive and unreasonable charge to require to be paid for the use of the streets of the city for a year. The corporation is primarily the judge of what is a reasonable charge under the power to license. Vansant v. Stage Co., supra. In this case it was said: "It may well be conceded that the mayor and city council of Baltimore are, primarily at least, the judges of what is a reasonable fee for licensing and regulating the omnibus lines, and that it is not within the legitimate province of a court to fix the precise amount to be charged them;" and again: "We may even go further, and say that, where there is a doubt whether the amount so fixed was reasonable or not, a court should be slow to reverse the judgment of the city council, and that every fair intendment should be made in its favor."

Giving the benefit of such intendment to the appellee here, there is nothing to disclose to the court in this case that the power it exercised in enacting and enforcing the ordinance in question was not used fairly and judiciously and in a reasonable manner. The charge to which the appellant was subjected, therefore, was one which the appellee had the right to exact under the power to require license to be taken out by parties using the streets with vehicles as the appellant was. This is not all, however. We have seen that the appellee was given under its charter the right "to license, tax, and regulate." This power to tax had no reference to the power to tax for general purposes, but it was a power accompanying the power to license and regulate. It could properly be exercised under the police power, and it was no valid objection to its exercise that revenue was derived therefrom. It is not, in legal contemplation, a tax on property, nor a double

tax. This view is well illustrated in the cases to which reference has already been made in Tomlinson v. City of Indianapolis, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413, and Frommer v. City of Richmond, 31 Grat. 646, and has received direct sanction by this court in the case of Germania v. State, 7 Md. 1. The decree of the lower court refusing the injunction prayed in this case, and dismissing the bill of the appellant, will, for the reasons herein set out, be affirmed, with costs to the appellee. Decree affirmed, with costs to appellee.

SINDALL *v.* MAYOR, ETC., OF BALTIMORE *et al.*

(*Court of Appeals of Maryland, June 12, 1901.*)

[49 Atl. Rep. 645.]

Taxation—Exemption to Be Strictly Construed.

An exemption from taxation will be strictly construed.

Same—Same—Property in Annexed Territory.*

Act Assem. 1888, c. 98, § 19 (Annexation Act), declared that until the year 1900 the rate of taxation on all "landed property" in certain territory annexed to Baltimore should not exceed the rate for Baltimore county; that from and after the year 1900 "the property, real and personal," should be liable to taxation as similar property within the other wards in the city: provided, that after the year 1900 the Baltimore county rate of taxation for the year 1887 should not be increased for city purposes "on any landed property within the said territory until avenues, streets or alleys shall have been opened or constructed through the same, nor until there shall be upon every block of ground so to be formed at least six dwellings or store houses ready for occupation." Plaintiff owned property in said territory situated on a tract of land bounded by a dedicated but unaccepted street, a private alley, a county road, and a turnpike road. Through the middle of such tract he opened a dedicated but unaccepted street, laying out 18 lots fronting thereon, and erecting houses on each lot: *held*, that such property was not rural "landed" property, within the proviso, but city property, and liable to taxation as such.

Same—Same.

Under Acts Assem. 1888, c. 98, § 19 (Annexation Act), providing that "from and after" the year 1900 certain property annexed to Baltimore should be taxed at the city rate, the city rate could not be imposed for the year 1900.

Fowler, Briscoe, and Jones, JJ., dissenting.

Appeal from circuit court of Baltimore city; Henry Stockbridge, Judge.

Injunction to restrain a tax by James W. Sindall against the mayor and city council of Baltimore and another. From a decree dismissing the complaint, plaintiff appeals. Reversed in part, and affirmed in part.

Argued before McSHERRY, C. J., and BRISCOE, FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

John P. Poe and R. E. Lee Hall, for appellant.

Wm. Pinkney Whyte and Olin Bryan, for appellees.

---

*See note at end of case.

Sindall *v.* Mayor, etc., of Baltimore

McSHERRY, C. J. There are two questions presented by this record, and the solution of both of them depends on the construction which may be placed on section 19, c. 98, of the act of assembly of 1888, known as the "Annexation Act," or the act under which portions of the territory of Baltimore county were withdrawn from the outlines of the county, and added to the municipal limits of Baltimore city. As the whole section of the statute will have to be examined and considered in disposing of the questions involved, it will now be quoted in full. It reads as follows: "That until the year nineteen hundred the rate of taxation for city purposes upon all landed property situated within the territory which, under the provisions of this act, shall be annexed to the city of Baltimore, and upon all personal property liable to taxation in said territory, whether owned by persons, corporations or otherwise, and upon which taxes would be paid to Baltimore county if said territory should not be annexed to the said city, shall at no time exceed the present tax rate of Baltimore county; and until the year nineteen hundred there shall not be, for the purpose of city taxation, any increase in the present assessment of such property as is now assessed; and all property in the said territory which is not now assessed, but which may be within the same period liable to assessment, shall be assessed at the same rate as similar property is now assessed in said territory; and during the said period up to the year nineteen hundred, the city of Baltimore shall expend within said territory an amount at least equal to the amount of revenue derived from taxation on the basis herein set forth from the said territory in affording to the residents within said territory the rights and privileges accorded to and enjoyed by the residents within what are the present limits of said city; but nothing in this act shall be so construed as to require the expenditure by said city of any greater sum. From and after the year nineteen hundred, the property, real and personal, in the said territory so annexed shall be liable to taxation and assessment therefor in the same manner and form as similar property within the present limits of said city may be liable: provided, however, that after the year nineteen hundred the present county rate of taxation shall not be increased for city purposes on any landed property within the said territory until avenues, streets or alleys shall have been opened and constructed through the same, nor until there shall be upon every block of ground so to be formed at least six dwellings or store houses ready for occupation." The appellant is the owner of a parcel of land brought within the city limits by the act just referred to. The area within which this parcel of land is located is bounded on the north by New Boundary avenue, a dedicated, but unaccepted, ungraded, unpaved, and uncurbed street, laid out by one Clemens in 1889, on the south by a 6-foot private alley; on the east by the Old York road, which was a county highway long before

the adoption of the annexation act; and on the west by the York turnpike road, which is owned and controlled by a corporation that charges and collects toll for the use of the road. Through the middle of this land owned by the appellant he opened in 1897 a street 40 feet wide, extending from the York road to the York turnpike, and called it "Franklin Terrace." This street has not been accepted by the city, nor was it constructed in conformity to section 840 of the city charter (Laws 1898, p. 560). On the north side of this 40-foot street he laid out 11 building lots, and on the south side 7 lots, upon all of which he erected houses. Four of the 18 houses and lots have been sold, but the remaining 14 are still owned by the appellant. Now, the two questions at issue in the cause are: First, is the appellant, as owner of these 14 houses and lots, liable to pay the current city tax rate on the assessed value of them, or is he still responsible only for the county rate of the year 1887, under the provisions of section 19 of the annexation act? Secondly, if he is liable for the full current city rate, does that liability apply to the taxes for the year 1900, or does it first begin in 1901?

The proviso at the end of the section gives rise to the first question. This proviso is a restriction on the power of the municipality to levy more than a designated rate of taxes on property annexed to the city limits until a prescribed condition shall be complied with. Like every other exemption from taxation, it must be stricty construed. The taxing power is never presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny an exemption. It is contended that the condition prescribed in the proviso to section 19 requires the Baltimore county rate of taxation, which had been fixed just before the annexation act took effect, to be adhered to for city purposes up to 1901, so far as the annexed property is concerned, and to be adhered to "until avenues, streets or alleys shall have been opened and constructed" through this then suburban locality, and, further, "until there shall be upon every block of ground so to be formed [that is to say, to be formed by avenues, streets or alleys to be opened and constructed] at least six dwellings or store houses ready for occupation." Is this the true meaning, not of the proviso taken by itself, but of the entire section which has been quoted? If we were dealing simply with the proviso, not as a mere proviso, but as an independent enactment standing alone, instead of considering it in its relation to the antecedent portion of the section to whch it is attached, there would be great, and possibly conclusive, force in the position taken by the appellant, to the effect that the case of Valentine v. City of Hagerstown, 86 Md. 486, 38 Atl. 931, is decisive of the controversy. By section 194, art. 22, of the Code of Public Local Laws, concerning the city of Hagerstown, it was enacted

that land within the city limits, and within the then newly-extended limits of Hagerstown, should not be assessed for purposes of municipal taxation "until a street shall be laid out and opened through the same; but when a street shall be laid out and opened through said real estate, the land abutting on said street, and improvements thereon, to a distance two hundred and forty feet back from the line of said street, shall be assessed and taxed for municipal purposes as other property in said town is now taxed." Valentine laid out into town lots a parcel of land, and caused a plat thereof to be recorded among the land records of the county. On this plat proposed streets, called "Carrollton Avenue" and "Carroll Street," were marked and defined. These streets, though thus dedicated to the public, were never accepted by the municipality, but were used as streets by the owners of the property abutting on them, and were generally considered streets of the town. Valentine was charged with municipal taxes on some of the lots abutting on these streets, but his lots were not within 240 feet of any street which had been laid out by municipal authority. He resisted payment of the tax exacted of him, and filed a bill in equity praying that an injunction might issue to restrain its collection. The bill was dismissed, but upon appeal the decree was reversed, and this court held in the course of its judgment that "the evident purpose of the legislature was to limit the power of taxation for municipal purposes to a distance of two hundred and forty feet 'back from the line' of such streets as the corporate authorities saw fit to lay out and open, and was a recognition of the principle that property owners, in consideration of being taxed, should enjoy the benefits of the improvements made with the municipal tax. Whilst it may be true," we went on to say, "that Carrollton avenue and Carroll street have been, since the alleged dedication, used as streets by the owners of property on the map, and may have been generally considered streets of the town, yet there never has been any formal acceptance of either of them by the authorities of the town, and, until that has been done according to law, they have not been 'laid out and opened,' within the meaning of the charter; and as the property of the appellant, sought to be taxed, is not within two hundred and forty feet of any street 'laid out and opened' by the municipal authorities, the contingency which renders it liable to be assessed and taxed for municipal purposes has not arisen." It would be quite difficult, perhaps impossible, to distinguish the case at bar from Valentine's Case, had we nothing before us but the proviso to section 19. The difference in the phraseology of the two statutes is unimportant, because the meaning of each is the same. The phrase "laid out and opened," used in the Hagerstown charter, is no more comprehensive than the terms "opened and constructed," contained in the proviso to section 19 of the annexation act. Both

apply to precisely similar situations. If under one statute lots within 240 feet of a dedicated and actually opened street were not liable to assessment, because that dedicated and actually opened street had not been accepted by the municipal authorities, and had not, therefore, become a street of the town, it could not well be held, under the proviso to the other statute, that land which was contained within a block bounded by a dedicated but unaccepted street, a private alley, a county road, and a turnpike road, is land within a block formed by "opened and constructed avenues, streets or alleys." If in the one instance acceptance by the municipality was necessary to make the dedicated streets such streets as were meant by the legislature, it could not with consistency be said in the other instance that acceptance by the municipality of Baltimore was not necessary to make the dedicated but unaccepted avenue or street such an "opened and constructed" avenue or street as the proviso contemplated. However ingenious this attempt to quadrate the case at bar with that of Valentine may be, it is untenable. The two cases must be viewed from entirely different standpoints. In Valentine's Case the real question for decision was whether the property had ever been brought within the reach of the taxing power,—whether it was a class of property declared by the charter of Hagerstown to be taxable at all. In this case the question is whether property clearly made liable to assessment by the body of section 19 at a fixed rate for a limited period, though after that period made liable generally, has been exempted from that general liability by the proviso, and again restricted to the same fixed rate until the happening of an entirely new contingency. This inquiry, differently stated, is whether in reality the kind of property referred to in the proviso is the same as that which, under an antecedent clause of the section, became liable to assessment at current city rates after the lapse of a definite period of time.

It must be borne in mind that at the date of the adoption of the annexation act a large part of the added territory was unimproved, outlying, rural land. It would have been manifestly unjust to have subjected such property to the same valuation and to the same rate of taxation as then obtained in the city with respect to distinctively urban property. Accordingly the nineteenth section specifically provided that "until the year nineteen hundred the rate of taxation for city purposes upon all landed property" within the annexed territory and "upon all personal property" in the same territory "shall at no time exceed the present tax rate of Baltimore county." Thus both "landed" and personal property were made liable to the county rate of 60 cents on the $100 until the year 1900. But the section proceeds: "From and after the year nineteen hundred the property, real and personal," in the annexed territory, "shall be liable to taxation

and assessment therefor in the same manner and form as similar property within the present limits of said city may be liable." Here are two definite things declared: First, that until 1900 the landed and personal property shall be assessed and taxed at the county rate existing when the act of 1888 went into effect; secondly, that from and after the year 1900 "the property, real and personal," shall be assessed in the same manner and form, and shall be liable to taxation in the same manner and form, as similar property within the city's old limits might be liable. Now, if there had been no proviso, it is perfectly clear that all property, real and personal, whether unimproved land, "landed property," or land laid out in lots, and improved with dwellings or places of business, would have been liable "from and after the year nineteen hundred" to precisely the same rate of taxation as unimproved land or lots with houses or business places thereon within the old limits were liable. To make that result certain beyond cavil, the term "landed property," used in the beginning of the section, was dropped when the legislature came to describe what kind of property was to be subjected to taxation at current city rates from and after the year 1900, and the phrase "property, real and personal," was substituted. But it was, no doubt, considered probable that there might be considerable "landed property" still unimproved even after the year 1900; and to meet that contingency the proviso was added. By the terms of that proviso the antecedent broad provision, subjecting after the year 1900 all property in the belt, "real and personal," to the same rate of taxation to which similar property in the city would be liable, was suspended as to landed property not comprised in blocks included within avenues, streets, or alleys, and not improved by at least six houses. Thus it is obvious that, while the body of the section subjected all real estate within the belt to current city rates from and after the year 1900, the proviso created an exemption from that imposition in favor of landed property which could not be strictly classed as city property, because not built upon and not situated within a block formed by city streets or avenues. But when that which had been "landed property" had been built up it became, after the year 1900, liable to taxation at current city rates, without the slightest reference to the existence or nonexistence of streets regularly laid out by the city, or dedicated by others and accepted by the city. The term "landed property," as used in the beginning of the section and in the proviso, evidently meant rural property, as contradistinguished from real estate which for all practical purposes was city property, because actually laid out in city lots on which dwellings were constructed that abutted on proposed or projected streets or subsisting highways, ultimately to be converted into regularly graded avenues or streets. Under the proviso, when this rural property comes to be divided into blocks by intersecting streets so laid out and constructed as to be strictly city streets,

it will then be liable to the city tax rate, even though each block has but six houses upon it, and even though it be not laid off in building lots. Under the body of section 19, making all real estate liable to be taxed at current city rates from and after 1900, without regard to the formation of blocks by the opening and construction of avenues, streets, or alleys, land laid off in lots, and improved with dwellings, became liable to taxation at current city rates, because it then ceased to be "landed property," in the sense of unimproved rural land, and was required to be dealt with, for the purposes of taxation, as similar property—not similarly situated property—within the original limits of the city, without any reference whatever to blocks, or streets forming blocks. To be within the exemption created by the proviso, the property must be "landed property"; that is, rural unimproved land, not laid out in lots, and not compactly built on, as in a city. It is significant that this term "landed property" does not occur in the general assessment laws when assessable property is described. Property there spoken of is real and personal. It is apparent that there was some design in departing from long-established precedents in this particular, and in using this phrase instead of employing the terms ordinarily adopted; and what that design was seems quite manifest when it is remembered that in the same section the usual words, "real and personal" property, are inserted to describe the property to be valued and taxed from and after the year 1900 as similar property is valued and taxed in the city; that is to say, as improved property is taxed in the city, or as lots laid out for buildings are there taxed. Whenever, then, this formerly rural property has been laid off in lots, and houses have been erected thereon as though built upon a street, it becomes liable to the current city tax rate, without the slightest reference to the existence of regularly condemned or accepted streets; but, when the property still remains rural property, then it cannot be taxed as city property until blocks have been formed by duly opened and constructed streets, and until six houses are erected on each block. There are therefore two conditions under which the full city tax rate may be imposed upon this annexed property: First, when the "landed property" has been divided into lots, and compactly built on, with a view to fronting on a street not yet constructed, but contemplated by the persons who project it or build with reference to it, though the municipality has not opened such street or accepted a dedication of it; secondly, when, though still "landed property" (that is, rural property), in the sense that it has not been divided into lots and has not been compactly built on, it is intersected by opened and constructed streets, —opened and constructed by or in conformity with municipal authority,—which streets form blocks, and upon which blocks there are at least six houses. In the second instance, though the residue of the block be unimproved or be not laid out in

Note

lots, the whole block will be liable to be taxed at the current city rate as soon as six houses are erected on it. The property described in the record in this case does not fall within the exemption created by the proviso, and is therefore liable to be taxed at current city rates of taxation, under that part of section 19 which subjects all real estate within the belt to taxation at those rates from and after the year 1900.

The second question is, Does the city tax rate apply to this property for the year 1900? The statute says, "From and after the year nineteen hundred" the annexed property shall be liable to the city tax rate. In its grammatical sense, the word "from," when referring to a certain point as a terminus a quo, always excludes that point. While there has been much discussion in the cases as to when and under what circumstances this word is to be treated as a word of exclusion, it would seem to be reasonably clear that, when employed as it is used in this statute, it can only be interpreted as excluding the year 1900. How could a point of time be within the year 1900 when its beginning is fixed as from and after the year 1900? No moment of time can be said to be after a given year until that year has elapsed and has passed. As the city tax rate is to be imposed from and after the year 1900, and as no act can be done after the year 1900 until the year 1900 has fully ended, it must follow that the city tax rate cannot be imposed during the year 1900. In Bigelow v. Willson, 1 Pick. 485, it was said by Wilde, J., in speaking of the signification of the word "from": "So, too, if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after a given day until that day has expired." 14 Am. & Eng. Enc. Law (2d Ed.) 553.

The views we have expressed lead to the conclusion that the property described in the proceedings is liable to assessment and taxation at the current city rate, but not until after 1900. As the pro forma decree dismissed the bill of complaint altogether, and thus denied all the relief sought, though the plaintiff was entitled to have the collection of the taxes for the year 1900, as levied at the city rate, restrained, the decree must be reversed to that extent, but in other respects it will be affirmed. Decree reversed in part and affirmed in part, and cause remanded; the costs above and below to be paid by the appellees.

FOWLER, BRISCOE, and JONES, JJ., dissent.

NOTE.

Taxation—Exemption of Property in Annexed Territory.

The ruling of the court in the principal case is but an illustration of the familiar rule that all exemptions from taxation are to be strictly construed. It was followed in Goebel *v.* Mayor, etc., of Baltimore, 19 Atl. Rep. 649, and Kuenzel et ux. *v.* Mayor, etc., of Baltimore, 49 Atl. Rep. 649, the facts in both cases being similar to those of the principal case, the property in question abutting and bounding on existing turn-

Note

pikes, or on lanes and alleys the dedication of which had not been completed by acceptance.

It is hard to perceive the distinction which the court attempts to draw between Valentine *v.* Mayor, etc., of Hagerstown, 86 Md. 486, 38 Atl. Rep. 931, and the principal case. In the former, the section of the statute out of which the contention arose provided as follows: "*The real estate and improvements thereon*, situated within the former boundaries of the town, and the extended limits, as fixed by section 154, shall not be assessed and taxed for municipal purposes until a street shall be laid out and opened through the same; but when a street shall be laid out and opened through said real estate, the land abutting on said street and improvements thereon to a distance of two hundred and forty feet back from the line of said street shall be assessed and taxed for municipal purposes." The proviso in the principal case is as follows: "Provided, however, that after the year nineteen hundred the present county rate of taxation shall not be increased for city purposes *on any landed property* within said territory until avenues, streets, or alleys shall have been constructed through the same, nor until there shall be upon every block of ground so to be formed at least six dwellings or storehouses ready for occupation." It is not perceived that there is any distinction between "real estate and the improvements thereon," and "landed property" with dwelling houses thereon, and the court admits that the difference in phraseology is unimportant; in short, the court recedes from the doctrine laid down in the former case.

The case of United Railways and Electric Co. *v.* Mayor, etc., of Baltimore, 49 Atl. Rep. 655, arose under the same statute as the principal case. The facts were that the company owned and operated forty-six miles of track in the annexed district; of this number of miles, thirty-one ran through property through which avenues, streets, and alleys had been constructed, and upon which there were ready for occupation, upon each block so formed, through which the railway tracks extended, six dwellings and storehouses. These thirty-one miles of tracks, and the property through which they ran, were taxed at the regular city rate of $1.67 for every $100, and no contention was made by the company but that such rate upon that portion of its roadway was legal; but it did contend that as to the remaining fifteen miles of track, which ran through property where avenues, streets, and alleys had not been constructed, and where each block did not contain six dwellings or storehouses ready for occupation, such rate was illegal, and that as to that portion of its roadway it should be compelled to pay no more than the county rate of 60 cents in the $100. It was held, that such contention was untenable, and that the company must pay at the city rate of $1.67 in the $100 upon the entire forty-six miles after the year 1900. Without attempting to set out the reasoning of the court *in haec verba*, we may say that, in substance, it was about as follows: The obvious purpose of the proviso contained in the statute was to extend the exemption after 1900 to suburban property used either for agricultural purposes, or suffered to lie idle until such time as, in the development and growth of the annexed territory, it should be intersected by regularly constructed avenues, streets, and alleys, and contain at least six dwellings or storehouses ready for occupation upon each block so formed. But while street-railway companies may lay their tracks in streets and avenues, and streets and avenues may run across such tracks, yet manifestly they cannot be opened through such tracks in the sense in which they are opened through property not devoted to public use; nor can such tracks be laid out in blocks, or any house or store ever erected on the right of way; therefore, if the exemption extended by the proviso was intended to apply to the property in the tracks and right of way of such company, such property could never be taxed above the rate of 60 cents in the $100, since the condition upon which the rate was to be increased would be impossible and could never arise. Such a construction would make perpetual an exemption which was confessedly declared to be only temporary, and is not to be countenanced.

DAVID WELLS *et al.*, Plffs. in Err., *v.* MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH and Robert J. Wade, City Marshal.

(*Argued April 9, 1901. Decided May 13, 1901.*)

[21 Sup. Ct. Rep. 697.]

Taxation—Exemption*—Lots Sold upon Ground-Rent Plan—Not Exempt in Absence of Express Contract.

A contract for the exemption from taxation for city purposes of lots sold by a city on the ground-rent plan under the Savannah (Georgia) ordinance of 1790, providing that the lots may be held forever on payment of the ground rent, but making no reference to taxes, is not created where the deeds provide that the holders shall be "subject to all such assessments and burthens as might be in common with other lot holders in the city," although for many years annual ordinances exempted such lots from taxation for the respective years, and on the sale of such lots from time to time statements were made by officials to the effect that they would not be taxable, and similar statements were contained in reports of committees.

In Error to the Supreme Court of the State of Georgia to review a decision affirming a judgment refusing an injunction against the collection of city taxes. Affirmed.

See same case below, 107 Ga. 1, 32 S. E. 669.

Statement by MR. JUSTICE PECKHAM:

The plaintiffs in error commenced this proceeding in the superior court of the state of Georgia, Chatham county, against the mayor, etc., of the city of Savannah and its city marshal, to enjoin the collection of taxes upon certain real estate in that city, of which they claim to be lessees from the city, and they alleged that the taxes assessed upon such real estate are illegal; they also seek to recover from the city the amount of taxes theretofore paid by them on such real estate, under protest. The trial of the case resulted in a judgment for the city, which was, on appeal to the supreme court of the state, affirmed, and the plaintiffs have brought the case here on writ of error.

They claim that the levying and collection of the taxes referred to, under an ordinance of the city providing therefor, passed in 1878, constitute an impairment of the obligations of a contract between the city and the predecessors in title of the plaintiffs in error, made at the time the real estate was purchased, by which contract it was agreed that on the payment of a certain annual sum, called "ground rent," to the city by the holders of the real estate, it was to be forever exempt from all city taxation.

Upon the trial of the action these facts appeared: Prior

*As to the power of municipal corporations to grant exemptions from taxation, see note appended to Garrison *v.* City of Laurens, 1 Mun. Corp. Cas. 581; that all exemptions from taxation are to be strictly construed, see notes appended to Trustees of Phillip's Academy *v.* Inhabitants of Andover, 3 Mun. Corp. Cas. 128; Sindall *v.* Mayor, etc., of Baltimore, ante, p. 453.

to 1790 the city of Savannah owned certain lots which were called "common lots," and on September 28 of that year the common council passed an ordinance for disposing of a portion of them. Each lot, by the provisions of the ordinance, was to be valued by the city, and then put up for sale at public outcry, and the highest bidder, over and including the original valuation, was to have the lot, and if he choose to pay the whole amount of his bid in cash he was to have a deed conveying it to him in fee simple, or he might, instead of making the whole cash payment, agree with the city to pay in cash the balance of his bid over the valuation, called the increase money, and also to pay a ground rent of 5 per cent. upon the amount of valuation, payable quarterly, and in that event the lot might be retained in his hands or in the hands of his heirs and assigns forever on payment of such ground rent. The ordinance further provided that at any time thereafter the purchaser or his heirs or assigns should have the power to pay the original valuation money, with what rent might be due up to that time, in full discharge and extinguishment of the ground rent, and he or they should thereupon be entitled to the land in fee simple. The city was also to give a deed by way of bargain and sale to each purchaser of lots which should vest an absolute or conditional estate in the purchaser, according to the circumstances; that is to say, an absolute one if the valuation and increase money should be paid down, or a conditional one if the valuation money should not be paid down, but which should become absolute if and when the valuation money should at any future time be paid into the treasury, which payment should be acknowledged by the mayor and a majority of the aldermen, under the seal of the city and attested by the city treasurer, to be indorsed on the deed. The ordinance continued:

"And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on failure therein for the space of fifteen days after the same shall become due the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having by means of their proper officers exercised such power and given a notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes, as fully as if the same had not been bargained for or purchased, any sale or encumbrance or other act, made or suffered by the purchaser or purchasers or others under him, her, or them, to the contrary thereof in anywise notwithstanding."

Pursuant to such ordinance the lands were sold and the purchasers of many of the lots elected to hold their purchases

on ground rent payable quarterly, as stated in the ordinance. Deeds were thereupon executed on the part of the city and also were signed by the respective purchasers. Lands have been sold from time to time under ordinances of substantially the same character and containing language in substance the same up to 1872, since which time conditional sales have been abandoned.

The deeds contained a provision that "in consideration of the rent to be paid, and of the several covenants and agreements to be performed (mayor and aldermen), have bargained and sold, and by these presents do bargain and sell, unto the said ——— ——— all that lot of land (describing it) . . . unto the said ——— ——— executors, administrators, and assigns, forever, on this express condition. Nevertheless, that ——— ——— the said ——— ——— executors and administrators and assigns" shall pay rent as covenanted; and "in case of failure herein for the space of twenty days after any of the said quarterly payments shall become due, that then the said lot and premises shall revert to the corporation of the said city, who shall immediately thereafter possess the power of re-entry; and having, by means of their proper officers, exercised such power, and given a notice thereof in writing, posted on the premises, the said lot, with all improvements thereon, shall be considered, at the expiration of ten days thereafter, as absolutely revested in the corporation, and the estate by these presents created determined to all intents and purposes as fully as if the same had not been bargained for or purchased; any sale or encumbrance, or other act made or suffered by the said ——— ——— executors, administrators, or assigns, or others under him or them, to the contrary thereof in anywise notwithstanding."

The purchaser also covenanted to pay the annual rent, and that in case of failure the city should have the lawful right of re-entry as already provided for.

The deed also contained the following provision:

"And it is hereby declared to be the true intent and meaning of these presents, and all parties to the same, that, on payment of the said ground rent, at the times and after the manner hereinbefore directed, the said ——— ——— heirs, executors, administrators, and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said lot and premises, and receive and take the rents, issues, and profits thereof, and of every part thereof, to ——— and ——— own use, absolutely, without the let, suit, trouble, eviction or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority, subject only to such assessments and burthens as shall be in common with other lot holders in the said city."

It was also provided in the deed that the purchaser, his heirs, executors, or administrators, or assigns, might at any

time pay into the city treasury the valuation money and the rent then due, in full discharge and extinguishment of such rent, and in that case there should be an acknowledgment of such payment under the seal of the city, signed by the mayor and a majority of the aldermen and attested by the city clerk, and indorsed on the deed, "which shall then and from thenceforth vest an absolute estate, in fee simple, of and in the said lot and premises, in the said ——— ——— heirs and assigns to ——— and their only proper use and behoof forever." It is admitted that the same character of deed has been executed for lots sold under other sales since 1790.

Extracts from the minutes of the proceedings of the common council of the city, in regard to meetings of that body in 1790 and thereafter, were put in evidence, from which it appeared that the ordinance for the sale of these lots was induced by the fact that the expenses of the city government were more than its revenues, and these sales were provided for in the hope that the condition of the city's finances might thereby be improved. There was also put in evidence a notice of sale of lots, advertised in the Georgia Gazette of June 13, 1799, in which were specified the terms contained in the ordinance for the sale of the lots, and the advertisement contained the statement that the "purchasers are at liberty to take a lease to him or her or his or her heirs and assigns forever of the lots so purchased, at a ground rent of 5 per cent. on the valuation," etc.

An ordinance for laying off into city lots what was called the "Springfield Plantation," and providing for the sale of the same, passed in the year 1851, was also put in evidence, which contained substantially the same plan as that provided for in the ordinance of September 28, 1790, except that the conditional sale was to be for twenty-four years only. Although the lots mentioned in the petition of the plaintiffs in error in this case are not situated within the Springfield Plantation, the ordinance and the deed thereunder regarding those lots were put in evidence for the purpose of comparison with the ordinance of 1790, and the deeds executed thereunder, in order to show that the same language, except as to the term, was used in the instrument which granted a lease for but twenty-four years as was used in the other granting a perpetual term. There were also ordinances of February 27 and July 31, 1851, put in evidence, the former of which permitted one of two or more tenants in common or joint tenants to pay his proportion of the purchase money, and, upon such payment, he should receive a deed in fee, and any lessee of a city lot might, on application, have it divided into two or more parts and receive a lease for the same; and the other ordinance provided for increasing the depth of certain lots, at an increased rent therefor, payable at the same time that the regular ground rents on these lots fell due.

A report of the mayor in 1854, to the common council, was

put in evidence, in which was a statement of the resources of the city of Savannah, among which were designated 643 lots in 22 wards "under lease;" also two reports of the mayor, the one on October 31, 1855, and the other a year later, both containing similar statements as to the number of lots belonging to the city, which were "under lease," and similar reports from and including 1857, up to and including 1877, with the exception of the years 1864 and 1865, when no report was made by the mayors of the city. This class of evidence was offered for the purpose of showing that the title conveyed to the purchasers was under a lease, and that it was not a conditional estate subject to be terminated by a breach of a condition subsequent, and that the city recognized the conveyance as a lease, and not in truth as a conditional estate.

On April 7, 1806, an ordinance was passed by the city council for raising a fund for the support of a "watch" in the city, which provided that a tax should be levied on property therein, "including all lots held by lease from the corporation," but on November 24, 1806, an ordinance was passed providing "that so much of the 1st section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation . . . be and the same is hereby repealed."

It was admitted that every annual tax ordinance to raise revenue for the city passed by the mayor and aldermen from the above date, November 24, 1806, up to and including the ordinance of January 22, 1857, used the words "excepting lots held by lease from the corporation." On December 11, 1857, the tax ordinance provided as follows:

"Sec. 4. The following real property shall be exempt from taxation, to wit: each lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen, of the class commonly called city lots."

The annual report of the mayor for the year 1871 was also put in evidence, in which the following language occurs: "It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and are, therefore, not the subject of taxation, and are not included in the assessments."

It was also admitted that lots known as "ground-rent lots" were never in fact assessed for taxation from 1790 until some time after the passage of the ordinance of May 29, 1878, and that those lots were omitted from the assessment books made in 1807 and every year thereafter down to the assessment book made out in the year 1878, and that in fact no city taxes were ever levied on them until after the resolution of the common council of November 17, 1889, under which they have been for the first time assessed for city taxation for the year 1890.

It was also admitted that no taxes were in fact assessed or levied under the ordinance of April 7, 1806, above mentioned.

The holders of these city lots have always paid state and county taxes, and street improvements, and assessments for sidewalks, and all other assessments and burdens common to lot owners in the said city, except city taxes. A report of the finance committee made in 1872 and signed by the chairman was also put in evidence, in which it was stated as follows:

"The reason why city lots are not taxed beyond the ground rent is that the city is understood to have bound itself not to tax them.

"The ordinance of 1790, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such a lot, and all claiming under him, shall have the use, etc., upon paying the ground rent. This ordinance has been followed either in terms or substance by all succeeding ordinances providing for such sale.

"It is of no moment that the stipulation does not appear in the deeds; the ordinances contain the real terms of the contracts and control the deeds whenever the latter depart from them or conflict with them. And as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

The ordinance of May 29, 1878, provided that—

"Every person and corporation owning real property in said city, including improvements, shall pay a tax upon said property of 2½ per cent. of the value thereof, including ground-rent lots, except on such property as may be exempt from taxation under the laws of this state."

The city is given full power of taxation by state legislation. Code of 1863, § 4756; Code of 1882, § 4847.

Oral evidence was also given from which it appeared that on sales of the property under various ordinances of the same nature as that of 1790 the city marshal by whom the sales were made "would announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under authority of the committee. And often when the bidding would lag the marshal would remind the bystanders that there was only a 20 per cent. cash payment required, and that there was no city taxes, but only an annual ground rent."

One of the witnesses, who was himself at the time of some of the sales an alderman between 1858 and 1869, stated:

"I, as a city official, in good faith, have made the statement and directed the marshal so to announce when making sales of the city lots under my supervision as chairman of the committee on public sales and city lots, and under the common and universal construction of the city deeds, the absence of any reservation of a right to tax the lots sold under ground rent has always been construed as an agreement not to tax."

Another witness said that he would not say that the city of Savannah ever at any time formally agreed not to tax ground-

rent lots; he did not know of any official action taken thereon by the city.

The above are substantially the facts upon which the contention of the plaintiffs in error that their lots are exempt from city taxation is founded. There is no evidence that any of them bought their lots at a sale where an announcement of exemption was made, or that they purchased them under the belief that they were forever legally exempt from all city taxation.

They also claim that the deed itself, respective of the above testimony, necessarily and by its terms implies a perpetual exemption from all city taxation upon the lots so long as the ground rent is paid.

Messrs. Pope Barrow and J. R. Saussy for plaintiffs in error.
Mr. Samuel B. Adams for defendants in error.

MR. JUSTICE PECKHAM, after making the above statement of facts, delivered the opinion of the court:

The contention on the part of the plaintiffs in error is that, in the exercise of the taxing power granted it by the legislature, the common council of the city adopted the ordinance of May, 1878, and in providing therein for the taxation of the leased lots, it thereby impaired the obligation of the contract existing between the city and the holders of that class of property, among whom are the plaintiffs in error, and the ordinance is therefore to that extent void. This contract they say is evidenced, first, by the ordinance of 1790 and the deeds executed in pursuance of its provisions; also by the minutes of the common council of the city and by subsequent proceedings of the common council; by the statements of the city officials at the time when some of the sales of the property were made; by the reports of the officials, mayors of the city and committees of the common council; by the actual omission for a hundred years—from 1790 to 1890—to tax these lots; also by ordinances similar to that of 1790 for the sale of lots, passed subsequently to that year, and by the deeds executed pursuant to such ordinances, which, it is admitted, were in substance similar to those executed under the ordinance of 1790.

Taking all the foregoing evidence into consideration, including the ordinance of 1790 and the deeds executed under it, we are unable to see that any contract of exemption has been proved. The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment, and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in

terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist. This has been many times decided by this court. Tucker v. Ferguson, 22 Wall. 527, 573, 22 L. Ed. 805, 815; Bank of Commerce v. Tennessee use of Memphis, 161 U. S. 134, 146, 40 L. Ed. 645, 649, 16 Sup. Ct. Rep. 456, and cases cited.

The different annual ordinances for taxation passed by the common council, exempting from taxation thereunder the leased lots, were but exemptions for the year in which the ordinance was passed, and there can be no plausible claim urged that they, one or all, constituted any contract for exemption beyond the time of each specific ordinance. The statements of officials when lots were sold, that they were not taxable, did not constitute a contract. The lots had not in fact been taxed at the time of these statements and had been annually exempted from taxation, and the statements amounted to no more than opinions of officials as to what would be done in the future. There is no evidence that they had the least power to speak for or to bind the corporation in this behalf. The reports of committees that the lots were not taxable are of the same character,—merely the opinions of officials upon a question of law, and not in the nature of a contract.

Upon this question of proof of a contract we quote what was said by the supreme court of Georgia in this case upon the last review, through Mr. Justice Lewis:

"Was such a contract shown in the present case? With the view of determining whether or not there was, we have naturally looked to the official action taken by the governing body of the city, either in its ordinances or resolutions providing for the plan upon which the sales were to be made and the consequences and effect thereof, or in its deed of conveyance to the purchaser. Upon examining the various ordinances set out in the record we fail to find any reference whatever to the matter of exempting this property from taxation, and instead of finding any stipulation to that effect in the form of deed invariably made by the city to the various purchasers, there appears a clause directly negativing the idea that the city ever intended to grant a perpetual exemption of this property from the burden of taxation. In each instance it was recited in the deed given to the purchaser that the conveyance of the city was made and the rights of the purchaser thereunder were conferred 'subject only to such assessments and burthens as shall be in common with other lot holders in the said city.' The term 'assessment' is often used as a synonym of 'taxes.' Indeed, one of the definitions of this term given by Webster is 'a tax.' But even if this word, as used in the deed, does not necessarily refer to taxation, the

word 'burthen,' which is also therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other landowners in the city. The deed was signed by both parties. Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and, of course, by his assigns) subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.

"Plaintiffs in error contend, however, that the contract they insist upon is evidenced sufficiently by the conduct of the municipal officers at the time the sales by the city took place. It was shown that when lots were put up for sale the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large, and that for nearly a hundred years after these sales first began the municipal authorities failed to tax the lands, and in various ordinances afterwards passed these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere nonuser by a government of its power to levy a tax, it matters not for how long it continued, can never be construed into a forfeiture of the power. This question was directly passed upon by this court when the case was here before. As to this point, Chief Justice Bleckley said: 'Whatever the expectation of purchasers or the unbroken practice of the city hitherto may have been, the mandate of the Constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now.'

"There is an absolute want of any testimony in the record showing that the mayor and aldermen of the city of Savannah, by ordinance, resolution, or official action of any sort, ever authorized the marshal to make the public announcement above referred to in offering for sale the city's property. . . . Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs or any of their predecessors in title bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with

reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them."

We think the opinion correctly states the facts and the law relating to them.

Looking specially at the contents of the deeds executed under the ordinance of 1790, which were signed by both parties, the city and the purchasers, we find that the provision under which the purchasers took the title and by which they were thereafter peaceably and quietly to have possession of the lots was by positive agreement, "subject to all such assessments and burthens as might be in common with other lot holders in the city."

Plaintiffs in error endeavor to give to the word "assessments," contained in the deeds from the city, its more modern meaning of a peculiar kind of tax levied upon lands specially benefited by improvements which are to be paid for by such assessments. The fact is notorious that a century ago special assessments of that kind upon the lands benefited were not usual in this country, and at that time the word was used as synonymous with "rates or taxes," generally. Thus, in a statute passed by the legislature of Georgia in the year 1787, to be found in Watkins's Digest of the Laws of Georgia, 1755–1790, at page 354, it was provided in the 4th section, in speaking of the city of Savannah and the hamlets thereof, "that it shall and may be lawful for the said wardens, or a majority of them, yearly and every year, or oftener, if occasion may require, to make, lay, and assess one or more rate or rates, assessment or assessments, upon all or every person or persons who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, house, or place, . . . within the limits of the town of Savannah or hamlets as aforesaid, for raising such sum or sums of money as the said wardens, or a majority of them, shall in their discretion judge necessary for and towards carrying this act into execution; and in case of refusal or neglect to pay such rate and assessment, the same shall be levied and recovered in manner as hereinafter directed."

Here is an instance of the use of the word "assessment" at that time in relation to this very city as descriptive of a general tax upon the owners of property within the limits of the city, and to be expended for the general purposes of the corporation. We agree with Mr. Justice Lewis in his construction of this language contained in the deed.

It is further objected in behalf of the plaintiffs in error that the condition that the land was to be subject to assessments, etc., was inserted in the deeds without the authority of the common council, and that the ordinance of 1790 providing for the sale of lots contained no such provision. We think the deeds are substantially in accord with that ordinance, and there is nothing therein inconsistent or at war with the inser-

tion of such provision in the deed; it was but providing for one of the details connected with the sale, and there was an implied power under the ordinance to do so. In addition to that the purchasers took their deeds with such language contained in them, and, having themselves signed the deeds, they personally agreed to the condition, and took their titles subject thereto. We do not by this mean to intimate that the title would not have been equally subject to the condition contained in the deed by accepting the deed while not signing it; but in addition to the acceptance there is the affirmative act of signing the instrument, and we think the language subjecting the lots to the same assessments and burthens as were laid in common with other lot holders created a valid agreement, and made the lands subject to the same kind of taxation as is levied upon other lots in the city.

The covenant on the part of the city that the purchasers should have peaceable and quiet possession, use, occupation, and enjoyment of the lots upon payment of the rent as it became due, is in no wise violated by the taxation of the lots in the hands of the purchasers or their assigns. A covenant for quiet enjoyment would not under these circumstances include an exemption from taxation. The purchasers of these lots became to all intents and purposes their owners, as they had the right to their possession, use, and occupation forever upon payment of the rent, and they could assign or devise the same, and their assignees or devisees would take good title, and their heirs would also take in case there was no assignment or devise. They could also, at their discretion and on the payment of the money agreed upon, become owners in fee.

Although the city retained the right of re-entry for nonpayment of rent, the character of the title conveyed to the purchasers and their heirs and assigns was not thereby so changed from an absolute fee that the property actually conveyed could not be assessed for the payment of city taxes. The interest of the purchasers was capable of assessment for taxation, and their right was in substance that of ownership. It bears no resemblance to the case of an ordinary lease for years between landlord and tenant.

In reference to this subject, Mr. Chief Justice Bleckley, in his opinion in this case on its first appearance in the supreme court of Georgia (87 Ga. 397, 13 S. E. 442), at page 399, S. E. p. 442, et seq., said:

"The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all the land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demised forever subject to a perpetual rent, is taxable as corporeal

property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent. The corporeal property in such case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby. It is to be assumed that the whole contract between the parties will be observed, not broken, and their true relation to the property is to be determined on that assumption. Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere lessee but a purchaser admitted into possession on the faith of his contract of purchase. Such were the contracts involved in the present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and is the equivalent of interest at a moderate rate per annum on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held. National Bank v. Danforth, 80 Ga. 55, 7 S. E. 546. Not an iota of beneficial ownership in the city lots now in question abides in the municipality. The city but retained a qualified and wholly unproductive title as security for the purchase money and, until that shall be paid, as security also for the annually accruing compensation under the name of the ground rents in lieu of interest on that money. If the municipal government held all the values in the city as trustee for the owners, or as security for purchase money, these values would be none the less taxable for that reason. The Constitution of the state requires that taxes on property shall be ad valorem, and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception. It prevails in Savannah. Savannah v. Weed, 84 Ga. 683, 8 L. R. A. 270, 11 S. E. 235. The property in question is situate in that city, and, as already said, its beneficial ownership is not in the municipality, but in those who long ago purchased it from the city or who holds under such purchasers by succession to

their title. Relatively to the question of taxation, it makes no substantial difference whether the estate or property of beneficial owners be classed as realty or personalty, whatever property of either kind belongs to them is taxable ad valorem. That the so-called ground-rent lots, as long as the conditions of sale are unbroken, are the property of the purchasers, follows from what was decided by this court in Laurence v. Savannah, 71 Ga. 392, and that case shows that, even after condition broken, the limit of the city's rights would generally be to have all arrearages cleared and discharged, the surplus proceeds realized by a sale of the property being payable to the real owner. Our reasons for the conclusion at which we have arrived need not be further elaborated. The Constitution is imperative that property is to be taxed ad valorem. The foundation principle of such a system is that those who own and enjoy values are to pay the taxes. The real owners of the money which these lots would now sell for on the market are the persons whom we have designated as owners, and it is upon the cash market value that taxes are assessable. If that value is any less, on account of the subjection of the property to ground rents or unpaid purchase money, than it otherwise would be, that fact would no doubt be taken into consideration in making the assessment. The market value, whatever that may be, is the proper basis.

"2. There was no error, either of practice or decision, in denying the injunction. Whatever the expectation of the purchasers, or the unbroken practice of the city hitherto may have been, the mandate of the Constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

We think these views are a correct exposition of the law applicable herein.

We find no element of estoppel in the case. As has been said, the statements of officials made at the time some of the sales may have been effected were nothing more than expressions of opinion, there being no evidence of any agreement on the part of the city or its duly authorized agents to exempt perpetually or at all these lots from taxation for city purposes. The ordinances and the deeds show the transaction and there is no estoppel arising from the language there used. On the contrary, there is evidence of an agreement to pay such taxes.

Such an estate as was created by these deeds does not in our opinion come under the general rule which imposes on a landlord, when the lease is silent upon the subject, the payment of taxes chargeable upon the premises during the term of the lease. Where the purchaser holds real property for a term which may be in perpetuity, upon the condition of paying a certain ground rent, and where he is entitled to a deed conveying the fee at any time on the payment of certain money,

he is more nearly described as an owner than he is as a lessee of such property, and he would be liable to pay the taxes imposed upon the property upon the principle which is set forth in Sanderson v. Scranton, 105 Pa. 469, and Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394. It is not necessary to decide this question, however, as the specific language of the deed places the burden of paying the taxes on the purchaser and his grantees.

The judgment of the Supreme Court of Georgia was right, and must therefore be affirmed.

HILL *et al. v.* CITY COUNCIL OF ABBEVILLE.

(*Supreme Court of South Carolina, March 9, 1901.*)

[38 S. E. Rep. 11.]

License and Privilege Taxes—Power to Impose.

Const. art. 8, § 6, empowers cities to assess and collect taxes for corporate purposes. Article 10, § 1, gives the general assembly power to provide for a graduated license on business and occupation. Abbeville City Charter, § 8 (21 St. at Large, p. 1134), gave the city authority to impose a license on certain enumerated occupations. Act March 5, 1896, No. 36, conferred on cities which would surrender charters already obtained power to impose license taxes. Act March 2, 1897, amended charters of all cities by endowing them with powers enumerated in the act of 1896: *held*, that the city council of Abbeville was empowered to impose license and privilege taxes on business, occupations, and professions.

Same—Uniformity—Constitutional Law.

A city ordinance requiring persons in certain occupations and professions to pay a license or privilege tax, which is uniform as to the members of each class or occupation on which it operated, is not in violation of Const. art. 8, § 6, requiring such taxes to be just, in that the different classes are not taxed alike.

Same—On What May Be Imposed—Dogs.

Under Act 1896, No. 36, authorizing cities to impose a license tax for corporate purposes, and to pass such ordinances as are necessary to enforce them, a city is empowered to impose a tax for the privilege of keeping a dog.

Appeal from common pleas circuit court of Abbeville county; James Aldrich, Judge.

Injunction by R. M. Hill and others against the city council of Abbeville to restrain enforcement of certain ordinance. From a judgment in favor of the defendant, plaintiffs appeal. Affirmed.

Plaintiffs' petition is as follows:

"The petition of the above-named petitioners respectfully shows to the court: (1) That heretofore, to wit, on the 26th day of September, 1899, the plaintiff above named, R. M. Hill, filed his complaint against the city council of Abbeville, the above-named defendant, on behalf of the plaintiff and all others similarly affected by the ordinance named in said complaint, and exhibited therewith as a part thereof, asking for an

injunction against the defendant to prevent them from enforcing said ordinance, on the grounds set out in said complaint and in the amended complaint therein, which was filed on the —— day of October, 1899, reference to which complaints are prayed as often as may be necessary. (2) That your petitioners are citizens of Abbeville county, South Carolina, and are engaged in business in the city of Abbeville, and are affected by the ordinance referred to in the complaint of the said R. M. Hill, which is known as the 'License Ordinance.' (3) That the said city of Abbeville is a municipal corporation, duly chartered by the legislature of this state, and it is provided that the mayor and aldermen collectively shall be designated as the city council of Abbeville, and may sue and be sued, etc. (4) That said ordinance is utterly unconstitutional, illegal, null, and void, in that it is levied for the sole purpose of raising revenue to meet the current expenses of the city of Abbeville, as said ordinance so declares, and it imposes a tax upon certain citizens of the city of Abbeville, and upon certain citizens outside of said city, but who occasionally come here for the purpose of disposing of their produce, which is not uniform, either in respect to persons or property; said ordinance imposing a tax upon your petitioner J. L. McMillan, as a manufacturer of brick, of fifteen dollars, when he has a capital invested of about four hundred dollars, whereas said ordinance only imposes a tax upon the Abbeville Cotton-Mill Company, which is engaged in manufacturing cloth, of seventy-five dollars, when they have a capital invested of five hundred thousand dollars; putting a tax upon your petitioners T. H. Maxwell and R. B. Haddon of fifteen dollars for butchering and selling meat, whereas merchants engaged in other lines of merchandising are only taxed one dollar upon the first thousand dollars of goods sold, and fifty cents upon each subsequent thousand dollars sold; puting a tax of fifteen dollars upon your petitioner J. L. Simpson, as an agent for sewing machines, and taxing other agents for retailing goods only ten dollars, and charging agents for merchant tailors only ten dollars; putting a license tax of fifteen dollars upon your petitioners J. W. McKee and E. H. Richey for selling meat in the city of Abbeville, although they are farmers and stock raisers, do not reside in the city of Abbeville, and have a right to sell their products in said city; putting a tax upon your petitioner J. L. Hill of five dollars for weighing cotton, and yet allowing the cotton mill to weigh all the cotton they may choose to weigh, without any license whatever; putting a tax of ten dollars upon your petitioner J. L. Roche for buying cotton seed for a nonresident of this state, to wit, the Charlotte Oil Mill, which is contrary to the interstate commerce act and the constitution of the United States; putting a tax of five dollars upon your petitioner J. A. Dickson for practicing dentistry, when he is licensed under the laws of the state of South Carolina, and is author-

ized to practice dentistry anywhere in the state; putting a tax of five dollars upon your petitioner J. K. Millford, as a photographer, and also as a boarding house keeper, thus putting a double tax upon him; putting a tax of three dollars each upon your petitioners J. W. Beagles, Alfred Foster, and Robert Watt, as blacksmiths, and not putting any tax whatever upon carpenters; putting a tax of three dollars each upon your petitioners Wade Sloan, Russell Robinson, and Chaney Jones, and putting no tax at all upon carpenters or brick masons; putting a tax of five dollars upon your petitioner H. D. Reese, for running a shop to repair jewelry, and only imposing a tax of three dollars upon other repair shops; putting a tax of three dollars upon your petitioner Mack Brooks for repairing buggies and wagons, and charging bicycle repair shops nothing; putting a tax upon your petitioners C. A. Smith and W. F. Smith of five dollars each, as contractors under five hundred dollars, and putting no tax upon other parties building houses not under contract; putting a tax of five dollars upon your petitioner J. D. Linton, as a contractor, which is subject to the same objection as set forth in regard to C. A. Smith and W. F. Smith. Said ordinance is also null and void and unconstitutional in that said license tax is not graduated as required by the constitution of this state, and is also void, in that it is not uniform in its operation, putting a heavy tax upon certain classes of occupations therein named, and putting no tax upon other similar occupations, and is also unconstitutional, null, and void, in that it is not based upon the value of the property of your petitioners, but is an arbitrary tax, and is also null and void in that it is not authorized by the charter of the city of Abbeville, or by any act of the legislature of this state. (5) That said city council of Abbeville is attempting to enforce said ordinance against your petitioners, having this day summoned your petitioner J. L. Simpson to appear before the council to show cause why he had not paid said tax, and threatening him and all your petitioners with fine and imprisonment if they fail to pay said tax; that irreparable injury will be done your petitioners unless said defendant is enjoined, as they have no remedy against the defendant for a false arrest or imprisonment, and putting your petitioners to the trouble and annoyance of continued and expensive litigation, and forcing them to have a multiplicity of suits to protect their right and liberty; that your petitioners are desirous of being allowed to come in as parties to the above-named action, and are willing to contribute their share to the expenses of this action. Wherefore your petitioners pray that they may be allowed to come in as parties to said action, and that the injunction heretofore granted be extended to them."

The following amended complaint for relief was also filed:

"The plaintiff above named, by this his amended complaint, complaining on behalf of himself and all others similarly

situated, and affected by the ordinance herein referred to, alleges: (1) That the defendant, the city council of Abbeville, is a body politic and corporate, and as such can sue and be sued. (2) That the plaintiff is a citizen and taxpayer of the city of Abbeville, in the county and state aforesaid, and is engaged in the business of general merchandising and buying cotton for Charles E. Johnson & Co., who reside in the city of Raleigh, in the state of North Carolina. (3) That this action is brought on behalf of this plaintiff and all others similarly situated, and affected by the ordinance hereinafter referred to, who shall in due time come into this action and have themselves made parties, and contribute to the expenses of this suit. (4) That on the 13th day of June, 1899, the said city council of Abbeville passed and ratified an ordinance known as the 'License Ordinance,' a copy of which is hereto attached as a part of this complaint, and marked 'Exhibit A.' (5) That said ordinance undertakes to impose upon this plaintiff and other business men of Abbeville a direct license tax, which, under the charter of the city of Abbeville, they have no right to do; said charter only providing, in section 8, for imposing a license upon certain occupations therein named, and making no provision for imposing a license upon this plaintiff, or upon any other business or occupation, other than those named in section 8 of said charter. (6) That said license ordinance is illegal, oppressive, and absolutely null and void, and is unconstitutional, in that it is levied for the sole purpose of raising revenue to meet the current expenses of the city, as said ordinance so declares, and it imposes a tax upon certain citizens of the city of Abbeville, which is not uniform, ether in respect to persons or property; said ordinance putting a tax of ten dollars upon this plaintiff, as a cotton buyer, and at the same time exempting cotton buyers who are buying for local mills; also putting a tax of ten dollars on all cotton-seed buyers, except for local mills, which are exempt; putting a tax of ten dollars upon druggists and undertakers, and allowing other merchants to do business by paying one dollar upon the first one thousand dollars worth of goods sold, and fifty cents upon each subsequent thousand dollars worth sold; putting a tax of five dollars upon lawyers whose income is not over one thousand dollars, and a tax of seven dollars and fifty cents upon those lawyers whose income is over one and less than two thousand dollars; putting a tax of fifty dollars upon each bank, when their total capital only amounts to about seventy-five thousand dollars each, and only charging the Abbeville Cotton Mill seventy-five dollars, when their capital is five hundred thousand dollars; putting a tax of one dollar upon all dogs, irrespective of their value; taxing livery stables running hacks $35.00, without hacks $25.00; putting a tax of two dollars and fifty cents upon a boarding house with two boarders, and five dollars upon one having more than two boarders,—and in many other ways, too numerous to men-

tion, making discriminations both as to persons and as to property, and putting on said tax in utter disregard of section 6 of article 8 of the constitution of this state, which provides that municipal corporations shall be vested with power to assess and collect taxes for corporate purposes, said taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same, which want of uniformity will more fully appear by reference to said ordinance, a copy of which is hereto attached, as above stated, marked 'Exhibit A.' (7) That said ordinance is also illegal, null, and void in so far as it seeks to impose a license tax upon a person buying cotton for nonresidents of this state, and upon cotton-seed buyers for nonresidents of this state, and at the same time exempting buyers for local mills; said tax being contrary to the interstate commerce law and to the constitution of the United States. (8) That said license ordinance is also illegal, null, and void, and contrary to section 5 of article 1 of the constitution of this state, in that said ordinance, in section 1 of said ordinance, provides 'that no person, firm or corporation shall engage in, prosecute or carry on any trade, business, occupation or profession hereinafter mentioned, without having first paid a special license tax therefor as follows, to wit,' etc., and section 4 of the said ordinance provides as follows: 'The city council hereby reserves the right to refuse or revoke any license for any cause which may seem to it just;' thus putting it in the power of the city council of Abbeville to abridge the privileges of the citizens of said city, and deprive them of their liberty and property without due process of law, and to deny to any one that they may see fit the equal protection of the laws. (9) That the city council of Abbeville is operating under a special charter, and only has the rights conferred by said charter, and there has never been any vote or election in said city of Abbeville upon the question of surrendering its charter and becoming incorporated under the general incorporation act of 1896, providing a method by which existing municipal corporations may surrender their charters, and take out new ones. (10) That the said city council has ordered that the said ordinance go into effect on the 1st day of October, 1899, and threatens to fine or imprison all persons who do not pay said tax on or by the 1st day of November, 1899. (11) That the question involved in this action is one of common and general interest to many persons, and it is impracticable to bring them all before the court; and therefore this action is brought in the name of the plaintiff, for his own benefit and for the benefit of all others similarly situated and affected by said ordinance, and in order to avoid a multiplicity of suits. (12) That, unless the said city council of Abbeville is enjoined from enforcing said illegal ordinance, irreparable injury will be done to this plaintiff and all others affected by said ordinance, their rights and immunities as citizens will be abridged,

and their property will be taken from them without due process of law. (13) That the plaintiff is without adequate remedy unless this honorable court enjoins said city council from enforcing said ordinance as they are threatening to do; said ordinance providing that all classes of persons therein named failing or refusing to pay said tax shall be fined not less than two dollars or more than one hundred dollars, or be imprisoned not less than two days nor more than twenty days, for every day such business is carried on without such license, and the law not providing any remedy against a city council for false imprisonment. Wherefore the plaintiff prays judgment that the city council of Abbeville be perpetually enjoined and restrained from attempting to enforce said ordinance, and for such other and further relief as may be just and proper."

The following is the decree of the lower court:

"This action is brought in behalf of this plaintiff and all others similarly situated and affected by the ordinance hereinafter referred to who shall in due time come into this action and have themselves made parties, and contribute to the expense of this suit. The judgment demanded is that the city council of Abbeville be perpetually enjoined and restrained from attempting to enforce the ordinance referred to, and such other relief as may be proper. The amended complaint was served upon defendant on October 16, 1899. The summons and original complaint were not read at the hearing herein, and were not submitted to me with the record in the cause. I cannot, therefore, state the date of the original complaint, when it was filed, or when it was served upon defendant. I find an order of his honor, Judge Ernest Gary, as presiding judge, dated October 5, 1899, which enjoins and restrains the defendant from enforcing said ordinance against the plaintiff 'until the hearing of this case upon its merits.' The answer of the defendant is dated November 7, 1899. A number of persons were, by order of court, permitted to come into this action as plaintiffs, and the restraining order above stated was extended so as to include them. On the 13th day of June, 1899, the defendant, the city council of Abbeville, passed and ratified an ordinance, known as the 'License Ordinance.' The preamble or beginning of said ordinance is as follows:

"'For the purpose of meeting in part the current expenses of the city government of the city of Abbeville, S. C., for the fiscal year commencing January 1, 1900, and to meet in part such other indebtedness of the city of Abbeville, S. C., as may become due in said fiscal year: Therefore, be it ordained by the city council of Abbeville, S. C., and by authority of the same:

"'Section 1. That no person, firm or corporation shall engage in, prosecute or carry on any trade, business occupation or profession hereinafter mentioned, without having first

paid a special license tax therefor as follows, to wit: Agents, for enlarging pictures $1.00 per day, per month $10.00.'

"Then follows, in alphabetical order, a list of one hundred and fifteen or twenty kinds of trade, business, occupation, or professions, and the amount of the tax upon each.

"The plaintiff alleges that he 'is engaged in the business of general merchandising and buying cotton for Charles E. Johnson & Co., who reside in the city of Raleigh, in the state of North Carolina.' The provisions of the ordinance in reference to merchants and cotton buyers are: 'Merchants shall pay license according to the following schedule of gross sales and prices upon sworn returns. Sales amounting to $1,000 or under the sum of one dollar, on each additional thousand dollars of sales or fractional part thereof, the sum of fifty cents. Cotton buyer, except for local mills, $10.00.'

"Returning to the ordinance:

" 'Sec. 2. Any person or persons carrying on or prosecuting any business or occupation, or running any establishment named in this or preceding sections, without first having taken out a license therefor, shall be fined (except in cases where special penalties are imposed) not less than two dollars nor more than one hundred dollars, or be imprisoned not less than two days nor more than twenty days, for each and every day such business is carried on without such license. That no license shall be used for a less period than one year (unless otherwise specified) dated from the first day of the month in which the same is issued, and it shall be the duty of the clerk of council to see that licenses and fees are imposed and paid, and to promptly report any and all cases of failure to do so.

" 'Sec. 3. That for any business occupation or profession not enumerated in the foregoing section, the license shall be regulated and imposed by the city council at any meeting of the same.

" 'Sec. 4. The city council hereby reserves the right to refuse or revoke any license for any cause which may seem to it just.'

"Section 5 refers to 'false or fraudulent returns' necessary or required by the ordinance, and the punishment therefor.

" 'Sec. 6. That any person, firm or corporation carrying on or prosecuting any trade, business, occupation or profession or running any establishment named in this ordinance, or upon which a license may hereafter be imposed by the city council, without first having taken out a license therefor, shall be fined (except in cases where special penalties are imposed) not less than two dollars nor more than one hundred dollars or be imprisoned not less than two days nor more than thirty days in the county or city prison, for each and every day such business, occupation or profession is carried on without such license.

" 'Sec. 7. That this ordinance shall go into effect on the first day of October, 1899, and all persons, firms, corporations

or professions, not conforming to its requirements shall be liable to the penalties herein imposed from and after said last-mentioned date.'

"Plaintiff, in paragraph 5 of his complaint alleges 'that said ordinance undertakes to impose upon this plaintiff and other business men of Abbeville a direct license tax, which, under the charter of the city of Abbeville, they have no right to do; said charter only providing, in section 8, for imposing a license upon certain occupations therein named, and making no provision for imposing a license upon this plaintiff, or upon any other business or occupation, other than those named in section 8 of said charter.' The charter of the city of Abbeville is contained in 'An act to incorporate the city of Abbeville,' approved January 5, 1895. See 21 St. at Large, p. 1134. Section 8 of said act or charter reads: 'Sec. 8. That the said city council may grant or refuse licenses to keepers of livery stables, drivers of public drays, hacks and vehicles kept for hire, butchers, auctioneers, peddlers, itinerant tradesmen, keepers of billiard tables, ten pin alleys, or any other kind of game, exhibitions of skill or chance within said corporation, and the said city council may impose a license fee on any of the said occupants, and also on any person who keeps a store, shop, office or other place of business and carries on his trade, profession or business in said city but resides and holds his property beyond the limits of said city, thus escaping his or her just share of the burdens of the city government; and said city council may enforce the collection of said license fees, which shall be turned into the city treasury.' The plaintiff alleges that he is a merchant and cotton buyer residing iin the city of Abbeville. A number of the parties who have intervened in this action and are now plaintiffs herein are not engaged in any business mentioned in said section 8, nor are they included in the provisions thereof.

"If this was the only law upon this subject, it is plain that the city council of Abbeville could not impose a license fee or tax upon persons other than those enumerated in said section, or upon occupations or kinds of business not therein specified; for 'a municipal corporation, in this state, can only exercise power with which it is clothed by our general assembly.' Mauldin v. City Council, 42 S. C. 298, 20 S. E. 844, 27 L. R. A. 288; State v. Town of Maysville, 12 S. C. 76. The constitution of this state, adopted in 1895, contains a number of provisions not found in the constitution of 1868. The constitution of 1868 contained no provisions in reference to license fees or taxes such as are found in the constitution of 1895. Yet under the constitution of 1868 the supreme court repeatedly held that the power to raise revenue by a license tax on business, given by statute to city council, violates no provision of said constitution. The supreme court, in Re Oliver, 21 S. C. 325, said: 'We think that it would result in no good to reopen the

argument and renew the discussion. It concerns the interests of all that the law and its interpretation should be settled.' This language was cited with approval in Re Jager, 29 S. C. 443, 7 S. E. 608. If such was the law under the constitution of 1868, it must be the law now, because the constitution of 1895 has numerous provisions which afford additional supports for the cases referred to. Indeed, after reading the decisions upon this subject, and the provisions of the constitution of 1895, we are impressed with the idea that the framers of the constitution of 1895 prepared several of the provisions of that instrument with reference to said decisions, and intended to incorporate in the new constitution the law as declared by the courts. I shall call attention to two provisions of the constitution of 1895. In the last proviso in section 1 of article 10, entitled 'Finance and Taxation,' we find, 'The general assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business.' This is an unequivocal grant of power to the general assembly, giving to that body a power which, under the constitution of 1868, had been questioned. Section 6, art. 8, Const. 1895, entitled 'Municipal Corporations and Police Regulations' provides: 'The corporate authorities of cities and towns in this state shall be vested with power to assess and collect taxes, for corporate purposes. * * * License or privileged taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto.' It will be noted that the 'license or privileged taxes' are to be imposed with reference to 'the classes subject thereto.' Paragraph 1, § 11, art. 17, of the constitution of 1895 provides 'that all laws in force in this state, at the time of the adoption of this constitution, not inconsistent therewith and constitutional when enacted, shall remain in full force until altered or repealed by the general assembly or expire by their own limitation.' In Mauldin v. City Council, 42 S. C. 299, 20 S. E. 844, 27 L. R. A. 288, it is said, in the opinion of Mr. Justice Pope, that 'the power of taxation may be given a municipal corporation, but such power, when exercised by such municipal corporation, must not only be exercised according to the charter thereof, but also within the limits of the constitution of the state.' This language was used in reference to the constitution of 1868, but, assuming that it is applicable to this case under the constitution of 1895, let us see if the city council of Abbeville has the power to impose license fees and taxes, and whether or not its ordinance is in conformity to law.

"Section 1, art. 8, Const. 1895, is as follows: 'The general assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporations shall have any power or be subject to any restrictions other than all corporations of the same class. Cities and towns now existing under special charters may reorganize under the gen-

eral laws of the state, and when so reorganized their special charters shall cease and determine.' In accordance with the above-stated provision of the constitution, the general assembly of this state on March 5, 1896, passed an act entitled 'An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants.' 22 St. at Large, p. 67. This act, in section 1, provides 'that citizens of any proposed town of this state * * * desiring to be incorporated shall present to the secretary of state,' etc., a petition. This refers to a 'proposed town,'—one not yet in existence. Section 25 of this act provides that 'any town * * * already chartered which is desirous of surrendering its charter and accepting incorporation under this act * * * may be incorporated under this act.' The terms of this section are manifestly permissory. Section 12 of said act reads: 'That said council may, and they are hereby, authorized annually to require by ordinance the payment of such reasonable sums of money as a license tax by any person or persons, corporation or corporations, engaged or intending to engage in any calling, business, occupation or profession, in whole or in part, within the limits of said town, except those engaged in the calling or profession of teachers or ministers of the gospel. They shall have power to collect license or taxes from all persons representing publicly within the limits of said town, for gain or reward, any plays or shows of whatever nature or kind soever; and said town council are hereby authorized and empowered to pass such ordinances as are necessary to give full force and effect to this section, and to punish delinquents thereunder.' It was admitted upon the argument that the city of Abbeville has more than one thousand and less than five thousand inhabitants.

"On March 2, 1897, the general assembly passed 'An act relating to the powers of certain corporations' (22 St. at Large, p. 464), as follows:

"'Section 1. That all municipal corporations of this state having a population of not less than one thousand inhabitants and not more than five thousand inhabitants are hereby endowed with the power enumerated in an act of the general assembly approved 5th March, 1896, and numbered 36,' etc.

"'Sec. 2. That the powers hereby conferred are in addition to those already enjoyed by the said municipal corporations under their respective charters.'

"Act No. 36 (22 St. at Large, p. 67), and 'approved 5th March, 1896,' is the act herein before referred to, and is entitled 'An act to provide for the incorporation of towns of not less than one thousand inhabitants.'

"I think, and so hold, the words 'that all municipal corporations of this state,' as used in section 1 of the 'Act relating to the power of certain corporations,' refer to and include municipal corporations existing under special charters, as well as those incorporated under the general act of 1896, supra.

This construction, if the plain and unambiguous words of section 1 need construction, is supported and sustained by section 2, which declares 'that the powers hereby [in section 1] conferred are in addition to those already enjoyed * * * under their respective charters.' The word 'charters' is plural. Under the general law there is but one 'charter,' or form of 'charter,' and we must assume that the act refers to all charters coming within the terms of the act. This view finds further and conclusive support in the word 'respective.' It would be without force or effect if the act is construed to refer only to charters under the act of 1896.

"The act of 1897 'endowed' the city council of Abbeville 'with the powers' enumerated in the act of 1896, numbered 36, including section 12, which authorizes said council to impose certain license taxes. I have heretofore cited said section 12 in full. The act of 1897, entitled 'An act relating to the powers of certain corporations,' was amended by 'An act to amend an act entitled "An act relating to the powers of certain corporations," ' approved 2d day of March, 1897. See Acts 1899, p. 53. This act was approved March 3, 1899. It amends the act of 1897 by striking out 'five' and inserting 'ten,' making the maximum number of inhabitants ten thousand instead of five thousand. By an act of the general assembly approved March 2, 1899, and entitled 'An act to provide a general law for the amendment of town and city charters' (Acts 1899, p. 70), it is provided 'that on and after the approval of this act, the charter or articles of incorporation of any city or town in this state, whether such city or town was originally incorporated by act of the general assembly or under the general law by the secretary of state, may be amended in any particular, not inconsistent with the constitution and laws of the state, in the following manner.' The 'manner' is then stated, viz. by petition, vote, etc. Section 2 of this act repeals all acts and parts of acts inconsistent with this act.

"The act just cited cannot affect the city council of Abbeville, and, inter alia, for the following reasons: The act is prospective. It has no effect upon past charters, unless those charters were amended after its passage. It is permissive and directory when called into use. It does not purport to repeal any existing charter or amendment thereof. The charter of the city of Abbeville was, as we have seen, approved in 1895, and amended in 1897. The city council of Abbeville are not trying to have the charter of the city amended. The council is trying to enforce charter powers given to the city before the passage of the act of 1899. It is contended that the act of 1896, entitled 'An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants,' and the act of 1897, entitled 'An act relating to the powers of certain corporations,' are unconstitutional, in that they relate to more than one sub-

ject not enumerated or expressed in their titles. I do not see any objection to the former act. The objection to the act of 1897 is that it legislated as to two subjects, the one being as to charters for towns of not less than one and more than five thousand inhabitants, and the other being charters for towns of not less than two hundred and not more than one thousand inhabitants, and also in that it seeks to amend charters generally. Article 3, § 17, of the constitution of 1895, is as follows: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.' The same provision is contained in the constitution of 1868. See article 2, § 20. The court has construed this section: 'As we have said in City Council v. Oliver, 16 S. C. 56, upon the authority of Mr. Justice Cooley: "There has been, and ought to be, a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction." Hence, when a question, under this clause of the constitution, is presented for adjudication, we are bound to take a liberal and enlarged view, and, if practicable, bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land.' This case is cited with approval in State v. Town Council, 39 S. C. 307, 17 S. E. 752, where the authorities are collated. In Ex parte Bacot, 36 S. C. 135, 15 S. E. 208, 16 L. R. A. 590, it was held that an act entitled 'An act to provide for the formation of certain corporations under general laws' was not subject to the objection herein presented. The court say: 'In the vary nature, various matters were to be considered under it, somewhat like an appropriation act, with a general title covering many particulars. The "subject" was the formation of certain corporations, and it would seem that the right to form corporations would include the power to be given to such corporations. How else could they be formed? The "subject" of the act of of 1897, supra, was the regulating of the powers of certain corporations, and it would seem that the right to regulate the powers of corporations would include the powers to be given to such corporations.'

"Article 3, § 34, of the constitution is as follows: 'The general assembly of this state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: * * * (3) To incorporate cities, towns or villages, or change, amend or extend the charter thereof. * * * (12) The general assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations.' The general assembly, under these provisions, could only amend the charter of Abbeville by a general law, and that is the nature of the act of 1897. The body of the act refers to municipal corporations, and nothing else; therefore it relates to but one subject. The argument of counsel is based upon the idea that,

inasmuch as the act refers to two former acts, it must refer to two subjects. This deduction is neither logical nor sound. The requirement of the constitution that an act shall relate to but one subject is complied with when the act relates to a part of a subject. It is not necessary, nor is it usual, for an act to exhaust a subject. If several acts relate to several phases of the same subject, the general assembly may legislate in one act upon several of said phases in a subsequent act. I hold that the general assembly can, by an amendatory act, amend several acts, by proper reference thereto, provided all of the acts relate to the same subject. I think that the act of 1897 'expresses' in its title the subject of the act. In addition to the authorities cited, I would also refer to End. Interp. St. (Ed. 1888) § 524, p. 740; People v. Mahaney, 13 Mich. 481.

"It is alleged in paragraph 6 of the complaint that the ordinance in question was passed 'in utter disregard of section 6 of article 8 of the constitution, which provides that municipal corporations shall be vested with powers to assess and collect taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same.' The 'want of uniformity' consists in alleged 'discriminations as to persons and property.' I will refer to this allegation further on, when considering the alleged 'discriminations'; but, in passing, will say that the complaint cites only a part of said section, and omits an entire and important sentence, containing the fundamental law upon the subject of 'license or privileged taxes.'

"Article 8, § 6, is as follows: 'The corporate authorities of cities and towns in this state shall be vested with power to assess and collect taxes for corporate purposes, said taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same, and all the property, except such as is exempt by law, within the limits of cities and towns shall be taxed for the payment of debts contracted under authority of law. License or privileged taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto.'

"It is the duty of the court to construe, not make, the constitution. That instrument authorizes municipal corporations to impose two kinds of taxes: First, a general or ordinary tax; second, license or privileged taxes. We must give force and effect to its provisions. A license or privilege tax has long been in use in this state. 'Strictly speaking, a license of a trade or calling by a municipal corporation is referable to the police power possessed by such bodies, and implies authority to prohibit the exercise of such business, except upon conditions having reference to some end of police regulation. In its simplest form of exercise, as when employed solely for the purpose of regulating avocations of a class tending to disturb public order, health, or morality, it is a power

totally distinct from that of imposing taxes for the purpose of raising revenue. It has, however, been long employed for the purpose of imposing on a class of avocations to which the exercise of that power particularly relates, embracing places of public entertainment and amusement, taxation for the purpose of revenue of an extraordinary character, based upon the idea that avocations of that class should contribute specially to the support of the government in excess of the burdens borne by the productive industries. In this way it became one of the customary modes of raising revenue. The extension of this mode of raising revenue beyond the sphere of avocations to which the power of police regulation properly related, where circumstances of a peculiar nature rendered it requisite that each particular avocation should have its own rate of taxation, was natural where taxation had divided itself into two methods,—the one embracing those subjects of taxation that are capable of being reached by means of a uniform rate, and the other such as could be treated in no other way than by subdivision into two distinct classes, and imposing a separate rate on each of such classes. Avocations of the class to which the power of police regulation properly relates naturally fall within the class of subjects of taxation last named, and the license and form of collecting special taxes have been frequently extended to embrace all subjects of taxation calling for special rates of taxation.' State v. City of Columbia, 6 S. C. 6. See, also, In re Jager, 29 S. C. 438, 7 S. E. 605, and other cases cited. I have cited this case (State v. City of Columbia, supra) as showing the origin and growth of license taxes for two reasons. As this was the only adjudged law of this state, we must assume that the words 'license or privilege taxes,' as used in the constitution, refer to, and were intended to refer to, licenses and license taxes as they existed at the time of the adoption of the constitution. Not only in the law, but also in its popular meaning, a license tax was well understood. The second reason for the above citation is that it was suggested and argued that the words of the constitution might and should be construed as relating to the police powers of municipal corporations, and not for the purpose of raising revenue. If there was any doubt upon this subject (and there was none), the constitution has dissolved that doubt now. I hold that the constitution authorizes and empowers the imposition of licenses or privilege taxes for the purpose of raising revenue, and that, so far as the section under consideration is concerned, the police powers of the municipal corporations are in no wise changed. The ordinance in question provides: 'Banks, $50.00; cotton factory, $75.00.' The complaint alleges that the ordinance 'is illegal, oppressive, and absolutely null and void, and is unconstitutional, in that it is levied for the sole purpose of raising revenue to meet the current expenses of the city, as said ordinance so declares, and it imposes a tax upon certain citizens of the city of

Abbeville which is not uniform, either in respect to person or property; said ordinance putting a tax of fifty dollars upon each bank, when their total capital only amounts to about seventy-five thousand dollars each, and only charging the Abbeville Cotton Mill seventy-five dollars, when their capital is five hundred thousand dollars.' Passing by the allegations as to the unconstitutionality of the ordinance, as set forth in the above quotation, and which have already been discussed, we will consider the allegations alleging illegal discrimination, as illustrated by the bank and the cotton mill. The underlying error in the complaint and the arguments in support of its allegations is in assuming that the requirement in the first sentence of article 8, § 6, viz. 'said taxes to be uniform in respect to persons and property,' applies to the last sentence in said section in reference to licenses. If such were the fact, why did not the framers of the constitution so declare? It would have been the most natural and easiest provision to have incorporated 'license or privilege taxes' in the first sentence, and have left it subject to the requirements of said sentence. But the framers of the constitution not only did not do so, but also took further, different, and affirmative action in regard to licenses, as manifested in the plain language of the last sentence of said section. When it is suggested and argued that the 'license or privileged taxes' should be graduated according to the value of a plant, the income, or the value of the product and sales, the answer is the constitution does not so provide. Let us construe the word 'classes' in the last line of said section 6. We might speculate as to the meaning of this word, because, standing alone, it might be properly construed as referring to persons or property, one or both. Taking into view the constitution and statutes of our state as construed by our courts and as shown by the practice in this state, I think that the legislation now in force is a reasonable and practical construction of the word 'classes.' The constitution permits the general assembly to empower cities and towns to impose license or privilege taxes upon 'classes'; but when a class is 'subject thereto' the tax must be graduated, etc. In section 12 of the 'Act to provide for the incorporation of towns,' etc. (22 St. at Large, p. 71), it is provided that the city council may 'require by ordinance the payment' of a license or privilege tax 'by any person or persons, corporation or corporations, engaged or intending to engage in any calling, business, occupation or profession.' The 'classes,' therefore, must be composed of persons or corporations engaged, or intending to engage, 'in any calling, business, occupation or profession.' A member of a class, as used here, may be thus defined: (1) A person or corporation; (2) a calling, etc.; and (3) that person or corporation engaging in that calling, etc. There can be no doubt that a cotton mill and a bank belong to different classes, or, certainly, that the council had the power to put them in different classes.

Is the 'discrimination between the mill and bank oppressive? That is a mere allegation of the complaint, denied by the answer, and supported by no evidence. The city council is authorized and empowered to determine such matter. In the absence of proof to the contrary, I must assume that the city council so graduated these license taxes as to secure a just imposition of such taxes upon the mill and the bank. It is not for the plaintiff, or any one of those who have come into this action, to decide such an issue. In view of the many acts and ordinances in this state permitting and regulating license taxes, the amounts charged in the ordinance in question seem neither oppressive nor illegal. The council, in 'graduating' these taxes 'so as to secure a just imposition of such tax upon the classes subject thereto,' may, and I assume did, take into consideration the calling, business, etc., the character of such calling, the value of same, and everything connected therewith. Again, and while upon the subject of 'classes,' I will refer to the provision thereof in reference to merchants. It reads: 'Merchants shall pay license according to the following schedule of gross sales and prices upon sworn returns: Sales amounting to $1,000, or under the sum of one dollar, on each additional thousand dollars of sales or fractional part thereof, the sum of fifty cents.' This provision has long been in use in this state. I think, and so hold, that this provision is constitutional. The objection that the requirement as to 'sworn returns' is illegal, because inquisitorial, and calculated to expose one's business, is wanting in support. The rule is, all taxpayers swear to their returns of taxable property, and in this instance the merchants are required to do what other taxpayers do. The law has wisely and necessarily left much to the legal discretion of town and city councils. There are poor and rich merchants. It might and would be unjust to charge each the same privilege tax. Therefore the license is a 'just imposition' when each merchant is called upon to pay according to the amount of his 'gross sales and prices.' If there is or can be any objection to this method of licensing merchants, it is easy to place another construction upon this provision, which makes it legal and valid. 'Merchant' is a general name. There are many kinds of merchants,—grocers, dry-goods, etc. One or more classes of merchants, dealing in one commodity, might be put into one class, while other merchants, dealing in other commodities, might be put in another class. This might be the only way in which the tax imposed on each class could be graduated so as to secure a just imposition of such tax upon each of said classes. This would be legal. So, in securing a just imposition of a license tax, it may be necessary to subdivide persons engaged in one calling into classes, and tax each included in such subdivision so much. These subdivisions, so called here merely for the purpose of illustration, would, under the law, be each a class. We must have regard

to the substance, and not the form, of the ordinance. It really makes classes of such merchants according to their sales. I do not mean to hold that the same merchant could be taxed double or twice upon the same calling or business. For instance, a druggist is a merchant; but he could not be taxed upon his gross sales first as a merchant, and then as a druggist. That would be illegal. Again, there are 'classes' upon which a graduated tax, according to incomes or gross sales or money collected, cannot be imposed. The 'calling, business, occupation, or profession' of such classes may be of such nature as to preclude such a method or system. In such cases I think that the city council had the legal right, in their legal discretion, to impose a fixed tax upon each member of each of such classes, and make each of such members pay a tax similar in amount and in other respects. Paragraph 8 of complaint alleges: 'That said license ordinance is also illegal, null, and void, and contrary to section 5 of article 1 of the constitution of this state, in that said ordinance, in section 1 of said ordinance, provides "that no person, firm or corporation shall engage in, prosecute or carry on any trade, business, occupation or profession hereinafter mentioned, without having first paid a special license tax therefor, as follows, to wit," etc.; and section 4 of said ordinance provides as follows: "The city council hereby reserved the right to refuse or revoke any license for any cause which may seem to it just,"—thus putting it in the power of the city council of Abbeville to abridge the privileges of the citizens of said city, and deprive them of their liberty and property without due process of law, and to deny to any one that they may see fit the equal protection of the laws.' I think that section is, as alleged, invalid and illegal. The city council legislate by way of ordinance, and can only ordain such ordinances as the law permits them to make. There is no law authorizing said council 'to revoke any license for any cause which may seem to it just.' There may be causes—legal causes—for which the council might revoke a license; but certainly 'any cause' which, in its opinion, irrespective of law, may seem to it 'just,' is beyond the limits of its power, and therefore without warrant of law.

"But this is a speculative question. The council has not 'refused' or 'revoked' any license for any cause 'which seemed to it to be just.' It will be time enough to consider such refusal or revocation when that issue is presented. Again, this section 4 may be stricken out, and it would not destroy the entire ordinance, nor seriously interfere with the enforcement of said ordinance.

"The complaint (paragraph 10) alleges 'that the said city council has ordered that the said ordinance go into effect on the 1st day of October, 1899, and threatens to fine or imprison all persons who do not pay said tax on or by the 1st day of November, 1899.' There is no legal reason why the said city

council, under the ordinance in question, should not carry out the 'threats,' or the provisions, of said ordinance, and 'fine or imprison' the persons referred to. I shall not prolong this decree by a full discussion of this question. I think that it is settled, and I shall refer to the statutes and a few of the cases upon this subject.

"The charter of the city of Abbeville, above cited, in section 8, which deals with licenses, provides: 'And the said city council may enforce the collection of said license fees, which shall be turned into the city treasury.' The act of 1896, to provide for the formation of towns, etc., in section 12 (22 St. at Large, p. 71), authorizing council to impose certain license taxes, is as follows: 'And said town council are hereby authorized and empowered to pass such ordinances as are necessary to give full force and effect to this section, and to punish delinquents thereunder.' There may be other statutory or constitutional law to the same effect, but I shall refer to no other. See, also, State v. Hayne, 4 S. C. 403; In re Jager, 29 S. C. 438, 7 S. E. 605; City of Charleston v. Oliver, 16 S. C. 47; Information v. Same, 21 S. C. 319. The charter of Abbeville and the act for the formation of towns, etc., authorize and empower the council to ordain the penalties and punishments prescribed in the ordinance.

"Before taking up such of the allegations of plaintiffs as is necessary, let us glance at the law. 'A license tax cannot be deemed unequal because it reaches one occupation only, if it reaches all who follow that occupation.' State v. Harrington (Vt.) 35 Atl. 515, 34 L. R. A. 100; Ex parte Williams (Tex. Cr. App.) 20 S. W. 580, 21 L. R. A. 783; Banta v. City of Chicago (Ill. Sup.) 50 N. E. 233, 40 L. R. A. 611; Haskell's Case (Cal.) 44 Pac. 725, 32 L. R. A. 527, 529. 'Imposing on laundrymen the payment of a license fee of $15 for a steam laundry, $10 for every male person in the business other than that of a steam laundry, and $25 for male laundrymen employing one or more other persons, does not grant a monopoly or have a prohibitive effect.' State v. French (Mont.) 41 Pac. 1078, 30 L. R. A. 415. The brief to this case is full and instructive. 13 Am. & Eng. Enc. Law, 514 et seq., and notes.

"The plaintiff is a resident of the city of Abbeville, and engaged in two callings or kinds of business. He is a merchant and a cotton buyer, but he alleges that he buys cotton for C. E. Johnson & Co., of the state of North Carolina. The same man or corporation may engage in two separate and distinct callings, occupations, or kinds of business. If so, he or it must take out the proper license for such, and pay the proper taxes therefor. Plaintiff is entitled to no relief so far as pertains to his being a merchant, and being required to take out and pay for a license to carry on that business. The license required of plaintiff as a cotton buyer depends upon the ordinance. It is as follows: 'Cotton buyer, except for local mills, $10.00.' I think that this provision is illegal.

Excepting buyers for local mills renders the provision void. A buyer of cotton for local mills is not entitled to exemption. Excepting the buyer for local mills is not graduating the tax; it frees him from the payment thereof, and consequently the tax does not apply to all persons of that class equally. This provision is illegal.

"After the service of the original complaint, but before the service of the amended complaint and the answer thereto, the defendant, the city council, by an ordinance, duly amended the ordinance mentioned and alleged in the complaint. Among said amendments the following appears: 'In lieu of "cotton buyers except for local mills," the words "except for local mills" are hereby stricken out,' so that the ordinance as amended reads: 'Cotton buyer, $10.00.'

"It was argued that the answer could not set up the said amended ordinance to the allegations of the complaint, because the ordinance was amended after the service of the summons and original complaint. Defendant contends that it can plead the amended ordinance because it was amended prior to the service of the amended complaint, and before defendant had answered. It will be noted that this is not the case of amending an answer, because the original answer pleads the amended ordinance.

"I shall consider the amended ordinance as before the court, and for the following, among other, reasons: The complaint seeks to enjoin the defendant from the collection of license taxes, and also from imposing fines or inflicting punishment upon plaintiffs for failure to comply with the provisions of the ordinance. The complaint deals, therefore, with defendant's jurisdiction in criminal matters,—its power to punish by fine or imprisonment. It is clear that the defendant could not punish plaintiff under an ordinance repealed at the time of the trial. State v. Carter, 28 S. C. 1, 4 S. E. 790. The amended ordinance took the place of the old. As held, the original ordinance was illegal, and there was no legal ordinance in this particular until the amended ordinance was adopted. So that now it is a purely speculative question as to the original ordinance. It does not now exist; whether its nonexistence is due to the inherent illegality or because it is repealed is a matter of no consequence. Plaintiff is in no danger from the original ordinance, but I will enjoin the enforcement of this particular provision therein. I do not mean, however, to enjoin the enforcement of the amended ordinance, because, except as pleaded in the answer, it is not before me for adjudication. The construction upon that ordinance is not involved in this action.

"Among the parties who have been made plaintiffs in this action, under the order of the court, are a number of lawyers. They allege that they are taxpayers and residents of the city of Abbeville, and that 'they are discriminated against in the ordinance imposing said license tax'; 'that the tax imposed

upon attorneys at law is a license of five dollars on some attorneys, and seven and one-half dollars on others.' The provisions of the ordinance in reference to lawyers are: 'Lawyers, whose income does not exceed $1,000, each, $5.00.' 'Lawyers, whose income is from $1,000 to $2,000, each, $7.50.' These words were, by the amendatory ordinance above referred to, stricken out, and the words, 'Lawyers, each, $5.00,' inserted in lieu thereof. I need not repeat what I have said in reference to this amendatory ordinance or the effect thereof. But, in passing, it may be well to say that I can see no infirmity in the ordinance as it originally stood. If merchants be classified according to the amounts of business done by them, why should not the same rule be applied to lawyers? The principle is the same and the facts analogous. But the classification is a matter left to the legal discretion of the city council. It could put all lawyers into one class, or could divide them into two classes, and, in either instance, the presumption would be that the action was legal. However, as the original ordinance, by act of council, has ceased to be of force, I will enjoin any attempt to enforce said original provision, and, as said, leave the amended ordinance alone.

"A. M. Hill & Sons came in as plaintiffs. Their alleged grievance is that they 'are required to pay as livery stable keepers, and are required to pay further tax on their hacks, which are simply a part of their livery business, while this tax is not put on other persons running a livery business.' I cannot make out what the last two words written by me 'livery business' really are. The manuscript is indistinct, but I think that I am right. The ordinance provides for: 'Street hack or carriage, $5.00; street wagon or dray, two horse, $5.00; street wagon or dray, one horse, $2.50; stable, livery, sale and feed and running hacks and drays, $35.00; stable, livery, sale and feed, $25.00.'

"As to the allegation that the tax imposed upon Hill & Sons 'is not imposed on other persons running a livery business,' it is denied by the answer, and there is no proof in support thereof, except such, if any, as appears upon the face of the ordinance. I can see no illegality in the provisions above cited. They are all in favor of the citizen. If a man wants to run a 'street hack,' or a 'street wagon,' or a 'street dray,' and not run a livery stable, he can do so, because such hacks, carriages, wagons, and drays are each put in a separate class, and a certain tax provided for each. If another man wishes to run a 'stable, livery, sale and feed,' and not run hacks and drays, he can do so, because he is included in a class established by the ordinance. If a third man wants to engage in all of these occupations, he can do so, because this ordinance establishes one general class authorizing him to do so, but for this he must pay a higher license tax.

"As to the plaintiff J. L. Simpson, it is alleged in the answer, and was admitted at this argument, that he was summoned

before the city council to show cause why he had not paid a license tax under the provision of the ordinance, 'Agents, sewing machines, $15.00,' and his case was dismissed upon his own statement that he is not doing business as a sewing-machine agent in the city of Abbeville. He therefore has no standing in the case. But, as the parties wish to test this ordinance, I hold a sewing-machine agent may be legally put in a separate class by the city council, and that 'other agents for retailing goods only,' for example, 'agents for merchant tailor manufacturer,' may be put into another class by the city council, and a different tax imposed on each. I do not mean to say that council could abuse their power in this or any other respect. I am speaking of the legal discretion of the council, and I must assume, as there is nothing to rebut that presumption, that the council acted with legal discretion in the premises.

"J. W. McKee and E. H. Richey attack the ordinance because they allege that they are charged a license tax for selling meat in the city of Abbeville, although they are farmers and stock raisers, and do not reside in the city of Abbeville, and have a right to sell their products in said city. Of course, the city council could not, by ordinance or otherwise, violate the provision of the 'Act to amend the charters of cities and towns in regard to the sale of meat,' approved February 7, 1896. See 22 St. at Large, p. 91; City Council v. Roberts, 55 S. C. 374, 33 S. E. 456. The words above stated, setting out the grievance of McKee and Richey, are not sufficient to bring them within the terms of said act. These words are denied in the answer. The burden of proof was upon McKee and Richey, and there is no proof in support of their allegations even as made. It was admitted upon the argument that these parties sold meats not 'produced or grown' by them in the city of Abbeville.

"J. L. Hill complained that he is charged a tax of $5.00 as a 'cotton weigher,' under the ordinance, 'and yet' the city council allows the cotton mill 'to weigh all the cotton they may choose to weigh without any license whatever.' This is a very broad and loose allegation. In this manner the return to the rule alleges 'there is a license of five dollars imposed on all cotton weighers, and the cotton mill is not exempt from tax as a cotton weigher; that this respondent is informed that the cotton mill does not weigh cotton for the public or for compensation; and that the said J. L. Hill weighs a large part of the cotton purchased by the mill.' All of the pleadings in this case, to wit, amended complaint, petitions to be made parties, returns to said petitions, orders of injunctions, answer, etc., were presented to the court at the hearing, and submitted with the record. Counsel in their arguments referred to and used these papers, and save in one or two matters, viz. the facts in regard to J. W. McKee and E. H. Richey, as butchers, and possibly one or two other facts not involved,

treated these papers as evidence. There was no testimony taken, and the case was heard upon the pleadings and papers. J. L. Hill has no legal cause of complaint, because, as I construe the ordinance, a 'cotton weigher' in the ordinance means such a one as weighs for the public or for compensation, and not a person or corporation weighing their own cotton, or cotton purchased for his or their own use.

"J. L. Roche's allegations as to the provisions of the ordinance, as follows: 'Cotton-seed buyers, except for local mills, $10.00,'—are sustained for reasons above, and he is entitled to an injunction against the enforcement of this provision.

"J. A. Dickson's objections are overruled. See authorities cited. Having a license from state to practice dentistry does not exempt him from the provisions of the ordinance.

"I have already considered the questions of requiring the same person, engaged in two occupations, to pay a license tax for each occupation.

"A person who, under the ordinance, is liable to a license tax, cannot legally object to paying same because a license tax is not imposed upon some other person engaged in a different occupation. The city council is not required to charge every person engaged in any occupation, business, calling, or profession a license tax.

"If I have overlooked any material allegation as alleged by any one of the plaintiffs, it is accidental, due to hurry, and because of the pressure of official duties. I have not, by name, taken up the particular case of each plaintiff, but have grouped their allegations, and then considered all of the real issues in the cause. As I hold that the ordinance, as an entire instrument, is not void, but that certain provisions thereof are void, it would be improper to pass upon provisions of said ordinance which do not affect any of the plaintiffs, and are not properly before the court for determination. This case, and the judgment herein, cannot bind persons not parties to the cause, and as to such persons no opinion is expressed. I must confine this judgment to the parties and issues before the court.

"Wherefore it is ordered, adjudged, and decreed that the defendant, the city council of Abbeville, their agents, officers, and servants, be, and hereby are, perpetually enjoined and restrained from enforcing, or attempting to enforce, the following provisions of the license ordinance hereinbefore referred to, to wit: (1) 'Cotton-seed buyers, except for local mills, $10.00.' (2) 'Cotton buyers, except for local mills, $10.00.' (3) 'Lawyers whose income does not exceed $1,000, each, $5.00.' (4) 'Lawyers whose income is from $1,000 to $2,000, each, $7.50.' It is further ordered, adjudged, and decreed that the summons and complaint herein be, and hereby is, dismissed as to all of the plaintiffs, saving and excepting such of the plaintiffs as are affected by the foregoing order and judgment, but as to such plaintiffs coming within

the relief adjudged it is retained; further, that each and all of the restraining orders heretofore granted in this action be, and hereby are, revoked, vacated, and discharged, except as the same are made perpetual by the judgment herein; and it is further ordered that each of the parties hereto pay his or its own costs and disbursements."

Frank B. Gary and Wm. N. Graydon, for appellants.
M. P. De Bruhl, for respondent.

TOWNSEND, J. This action was commenced by the plaintiff for himself and all others who would join as plaintiffs to enjoin the enforcement of a certain ordinance passed by the city council of Abbeville on the 13th of June, 1899, on the ground that it was illegal, null and void, and unconstitutional. After the original complaint had been served, and a temporary injunction issued, several parties came in and were made parties by order of court. An amended complaint was then served setting out the ordinance in question as originally passed. The defendant then served its answer, alleging that since the serving of the original complaint the ordinance in question had been amended, and, among other things, set up the amended ordinance. The amendment related to the license tax on lawyers, and on cotton buyers, and on cotton-seed buyers. All lawyers were not taxed alike in the original ordinance. Some were taxed $5, and others $7.50. Cotton buyers and cotton-seed buyers were not taxed the same, for, while buyers for nonresidents were taxed $10 each, buyers for local mills were exempt from the tax; thus making a discrimination. The amendment changed the ordinance in these respects so that all lawyers were taxed the same, and all cotton buyers the same, and all cotton-seed buyers the same. Both ordinances are printed in the "case," and are exactly the same except as to the provisions last above mentioned which have been amended. The amended ordinance makes no discrimination among lawyers, cotton buyers, and cotton-seed buyers, respectively, and in the same words as the original (except as to the amended parts) provides for a license tax on a number of occupations, professions, and kinds of business. For instance, agents for enlarging pictures are taxed $1 per day, or $10 per month; agents retailing goods are taxed $1 per day, or $10 per month; agents or dealers in pianos or organs, $15; bakers, not taxed; banks, $50; bootblacks, $1; cotton mills, $75; keepers of livery, feed, and sale stables, $25; keepers of livery, feed, and sale stables, with hacks, $35; and so on. The list is so long, and embraces probably 100 or more different occupations, professions, and kinds of business. The plaintiff contends that the ordinance is illegal, null and void, and unconstitutional, for the various reasons set out in his complaint, which will form part of the report of this case. He contends, in the first place, that the city council of Abbeville had no power to pass the ordinance;

and, in the second place, that the ordinance, as passed, provides taxes that are not uniform as to persons and property, and makes unjust and illegal discriminations among those engaged in the different occupations and kinds of business. He refers especially to his own case. He alleges that he is taxed both as a cotton buyer and as a merchant. He alludes also to the tax of $50 on the bank with only $75,000 capital, while the cotton mill, with half a million capital, is taxed only $75; and to keepers of livery, feed, and sale stables, who are taxed $25, while a keeper of a livery, feed, and sale stable, with hacks, is taxed $35. He mentions the above as instances of wrongful classification of persons engaged in business, and of unjust imposition of the license tax. The circuit judge construed only the original ordinance as it was before it was amended. He sustained all of its provisions except the three hereinbefore mentioned, which related to lawyers, cotton buyers, and cotton-seed buyers. These three he adjudged to be illegal because of the discrimination made by them among lawyers, cotton buyers, and cotton-seed buyers, and enjoined the enforcement of them. The plaintiff appealed to this court on numerous exceptions, which raise only two general questions, which are well and correctly expressed in the brief of respondent's counsel as follows: First. Has the city council of Abbeville power to impose license or privilege taxes? Second. Has this power been exercised in a lawful and constitutional manner, and the license graduated so as to secure a just imposition of such taxes upon the classes subject thereto?

These two questions cover the entire contention, which appears to depend entirely or largely upon the construction of certain statutes of the general assembly and of certain provisions of our laws. The circuit judge, in his elaborate and well-considered decree, which will form a part of the report of this case, answered both of these questions substantially in the affirmative, and, as this court agrees with the circuit judge, it will, we think, not be necessary to go over the whole ground again.

The first question relates to the power of the city council to pass the ordinance in question. Section 8 of article 9 of constitution empowers cities and towns to assess and collect taxes for corporate purposes, said taxes to be uniform in respect to persons and property. Section 1, art. 9, gives the general assembly power to provide for a graduated license on occupations and business. The constitutional authority, therefore, to levy license tax, is undoubted, and it is clear that the general assembly was not bound to do more than provide for a license tax. The cities and towns are allowed to graduate the tax. License and privileged taxes have been in use for years in this state, and this court has determined that municipal corporations may, when authorized by the legislature, impose such taxes either for the purpose of raising revenue or as a police regulation. State v. City of Columbia, 6 S. C.

1; In re Oliver, 21 S. C. 325. The city of Abbeville was chartered by an act of the legislature approved January 5, 1895 (21 St. at Large, p. 1134). Section 8 of this act gives power to the city to impose license taxes on certain occupations, such as keepers of livery stables, public drays, hacks, butchers, and some others. Act No. 36, approved March 5, 1896 (22 St. at Large, p. 67), gave to such towns as proposed to form under its provisions, and to such as would surrender their charters already obtained and form anew under its provisions, power to impose license taxes. Said section simply confers on municipal corporations coming within the provisions of the act the power to impose license taxes. It does not impose the tax, or compel such corporations to do so. It merely authorizes them to require by ordinance the payment of such license taxes. It is not necessary to provide in this act that such taxes should be graduated. If the ordinance imposing the license tax does so in conformity to the constitution, that is sufficient. Next followed the act approved March 2, 1897, which amended the charters of all cities and towns in this state by endowing them with all the powers enumerated in the said act of 1896; so that there can be no doubt as to the statutory authority to impose said license taxes.

Objections are made against the constitutionality of the said act of 1897 on the grounds: (1) That the powers that it confers are inconsistent with, and in some cases—as Abbeville, for instance—repugnant to, the powers previously conferred by the charters already in existence; and (2) that it refers to more than one subject; and (3) that it does not specify in what particular it amends city and town charters; and (4) that it was repealed by Act 1899, p. 70. But the circuit judge has passed upon all these questions, and has found adversely to appellants' contention, and this court is satisfied with his rulings in regard thereto; and, further, that the city of Abbeville had full power to pass the said ordinance. It remains only to ascertain whether or not it exercised said power in a proper manner. The constitution (section 8, art. 9) only requires that the license of privilege tax shall be just. The requirement in said section that taxes must be uniform in respect to persons and property does not apply to the license of privilege tax. As all callings, occupations, and kinds of business differ, more or less, the one from the other, "the very power to impose a tax that will be just on each class involves the right to make distinctions between trades, and between essentially different methods of conducting the same general character of business or trade" (In re Haskell [Cal.] 44 Pac. 725, 32 L. R. A. 529), and "what is a reasonable license fee must depend largely upon the sound discretion of the city council," etc. (In re Haskell, supra). In a Texas case (Albrecht v. State, 34 Am. Rep. 737) it was held that "to tax a merchant upon his stock as property, and also upon his gross sales, may seem burdensome, but it is not unconstitutional when not expressly forbidden by the constitution." Nor is a

license tax imposed by a municipality upon merchants, graduated according to their monthly sales, unconstitutional, as it applies equally to all in the same category. City and County of Sacramento v. Crocker, 16 Cal. 119. "And an ordinance charging a license on vehicles, the uses to which they are put, and the number of horses used, is not void," etc., "as it acts uniformly on all subjects in the same class." City of Newton v. Atchison, 31 Kan. 157, 1 Pac. 288. In Banta v. City of Chicago (Ill. Sup.) 50 N. E. 233, 40 L. R. A. 617, it was held that a license cannot be deemed unequal because it reaches one occupation only, if it reaches all who follow that occupation. These authorities are not judicially binding on this court, but they show the views which courts of last resort in other states have taken of the matter involved in this case, and in this way throw some light on the subject. An inspection of the ordinance in question fails to disclose any violation of either the statutory or the constitutional requirements. It is true that appellants urge that the ordinance does not impose a tax uniform as to persons and property; and that the city of Abbeville did not have the right to classify its citizens and their occupations so as to put them in as many classes as they chose; and that the license to tax is not so graduated as to impose a just share of the burdens of taxation upon occupations and business affected thereby; and that the city council of Abbeville had no right to fix a different rule for taxing merchants than the rule fixed for taxing them under the state law; and that his honor, the circuit judge, erred in treating the ordinance as a police regulation, when it declares on its face that it is for revenue; and that the imprisonment provided for in the ordinance would be imprisonment for debt, and therefore unconstitutional; and that the classification of keepers of livery stables is erroneous; and, as bakers are exempt, that the taxation is not just, as it does not reach all classes. But the circuit judge has found all these points adversely to the appellants' claim, and this court agrees with his findings.

In answer to the twenty-third exception of appellants as to the omission of the circuit judge to rule upon the taxation of dogs, the tax fixed, as alleged, being one dollar for the privilege of keeping a dog, and it being claimed that, as dogs are property, they should have been taxed as any other property is taxed, it is sufficient to say that the act of 1896, No. 36, authorizes cities and towns to impose a license tax for corporate purposes, and to pass such ordinances as are necessary to enforce them, and to punish those who fail to comply with the law; and we see nothing wrong in the ordinance in this respect. And the same may be said as to the point raised that there is a distinction between ordinances for police regulations and ordinances for revenue. Both are authorized by our constitution and the acts referred to. It is, therefore, ordered that the decision of the court below be affirmed.

CITY OF ST. PAUL *v.* BRIGGS.

(*Supreme Court of Minnesota, Jan. 24, 1902.*)

[88 N. W. Rep. 984.]

r—Defined.*
ddler, within the generally accepted meaning of the term, is a retail dealer, who carries his merchandise with him, traveling lace to place, and from house to house, exposing his goods for sale, lling them.

ipal Corporations—Charter Powers—To Be Strictly Construed—ercisable Only within Principles of Law Applicable to Subject-atter Thereof.
power conferred upon municipal corporations by their charters to ordinances on specified subjects is to be construed strictly, and ercise of the power must be confined within the general princi- the law applicable to such subjects.

r—Ordinance Declaring Person to Be Peddler Who Is Not Such Fact, Invalid.*
er the power conferred by its charter to define and restrain ped- he city of St. Paul is limited and restricted in defining such term generally accepted meaning and scope of the law relating thereto. nce No. 2151 of said city, in so far as it exceeds such limits, is

r—Who Is Not—Agent of Wholesalers Who Sells Only to Dealers.*
ndant was an agent of wholesale dealers in shoemakers' supplies, such made periodical trips through the city of St. Paul, selling livering such goods to dealers only, and not to consumers: *held*, not a peddler within the meaning of the law.
abus by the Court.)

eal from municipal court of St. Paul; Robert C. Hine,

. Briggs was convicted of peddling in violation of law, ppeals. Reversed.

ton & Molyneaux, for appellant.
es E. Markham and Thomas McDermott for respondent.

OWN, J. Defendant was convicted in the municipal of St. Paul of peddling in violation of the ordinances of ity, and appeals from the judgment against him. The re as follows: J. H. Martin & Co. are wholesale mer- dealing in leather and shoemakers' supplies, and own conduct a wholesale store at Minneapolis. Defendant employee or agent of said Martin & Co., and as such periodical trips from Minneapolis to St. Paul with a load of such supplies, selling and disposing of the same emakers and dealers in St. Paul. If any such dealers to purchase articles which he does not happen to have im on any such trip, an order is taken therefor, and the s subsequently delivered. Defendant neither sold to, ok orders from, consumers, but dealt wholly and entirely lealers. There is no controversy about the facts. On t 21, 1901, defendant was arrested and charged with ng without a license, in violation of Ordinance 2151 of

notes at end of case.

the city of St. Paul, and upon the foregoing facts he was convicted and fined.

Among the powers conferred upon the common council of the city of St. Paul by its home-rule charter, we find the following: "To define, restrain, regulate and license hucksters, peddlers, porters, runners, agents and solicitors for common carriers, hotels, public houses, express companies, or other establishments." Under this power the ordinance in question was enacted, the material portion of which is as follows: "Every person who shall sell, or offer for sale, any goods, wares, fruits, nuts, candies, groceries, provisions, vegetables, or article of value, or barter or exchange the same at any place within the city of St. Paul other than upon land owned or rented by such person, or at a store kept by said person, or at a stand at one of the public markets, shall be deemed, called and known as a peddler," etc. The offense of peddling, or the term "peddler," as defined by the ordinance, is much broader and more comprehensive than any of the definitions given by the lexicographers, or found in any of the adjudicated cases. A peddler, within the general accepted meaning of the word, is a small retail dealer, who carries his merchandise with him, traveling from place to place, and from house to house, exposing his goods for sale and selling them. It is said in 34 Am. Law Reg. 569, in an article relating to this subject, that there are four elements required to constitute a peddler, namely: (1) That he should have no fixed place of dealing, but should travel around from place to place; (2) that he should carry with him the wares he offers for sale, not merely samples thereof; (3) that he should sell them at the time he offers them, not merely enter into an executory contract for future sale; and (4) that he should deliver them then and there, not merely contract to deliver them in the future. To these should be added a fifth, to the effect that the sales made by him should be to consumers, and not confined exclusively to dealers in the articles sold by him. It is generally held that, if any one of these elements be absent from the regular dealings of a vender, he is not a peddler, whatever else he may be. One who solicits orders from dealers for future delivery, or sell by sample, whether in his own behalf or as the agent of a dealer, cannot be held to be a peddler. There can be no difference in principle between a person who solicits orders from dealers, and subsequently delivers the goods ordered, and a person who makes the sale and delivery one transaction. The fact that the sales are to dealers, and not to consumers, is the distinguishing feature. An examination of the cases found in the books—and they are quite numerous—sustains this view of the law. 2 Am. & Eng. Enc. Law, 291; City of South Bend v. Martin (Ind. Sup.) 41 Cent. Law J. 400, 29 L. R. A. 531, and cases cited in note (s. c. 41 N. E. 315).

The only question for determination in the case at bar is

whether, under the authority to define the offense of peddling, the ordinance under consideration, going, as it does, far beyond the ordinary definition, is valid. It is contended by the prosecution that, because of the fact that the city is empowered by its charter to define the offense, definitions by lexicographers and others are irrelevant, and not controlling, and that the city had power to adopt a definition or meaning within such limits as its council deemed wise and proper. We are unable to adopt this contention. The charter of the city, it is true, authorizes the council to define and restrain peddlers, porters, and others; but it is clear that the power to define the offense must be confined within reasonable bounds, and limited to the generally accepted meaning and scope of the law relating to that subject. It is a rule of general application that the authority given municipal corporations to enact ordinances must be construed strictly (Dill. Mun. Corp. 91, note 2), and this rule should apply with special force to cities authorized to form and adopt their own charters. If a city, organizing under the constitutional amendment empowering cities to form their own charters, may assume and clothe itself with power to define crimes and misdemeanors, it may extend and enlarge the criminal laws of the state to suit the notions of its council. There must, in the nature of things, be some limitation upon such authority; if not, confusion may result. Under authority to define peddling, the ordinances of one city might be entirely different from those of another. What would constitute peddling in St. Paul might not in Minneapolis, or in Duluth. It could not well be said that, if a city was authorized to define petit larceny, it could go beyond, in doing so, the definition of the offense as known to the law generally. The exercise by municipal corporations of the delegated power to enact ordinances must, therefore, be confined within the general principles of the law applicable to the subject of such ordinances. Any other rule would confer upon municipal authorities greater power than was intended they should possess. Mays v. City of Cincinnati, 1 Ohio St. 268; Mayor, etc., v. Hussey, 21 Ga. 80, 68 Am. Dec. 452. It follows that the ordinance in question is void in so far as it covers acts of the character of those shown to have been committed by the defendant in this case. His conduct in selling goods as the agent of wholesale merchants, being confined exclusively to selling to dealers in the articles, and not to consumers, does not constitute peddling within any of the definitions found in the books. State v. Fetterer (Conn.) 32 Atl. 394; Standard Oil Co. v. Com. (Ky.) 55 S. W. 8; Village of Stamford v. Fisher (N. Y.) 35 N. E. 500. Generally speaking, peddlers are those who travel about selling to consumers, acting in their own behalf and in their own interests, and are not, as a rule, agents or employees of others, though an agent thus selling goods may come within the law. It is conceded in

this case that defendant did not own the goods or chattels he was engaged in selling; it is conceded that he was the agent and employee of the owners, who were wholesale dealers in such articles; and it is further conceded that the sales by him were to dealers, and not to consumers, or to the public generally. We are of opinion that the city council had no authority, under the power conferred by its charter, to bring such a case within the law of peddling, and the judgment appealed from is reversed.

NOTES.

HAWKERS AND PEDDLERS—WHO ARE SUBJECT TO LICENSE TAX AS SUCH.

Hawkers and Peddlers—Who Are—Definitions.

"The leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, though perhaps not essential, by a 'hawker' is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish." Com. *v.* Ober, 12 Cush. (Mass.) 493, 495; Emert *v.* State of Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367.

"A peddler, petty chapman, or other trading person, going from town to town, or to other men's houses, either on foot or with horse or horses, or otherwise conveying to sell, or exposing to sale, any goods, wares, or merchandise." Rap. Law Dict. tit. "Hawker."

"Hawkers: Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandise, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with *hawks* seize their game where they can find it. * * * Hawkers and peddlers, etc., going from town to town, or house to house, are now to pay a fine and duty to the king." Jacob's Law Dict. tit. "Hawkers."

"Any method of selling goods, wares, or merchandise by outcry on the streets or public places in a city, or by attracting persons to purchase goods exposed for sale at such places by placards or signals, or by going from house to house, selling or offering goods for sale at retail to individuals not dealers in such commodities, whether the goods be carried along for delivery presently, or whether the sales are made for future delivery, constitutes the person so selling a hawker or peddler *within the meaning of the statute.*" Graffty *v.* City of Rushville, 107 Ind. 502, 8 N. E. Rep. 609; City of South Bend *v.* Martin, 142 Ind. 31, 41 N. E. Rep. 315. See also, Davis *v.* Mayor of Macon, 64 Ga. 134; State *v.* Hodgdon, 41 Vt. 139.

"A small retail dealer, who carrying his merchandise with him, travels from house to house, or from place to place, either on foot or on horseback, or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them." Randolph *v.* Yellowstone Kit, 83 Ala. 474, 3 So. Rep. 706; Ballou *v.* State, 87 Ala. 144, 6 So. Rep. 393.

"A peddler, * * * is any one who sells anything having value, bought by him and sold from place to place in small quantities. He is engaged in a small business,—something of a trader." Roy *v.* Schuff, 51 La. Ann. 86, 24 So. Rep. 788.

Under the decided cases, of which examples will presently be given, the chief distinction seems to be, that in order to constitute a person a

Notes

peddler, he must be one whose chief business is that of a trader, and who, carrying his wares with him, solicits sales for present delivery among individuals not dealers in the articles sold. The state may by statute declare persons selling only by sample to be peddlers, and tax them as such, but when it is attempted to include drummers or agents selling by sample for nonresident firms under such a statute, it runs contra to the interstate commerce clause of the federal constitution as will appear in the examples below.

EXAMPLES.

Farmer Retailing Rice from Wagon.

Thus, as illustrating the proposition that a peddler is one whose chief business is that of a trader, it was held in Roy, Mayor, *v.* Schuff, 51 La. Ann. 86, 24 So. Rep. 788, that an ordinance exacting a license fee of peddlers did not include a farmer who traveled in a small wagon and sold rice of his own growing in small quantities, the court saying that a peddler is one whose business is that of a trader, and who goes from place to place selling small wares which he has purchased; whereas, the farmer was not a trader, but was simply carrying out the purpose he had in view in making his crop, namely, to sell it in whatever manner should seem to him the most advantageous, whether by wholesale or retail.

Selling by Sample—Agent Carrying Sample Stove with Him.

In Ballou *v.* State, 87 Ala. 144, 6 So. Rep. 393, the defendant traveled through the country in a two horse wagon taking orders for stoves. He carried with him a sample stove which was usually left at the house of the person from whom he received his last order on the trip; otherwise, the sample stove was not sold. A third person, sent out by the concern which the defendant represented, followed in his rounds and delivered the stoves in from twenty to thirty days after the orders were taken: *held*, that the defendant was not a peddler. For similar decisions upon similar facts, see State *v.* Lee, 113 N. Car. 681, 18 S. E. Rep. 713; Wrought Iron Range Co. *v.* Johnson, Ordinary, 84 Ga. 754, 11 S. E. Rep. 233.

Same—Drummers.

Drummers selling by sample are not peddlers, and if representing a foreign concern are not taxable by the state or city for any purpose whatsoever, even though expressly declared by statute to be peddlers. Robbins *v.* Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Asher *v.* State of Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1. In Georgia a person traveling from place to place with a sample stove and soliciting orders for a nonresident firm, was held to be a peddler under the statutes of that state; but under the ruling of the federal supreme court in the cases just cited, it was held that the state had no power to exact a license fee either of him or his principal, the chief justice (Bleckley) remarking, in his characteristic manner, that after the state had yielded to the federal army, it could well afford to yield to the federal judiciary. Wrought Iron Range Co. *v.* Johnson, Ordinary, 84 Ga. 754, 11 S. E. Rep. 233. So taking orders for goods to be manufactured, as for example, shirts, is not peddling goods, and an agent representing a foreign principal in such business is not subject to pay a peddler's license fee. Town of Spencer *v.* Whiting, 68 Iowa 678, 28 N. W. Rep. 13.

Merchant Having Store in Town and Soliciting Orders in Country.

So a merchant who, having an established place of business in a town or city, sends a wagon about the country and to the neighboring towns to solicit orders and to deliver goods in response to previous orders, is not a peddler. Village of Stamford *v.* Fisher, 140 N. Y. 187, 35 N. E. Rep. 500; Rex *v.* McKnight, 10 Barn., etc., 734; Com., Schrunk, *v.* Eichenberg, 140 Pa. St. 158, 21 Atl. Rep. 258. Nor is a solicitor, employed by a local mercantile firm to call on citizens and solicit orders, and who usually carries samples, a peddler or hawker. City of Davenport *v.* Rice, 75 Iowa 74, 39 N. W. Rep. 191.

Same—Merchant Sending Solicitor with Wagon into Adjoining State.

In *Hewson v. Inhabitants of Twp.* of Englewood, 55 N. J. L. 522, 27

Notes

Atl. Rep. 904, a merchant dealing in groceries in New York City, employed the relator to drive his wagon to his customers in Englewood, New Jersey, to solicit orders and to deliver goods in response to previous orders: *held*, that the relator was not a peddler, hawker, or itinerant vendor.

Agent or Principal—Corporation.

Where one travels from place to place selling and delivering goods which he has in his possession at the time of soliciting the purchase, but which goods belongs to another for whom the person selling acts as agent, the agent is the peddler, and the proper person of whom a license should be required, and not the principal and owner; and a process issued against the principal upon the grounds that he, by his agent, peddled, etc., without a license, is illegal and void upon its face. And when an oath is required of a peddler, a corporation cannot be a peddler or obtain a license as such. Howard *v.* Reid, 51 Ga. 328; Wrought Iron Range Co. *v.* Johnson, Ordinary, 84 Ga. 754, 11 S. E. Rep. 233; Standard Oil Co. *v.* Commonwealth (Ky.), 55 S. W. Rep. 8.

Agent Delivering Goods in Response to Orders Previously Taken by Another Agent.

An agent who delivers goods in the fulfilment of orders previously taken by another agent, collecting the purchase price thereof, is not a peddler. City of Stuart *v.* Cunningham, 88 Iowa 191, 55 N. W. Rep. 311.

Mountebank Selling in Tent.

In Randolph *v.* Yellowstone Kit, 83 Ala. 474, 3 So. Rep. 706, the defendant came to the city from another state and rented a vacant lot by the month, said rental to terminate, at the option of the defendant, at the end of any rental month. On this lot he erected a large tent, and fitted it up with seats, stands, electric lights, etc. And in this tent he gave free concerts, slight of hand and similar exhibitions, and lectures in which he described his goods and extolled their merits. During these exhibitions he sold medicines and various panaceas from a stock in the tent, the articles being handed around among the audience by himself or his agents. He sold no medicines and solicited no orders outside of the tent: *held*, that he was not a peddler.

But while an itinerant vendor of that kind is not a peddler, yet he may be required to take out a license as such under a statute so worded as to meet his case. Thus in State *v.* Hodgdon, 41 Vt. 139, one who went from town to town, renting a store for ten days or so in each place, and exposing for sale, and selling goods therein, both in the ordinary way and at auction, was held liable to pay a license fee under a statute which provided that "Any person going from town to town * * * or who shall come from without this state into any town within the same, bringing any such [previously specified] goods, wares, or merchandise, and shall in any town to which he may transport or bring the same, temporarily expose said goods, wares, or merchandise for sale at auction or otherwise, at any public place or private house, store or other place, shall be deemed a peddler."

Agent Selling to Retailers Only.

As sustaining the doctrine of the principal case that persons selling to retailers only are not peddlers, see Standard Oil Co. *v.* Commonwealth (Ky.), 55 S. W. Rep. 8, and State *v.* Fetterer, 65 Conn. 287, 32 Atl. Rep. 394. In the former case the defendant established an oil tank in a central town and from thence sent its agent with a tank wagon on periodical trips to supply the small dealers in the neighboring towns. In the latter case, the defendant, acting as agent for a wholesale confectioner, made periodical trips through certain towns, selling candy to retailers from the wagon in which he traveled; it appeared that in some instances the sales were for cash, and in others on credit; and in case he failed to have just the kind or quantity that any particular customer might want, an order was booked to be filled on the next trip. In both cases the defendants were held not to be peddlers. The Village of Stamford *v.* Fisher, 140 N. Y. 187, 35 N. E. Rep. 500, is also cited in this connection, but it does not definitely appear in that case that the defendant sold only to dealers.

Notes

Where Vendor Sells and Makes Present Delivery.

The one case concerning which there is no dispute, is where the vendor goes about from house to house, carrying his wares with him, selling and making present delivery; here he is a peddler pure and simple. This includes one whose business consists in going from house to house with rugs which he leases at a certain amount payable weekly, with the understanding that the rug is to become the property of the lessee upon the payment of the entire rent. People *v.* Sawyer (Mich.), 64 N. W. Rep. 333.

And a regularly authorized practicing physician, holding a certificate from the state board of medical examiners, which certificate he has recorded, not only in the county of his residence, but in other counties as well, who travels from town to town and from county to county, selling medicines which he carries with him, and which have been prepared from his own formulas, is an itinerant vendor within the meaning of a statute imposing a license tax upon that class of salesmen. State, Commission of Pharmacy *v.* Goerss, 85 Iowa 21, 51 N. W. Rep. 1147.

Same—Interstate Commerce.

Notwithstanding the interstate commerce clause of the federal constitution, a hawker or peddler who carries with him goods which he peddles for a foreign principal, or which were manufactured in a foreign state, may be required to pay a license fee under a state statute or municipal ordinance. Thus, in City of South Bend *v.* Martin, 142 Ind. 31, 41 N. E. Rep. 315, one who went about the public streets and avenues crying and exposing for sale, and selling, rattan rocking chairs which he carried with him, and which he sold as agent for a foreign manufacturer, was held liable to pay the license tax imposed upon peddlers by the city ordinance. And in Emert *v.* State of Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367, aff'g 103 Mo. 241, 15 S. W. Rep. 81, one who, as agent for a manufacturer in another state, traveled from place to place in a wagon or like conveyance, selling and delivering sewing machines which he had with him at the time of soliciting the purchases, was held to be a peddler and subject to the state laws regulating the same. But such statute or ordinance must operate equally upon residents as well as nonresidents; any discrimination in favor of the one and against the other, will render it unconstitutional as an attempt to fetter interstate commerce. Com. *v.* Myer, 92 Va. 809, 23 S. E. Rep. 915.

Ordinance—City Cannot Arbitrarily Define Peddlers and Declare Persons to Be Such Who Are Not So in Fact.

Although the state, so long as it does not run contra to the interstate commerce clause of the federal constitution, may arbitrarily declare certain persons to be peddlers who but for the statute would not be considered such, yet a municipal corporation has no such power, and a power to license, tax, and regulate hawkers, hucksters, and peddlers confers no authority to extend the meaning of those words beyond their primary and commonly accepted meaning. Thus, a solicitor who carries samples and solicits orders, whether it be for a resident or nonresident firm, cannot be taxed as a peddler simply because he is declared to be such by ordinance. City of Davenport *v.* Rice, 75 Iowa 74, 39 N. W. Rep. 191; Village of Cerro Gordo *v.* Rawlings, 135 Ill. 36, 25 N. E. Rep. 1006. And in Mays *v.* Cincinnati, 1 Ohio St. 270, a charter power to regulate markets and prevent huckstering therein, was held not to authorize an ordinance declaring that all persons, not farmers or butchers, who should offer for sale in the market any meats, vegetables, provisions, groceries, wares, or other commodities whatsoever, not of his own produce or manufacture, should be deemed hucksters, and liable to pay a license tax as such.

McGREW *v.* CITY OF KANSAS CITY *et al.* (two cases).

(*Supreme Court of Kansas, Division No. 1, Jan. 11, 1902.*)

[67 Pac. Rep. 438.]

Public Improvements—Local Assessments—Unplatted Land within City*—To Be Assessed Only as Prescribed by Statute.

Unplatted land within a city—that is, land not divided into lots and blocks—can only be specially assessed for improvements in the manner provided by section 737, Gen. St. 1901.

Same—Same—When Unplatted Land Is to Be Deemed Specially Benefited.

Parcels of such land which do not actually adjoin the improvement or which lie more than 300 feet from it are not deemed to be specially benefited by the improvement, and cannot be specially assessed for making it.

Same—Same—Land Unplatted and Undivided Not to Be Deemed a Block Because Surrounded by Streets.

The fact that a tract of ground in a city which has not been platted or subdivided into lots and blocks by the owner is surrounded by streets does not make it a block, within the meaning of section 729, Gen. St. 1901, nor make it assessable to the center of the tract for special improvements, without regard to whether or not it abuts upon the improvement.

(Syllabus by the Court.)

Error from district court, Wyandotte county; E. L. Fisher, Judge.

Two actions by James McGrew against the city of Kansas City and others. Judgments for defendants, and plaintiff brings error. Reversed.

Argued before DOSTER, C. J., and JOHNSTON, SMITH, and GREENE, JJ.

McGrew, Watson & Watson, for plaintiff in error.

M. J. Reitz, City Atty., and T. A. Pollock, City Counselor, for defendants in error.

JOHNSTON, J. Two proceedings were begun by James McGrew to enjoin the levy and collection of a special assessment upon his property for the paving and curbing of a portion of Fifth street in Kansas City, Kan. One of them was an attack on the paving proceeding against that city, and the other was an attack upon the curbing, and both were brought before any work was begun, and within 30 days after the cost of the proposed improvements had been ascertained and apportioned. McGrew owned a track of unplatted land of irregular form, which had streets on all sides of it; and Fifth street, the one which the city proposed to improve, bounded this land on the east. For the purposes of assessment the lands levied upon and in question here were designated as

*As to the liability of unplatted land within city limits to taxation or assessment, and when unimproved property is to be deemed a block or a square, see Bell County Coke & Improvement Company *v.* City of Pineville (Ky.), 6 Mun. Corp. Cas. 826; Sanitary Dist. of Chicago *v.* City of Joliet (Ill.), 6 Mun. Corp. Cas. 115; Fidelity Forest & Safety Vault Co. *v.* Voris' Ex'rs (Ky.), 6 Mun. Corp. Cas. 153.

"land 1," "land 2," "land 3," "land 4," "land 5." Lands 1, 2, 3, and 4 abutted upon Fifth street,—the one to be improved,—while land 5 was separated from these other pieces by an alley 15 feet wide, which had formerly been conveyed by McGrew and wife to the county of Wyandotte for use as an alley. Land 3 and land 4 had been sold by McGrew to other parties prior to the commencement of the assessment proceedings. It therefore appears that land 5 does not abut on the street to be improved, but lies back of the other pieces, and is separated from them and from Fifth street by the alley mentioned. The plaintiff questioned the validity of the proceedings for the improvement of the street upon various grounds. The trial court held them to be insufficient and refused a temporary injunction.

One of the objections is that the portion of the street paved is not in the center of the same. There is nothing substantial in this objection. It appears to have been due to irregularity in the width of the street, and whether the curb line shall be closer to the lots on one side of the street than on the other is a matter within the discretion of the city officers.

There is also a claim that the property was not fairly appraised,—that the assessments were unequal, and were levied without regard to the special benefits to be derived from the improvements; but the testimony in the record does not sustain these claims.

A serious objection, however, is made that the property of the plaintiff was not assessed upon the correct theory. It appears that the city was proceeding upon the theory that the plaintiff's property was platted land, and was assessing it without regard to whether it fronted or abutted on the street to be improved. Two methods of assessment are provided by statute. Where the lands are platted, the cost of improvements must be assessed upon all the lots and pieces of ground to the center of the block on either side of the street the distance to be improved, and such lots and pieces are subject to assessments levied if they do not abut upon such street. Gen. St. 1901, § 729; City of Ottawa v. Barney, 10 Kan. 270; Olsson v. City of Topeka, 42 Kan. 709, 21 Pac. 219. As to unplatted lands, the statute provides that the assessment shall be made on the pieces of land abutting on the improvement to the distance of 300 feet of the street to be improved. Gen. St. 1901, § 737. That the lands are unplatted is conceded, and that portions of them do not adjoin Fifth street is beyond question. There is a contention that all these lands, as well as an additional tract adjoining land 5, constitutes a block, and that a special assessment may be levied to the center of the tract. According to the common understanding, a block is a portion of platted ground in a city, surrounded by streets, and the term is not ordinarily applied to a tract of unplatted land. Blocks in platted territory are generally uniform in extent and shape, *and the theory* of the legislature was that *such limited parcels may be* specially benefited by the im-

provements on surrounding streets, whether the lots composing the block abut upon the improved street or not. As to tracts within a city not platted into lots and blocks, the evident idea of the legislature was that the special benefits derived from an improved street through such tracts did not extend further than 300 feet from the street, and that only such pieces as actually adjoin such improvement could be regarded as within the scope of special benefits. The claim that a tract of unplatted land, of whatever extent, if surrounded by streets, is a block, and is deemed to be benefited to the center of the tract, although not abutting on the improvement, is not reasonable, and does not accord with the manifest purpose of the legislature. Frequently large tracts of unplatted and unoccupied lands lie within the exterior limits of cities, and are surrounded by public highways. If an 80-acre tract was so situated, would it be contended that it constituted a block within the legislative intention, or that an improvement of a street through one end of the tract could be regarded as a special benefit to the center of the tract, one-fourth of a mile away? It would hardly be argued that the legislature contemplated that one acre of such tract which did not adjoin the improved street, but was in fact 80 rods distant from it, should be taxed for the improvement. We think the "block" referred to in section 729, supra, is the ordinary one made by platting. The law provides how tracts of unplatted ground may be subdivided by the owner; and when such subdivision is made the different parcels of ground, other than those which are public, are designated as lots and blocks. In the absence of anything showing a contrary intent, the ordinary signification should be given to terms employed in the statutes; and according to this interpretation "lots" and "blocks," as used in the statute in question, must be regarded as the subdivisions ordinarily made by platting. When ground in cities is so platted, the parcels are described in conveyances and proceedings for taxation as lots and blocks, but ordinarily they are not so described unless the ground has been platted as the law provides. Reference is made to City of Ottawa v. Barney, supra, and Blair v. City of Atchison, 40 Kan. 353, 19 Pac. 815, as holding that any portion of a city inclosed by streets constitutes a block; but in these cases the court was speaking of subdivisions of platted territory within a city, and did not have in mind tracts of unplatted territory which might by chance be surrounded by the streets or other highways. The statutes pertaining to city improvements recognize the distinction. In section 729, supra, it provides for cases where there is a division into lots and blocks, while section 737 provides for cases wherein no such division has been made. The latter statute reads as follows: "Whenever any improvement specified in the preceding sections in this act shall be made, and the piece or pieces of land abutting on such improvement shall not be divided into lots or blocks, the assessment therein provided shall be made on the piece or pieces of ground adjoin-

ing such improvement through which the same may be located, to the distance of three hundred feet from the street, avenue, lane or alley upon which such improvements are made, extending along the street, avenue, lane or alley the distance improved or to be improved, as provided in said section." The plaintiff's property clearly comes within the provisions of this section, as it was agreed between the parties that the lands in question were sold and described by metes and bounds, and that they have never been divided into lots and blocks by platting. The section plainly provides for all tracts not divided into lots and blocks; that only pieces abutting or adjoining the improved street, avenue, lane, or alley shall be specially assessed; and, further, that the assessment district cannot extend more than 300 feet from the line of improvement. Unplatted ground, therefore, however small, and which does not actually adjoin the improvement, cannot rightfully be specially assessed for such improvement. It is contended, however, that because this property does not extend more than 300 feet from Fifth street, it is taxable under the provisions of the section last quoted. The difficulty with this contention is that portions of the land do not adjoin the street to be improved. Land 5 is separated from the balance of that assessed by an alley, and portions of it lie back of property owned by other persons. It is argued that the strip of land designated as an alley which runs through the property cannot be regarded as public ground, because the deed to the strip has never been formally accepted by the county; and, further, that, if accepted, streets and alleys cannot be created without the consent of the city. First, it is to be noted that in the agreed facts it is stipulated that it is an alley, the fee title to which is in Wyandotte county. There is a further stipulation that the conveyance of the alley was made without the knowledge or consent of Wyandotte county or Kansas City, Kan., and was not accepted by any recorded act. There was official recognition, however, of the conveyance, and the use for which it was made, as the county has exempted the strip from taxation ever since the conveyance. There was recognition, too, by the city in these proceedings, and, it being conceded that the conveyance carried the fee to the county for use as an alley, and that because the strip was treated as an alley in the assessment proceedings and exempted from taxation it effectually separates the land west of the alley from all of that east of it, and so much of it as lies west cannot be said to adjoin the improved street. All of the lands having been assessed upon the wrong theory, and under provisions of the statute not applicable, the proceedings are invalid, and the plaintiff was entitled to an injunction.

None of the other objections seem to require attention from the court, but for the error mentioned the judgments in both causes will be reversed, and the causes will be remanded for further proceedings. All the justices concurring.

STATE *v.* SPAUGH *et al.*

(*Supreme Court of North Carolina, Dec. 10, 1901.*)

[40 S. E. Rep. 60.]

License Tax—Meat Dealer—Exemption of Farmers Selling Their Own Produce*—Scope of Exemption.

Pub. Laws 1899, c. 11, § 51, imposes on individuals, firms, or their agents buying and selling fresh meats from stores, etc., in cities or towns of less than 8,000 inhabitants, an annual license tax of $3, but exempts farmers vending their own products, and without a regular place of business. Section 71 prescribes the penalty: *held*, that the word "products," as used in the proviso exempting farmers, included live stock and fresh meats.

Same—Same—Same—Same—Farmer Buying Cattle and Fattening before Sale.

Under the statute, cattle bought by farmers to be grazed and fattened on their farms and sold, though not actually "produced" on the farm, may be sold by such farmers without a license.

Appeal from superior court, Forsyth county; Starbuck, Judge.

A. A. Spaugh and J. D. Beckle were indicted for selling fresh meats without paying a license tax. From an order directing the jury to find defendants guilty if they believed the testimony, defendants appeal. Reversed.

These defendants were separately indicted under sections 51 and 71 of chapter 11 of the Public Laws of 1899. The cases were consolidated by consent upon motion of the solicitor. Section 51 of said act is as follows: "On every individual or firm, or his or their agents engaged in the business of buying and selling fresh meats from offices, stores, stalls or vehicles, an annual license tax as follows: * * * In cities or towns of less than eight thousand inhabitants, three dollars: provided that nothing in this section shall apply to farmers vending their own products and without a regular place of business." Section 71 prescribes the penalty. The entire evidence is as follows: "The state introduced E. A. Ebert, deputy sheriff of Forsyth county, who testified that in December, 1900, the defendant applied to the sheriff of Forsyth county for license to buy and sell fresh meats in the town of Salem, a municipal corporation of the state of North Carolina of less than eight thousand inhabitants; that he issued license to the defendants, as partners, trading as Beckle & Spaugh, in December, 1900, and dated them back to September 1, 1900, at their request; that witness had purchased fresh meats of the defendants, trading as Beckle & Spaugh, but that it was during other times when they had license; that he did not buy any meats of them during the period embraced between September 1, 1900, and December 1, 1900, but defendants stated to witness they did not sell dur-

*As to the taxation of nonresident farmers and butchers selling their produce within city limits, see note on "Municipal Regulation of Food Stuff," ante, p. 428, subhead II, D, 5.

ing that period. Witness testified that the defendants were both farmers, but witness did not know whether the fresh meats sold were produced from defendant's own farm or not. L. A. Brietz, witness for the state, testified that he bought fresh meats at different times and frequently from the defendants,—who were partners,—sometimes on foot, and sometimes dressed; that they were both farmers, and owned their farms. He had been to their homes. State here rested, and defendants introduced defendant Beckle, who testified: That witness and his codefendant traded sometimes as partners and sometimes individually in the business of buying, butchering, and selling beef cattle. That in the spring of 1900 witness and codefendant purchased a number of cattle, some of them calves in poor condition. That they took them to their farms where they lived, grazed them, and fattened them on their farm; and that during the months of September, October, and November, 1900, they sold out these cattle,—some by wholesale; some they butchered, and sold by retail from their wagons in the city of Salem. But that during the months of September, October, and November, 1900, they sold no other fresh meats in the city of Salem except what they raised on their farms, and those they purchased in the spring of 1900, and grazed and fattened on their own farms, and these they bought for the purpose of grazing, fattening, butchering, and selling. That they sold no fresh meats without license by the retail except during the months of September, October, and November, 1900, and that these fresh meats were of cattle from their farms, as before stated." The defendants here rested their case, and asked his honor to charge the jury that, if they believed the evidence, they should render a verdict of not guilty, as defendants were indicted under section 51, c. 11, Pub. Laws 1899, and, being farmers, the meats sold, according to the testimony, were produced on their own farms, and the defendants were expressly exempt in said section. His honor refused to give this instruction, but charged the jury that, if they believed the testimony, they must find the defendants guilty.

Jones & Patterson, for appellants.
Brown Shepherd, Atty. Gen., for the State.

DOUGLAS, J. We think there was error in the charge of his honor. The evidence was practically without contradiction, and the defendants should have been acquitted if the jury believe their evidence, which fully brought them within the exception, if, indeed, the burden of proof rested upon them. The state contends: (1) That the word "product," as applied to a farm, does not include live stock; and (2) that, if it does include live stock, it applies only to such as were 'produced" or "dropped" upon the farm,—"natives," so to speak. Whatever may be the strict meaning of the word, it is evident that the legislature intended to include fresh meats,

for the simple reason that it used the word in a section which by its very terms applied solely to fresh meats. Any other construction would deprive the proviso of any meaning whatever.

The second contention is equally untenable, considering either the letter of the law or its essential purposes. If a farmer—and we use this word in the sense of an occupation, and not a class—finds it more profitable to turn his corn and grass into meat, it makes no difference to him whether a calf is dropped on his own farm or on that of some one else. What he wants is the calf, and he wants it at once. He may have more feed than stock, and may find it impossible to dispose of his surplus provender, even at the cost of production. If he happens to raise an unusually good crop of corn, it is quite likely that his neighbors have done the same thing, and therefore corn will be cheap. To compel him to haul it to a distant market, there to come in competition with Western corn, or to await the slow process of "producing" a calf to eat it, cannot be within the intention of the law. Moreover, we think there is, as contended by defendants' counsel, a broad view of public policy underlying this provision of the statute, applying to the community as well as to the individual. It is to encourage the general raising of live stock by the small farmer, which will not only be profitable to the individual, but add to the aggregate wealth of the community, and tend to preserve and increase the fertility of its lands. In this view of the law it makes no difference where the calf was dropped, as its principal value is in raising it, owing to its two distinctive qualities of converting an unmarketable crop into one more marketable and of greater value, and at the same time giving back to the land the greater part of what has been taken from it. One drawback in the raising of beef cattle at a distance from the large cities is the difficulty of disposing of it in bulk or of preserving it for home consumption. Therefore the law leaves his home market open to the producer. With our increasing tendency to small farms, and the absolute necessity for the average farmer to raise enough for his own support with a little surplus to exchange for those things which he cannot raise, it is essential that that surplus should find a ready market where it will not be eaten up by the cost of transportation, or absorbed by the want of competition. Hence the legislature has confined the exemption to farmers, not because they are in any sense a privileged class,—for we have no privileged classes in this country,—but because they are the only class whose occupation brings them within the reason of the law. Hence we do not see why a market gardener who should raise a calf or a hog on the waste products of his land should not be equally entitled to kill it, and peddle out the product. And yet this must be done in good faith, which, if disputed, would be largely a question of fact. A man whose principal occupation is that of a butcher cannot claim this

privilege simply by buying or renting a few acres of land to be used as fattening pens in furtherance of his regular business of a butcher. In such a case the beeves would be his own products only to the extent of the few extra pounds of flesh he put on them. What this law contemplates is that the meat in its essential character must be the product of land owned or worked by the man who seeks to peddle it. There is a singular dearth of authority on this subject. The case most nearly in point seems to be that of Trustees of Rochester v. Pettinger, 17 Wend. 265, decided in 1837. There the court says on page 266: "Now, if the farm was in fact used and occupied as a convenient and profitable appendage to another calling, to wit, the business of butchering, and was not occupied and cultivated as a farm in the ordinary mode of farming, in the common and popular acceptation of the term, he could not be considered as coming within the exception. He would occupy it, not as a farmer, but as a butcher, with the view the better to promote his business in that line. The plain object of the ordinance was, while it protected licensed butchers, to allow farmers to come in and sell the produce of their farms." The defendants here appear to live on their farm, and to be farmers in the truest acceptation of the term, as their regular occupation is farming, although they may occupy some of their spare time dealing in fresh meats. When they have done so, they have paid the tax; but that does not deprive them of the right to sell the product of their own farms without tax.

We have carefully considered this case because it involves a principle of general importance, which it seeks to determine. Counsel frankly stated that this was their object, which is apparent from the record, as we can scarcely suppose that able lawyers would be employed to carry a case through all the courts to that of last resort for the simple purpose of avoiding the payment of a single license tax of $3.

For error in the direction of his honor there must be a new trial. New trial.

COMMON COUNCIL OF CITY OF DETROIT *et al. v.* SCHMID, City Clerk, *et al.*

RUOFF *et al. v.* COMMON COUNCIL OF CITY OF DETROIT *et al.*

(*Supreme Court of Michigan, Oct. 8, 1901.*)

[87 N. W. Rep. 383.]

Constitutional Law—Statutes—Enactment—Object Not Expressed in Title—Substituted Bill.

Const. art. 4, § 20, provides that no law shall embrace more than one object, which shall be expressed in its title. A bill introduced in the house of representatives was entitled "A bill to amend section 2 of chapter 4 of an act entitled, 'An act to provide a charter for the city of Detroit and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1883' ": A second bill, afterwards act of May 21, 1901,

was later substituted for this bill, the title of the second bill being "An act to amend sections 1, 2, and 13 of chapter 2, and sections 1 and 25 of chapter 4, of an act entitled 'An act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1883' " : *held*, that the substitution of the second bill did not violate Const. art. 4, § 20; that provision having no relation to bills in process of legislative enactment, but applying only to completed laws.

Same—Same—Same—Time of Introduction—Substituted Bill.

Const. art. 4, § 28, provides that no new bill shall be introduced into either house of the legislature after the first 50 days of the session shall have expired. On February 12, 1901, and within the first 50 days of the session of that year, a bill was introduced in the house entitled "A bill to amend section two of chapter four of an act entitled 'An act to provide a charter for the city of Detroit and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1883.' " After the 50 days had expired, a second bill, afterwards act of May 21, 1901, was substituted, entitled "An act to amend sections 1, 2, and 13 of chapter two and sections 1 and 25 of chapter 4, of an act entitled 'An act to provide a charter for the city of Detroit,' etc." : *held*, that the second bill was not violative of Const. art. 4, § 28, though its subject-matter was wholly dissimilar to that of the original bill; the title of the original bill being sufficient to indicate that an amendment of the Detroit city charter was in contemplation.

Same—Local Self-Government—Municipal Officers—Appointment and Election—Legislative Interference*—When Not Unconstitutional.

Const. art. 15, § 13, empowers the legislature to provide for the incorporation and organization of cities and villages, and section 14 provides that judicial officers of cities and villages shall be elected and other officers elected or appointed at such time and in such manner as the legislature may direct. Chapter 4, § 5, of the Detroit city charter, provides that all officers, whether elected or appointed, shall hold their offices, respectively, until their successors are duly elected or appointed and qualified, and shall enter upon the discharge of their duties. By act of May 21, 1901, amendatory of the city charter, the election at which certain city officers were to be chosen was postponed one year: *held*, that the act of May 21, 1901, did not amount to a legislative appointment to office of the city officers holding over in consequence of the postponement of the election, so as to violate the principle of local self-government implied in the constitution, since such officers held over, not by virtue of the legislation assailed, but by virtue of chapter 4, § 5, of the Detroit city charter.

Same—Same—Same—Extension of Term by Legislature—When Not Unconstitutional.

Const. art. 15, § 13, empowers the legislature to provide for the incorporation and organization of cities and villages; and section 14 provides that judicial officers of cities and villages shall be elected, and all other officers elected or appointed, at such time and in such manner as the legislature may direct. Act of May 21, 1901, amendatory of the Detroit city charter, postpones the election at which the successors of municipal officers then in office might be chosen for one year: *held*, that this did not work a continuance of the present incumbents in office for such an unreasonable length of time as to violate the principle of local self-government implied in the constitution, and thereby render the act of May 21, 1901, void.

Same—Same—Same—Special Election to Fill Vacancy.

Where a vacancy existed in the office of alderman of the city of Detroit, and in a mandamus proceeding to test the validity of act of May 21,

*As to the power of the legislature to interfere in the appointment and control of municipal officers, or to shorten or extend their terms, see Cook Farm Co., L't'd, *v.* City of Detroit, 4 Mun. Corp. Cas. 715; Collins *v.* Russell, 2 Mun. Corp. Cas. 279, and note.

Common Council of City of Detroit *v.* Schmid

1901, amendatory of the Detroit city charter, by which the election at which such vacancy could be filled was postponed for a year, the court sustained that act, it was proper to order a special election to fill the vacancy.

Grant and Moore, JJ., dissenting.

Certiorari to circuit court, Wayne county; Flavius L. Brooke, Robert E. Frazer, Joseph W. Donovan, and George S. Hosmer, Judges.

Mandamus by the people, on the relation of the common council of the city of Detroit and others, against John A. Schmid, city clerk, and De Witt H. Moreland, commissioner of public works; and mandamus by the people, on the relation of Augustus Ruoff and others, against the common council of the city of Detroit and William C. Maybury, mayor. From a refusal of the writ in the first case the relators bring certiorari, and from an order in favor of relators in the second case the respondents bring certiorari. Orders affirmed.

Timothy E. Tarsney, for relators common council of City of Detroit and others.

John J. & R. T. Speed (Fred. A. Baker and John W. Beaumont, of counsel), for respondents Schmid and others.

Robert W. Webb, for relator Ruoff.

Timothy E. Tarsney, for respondents common council of city of Detroit and others.

LONG, J. For the purpose of testing the constitutional validity of an act of the legislature of 1901, approved May 21, 1901, establishing biennial instead of annual city elections, the common council of the city of Detroit instructed the city clerk to take the necessary steps for the registration of voters for an election to be held on the first Tuesday after the first Monday of November, 1901, and also instructed the commissioner of public works to cause polling booths to be erected for the purpose of such registration and election. The city clerk and commissioner both refused to follow the instructions of the common council, basing their refusal upon the validity of said act of May 21, 1901. Mandamus proceedings were thereupon instituted against the city clerk and commissioner in the circuit court for Wayne county, and an order to show cause was issued to said officers. Upon a hearing before four of the Wayne circuit judges, sitting in banc, the mandamus was refused; Judge Hosmer dissenting on the ground that the act was in violation of section 28, art. 4, of the constitution of this state. The proceedings are before this court upon certiorari to review the action of the circuit judges.

Previous to the passage of the act of May 21, 1901, annual city elections were held in Detroit in November and April each year. Section 1, c. 2, of the act of 1901, provides that no election shall be held in November, 1901, and abolishes annual city elections. It provides for a biennial city election on the first Tuesday after the first Monday in November, 1902, and every second year thereafter, in connection with the gen-

eral state elections. It provides also for a biennial spring election on the first Monday of April, 1903, and every second year thereafter, in connection with the state judicial elections. These were the only material changes in this section. Section 2, c. 2, was amended so as to conform to the change from annual to biennial elections. Section 13, c. 2, was changed to cure a claimed existing defect in the boards of registration, and has no bearing upon the change from annual to biennial elections. Section 1, c. 4, was also amended so as to conform to the change to biennial elections. Section 25, c. 4, was amended so as to define a vacancy in office under the charter. The constitutionality of the act of 1901 is attacked upon two grounds: (1) That it was not introduced in either branch of the legislature within the first 50 days of the session; (2) that in effect it operates as an appointment by the legislature of the local city officers.

It appears that a bill was introduced in the house within the first 50 days of the session, to wit, on February 12, 1901, entitled "A bill to amend section 2 of chapter 4 of an act entitled, 'An act to provide a charter for the city of Detroit and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1883.'" The bill thus introduced was amended after the first 50 days, the substituted bill being entitled "An act to amend sections 1, 2, and 13 of chapter 2, and sections 1 and 25 of chapter 4, of an act entitled, 'An act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1883.'" It appears that the bill as finally passed did not amend section 2 of chapter 4 of the charter, but amended sections 1, 2, and 13 of chapter 2, and sections 1 and 25 of chapter 4, of the act entitled "An act to provide a charter for the city of Detroit," etc. It is the contention of relators that inasmuch as section 2, c. 4, which was proposed to be amended by the bill as introduced, has reference to an entirely different subject than the bill as finally passed as amended after the first 50 days, the act passed is void as contravening section 28, art. 4, of the constitution, which provides that "no new bill shall be introduced into either house of the legislature after the first fifty days of the session shall have expired"; and it is further contended that the act is also void under the provisions of section 20, art. 4, of the constitution, which provides that "no law shall embrace more than one object which shall be expressed in its title." The argument upon this latter question is that, because the title as introduced is an index to the subject of the bill, the substitute introduced after the first 50 days is void, as it is broader than the title as introduced, and is not germane to the general purpose as expressed in the title. This latter objection has, we think, no force whatever. The exact question was passed upon in Attorney General v. Rice, 64 Mich. 387, 388, 31 N. W. 204. It was there said: "The attorney general contends that the consti-

tution (article 4, § 20) was violated in its spirit because the title of the bill as introduced did not express the object of the act as passed. We cannot extend the provisions of the constitution beyond its express terms in this respect. If the object of the act as passed is fully expressed in its title, the form or status of such title at its introduction or during any of the stages of legislation before it becomes a law is immaterial. To hold otherwise would in many cases prevent any alteration or amendment of a bill after its introduction, as in legislative practice it frequently becomes necessary to amend the title as introduced in order to conform to changes in the bill. The title to a bill is usually adopted after it has passed the house, and is not an essential part of the bill, although it is of law," —citing Larrison v. Railroad Co., 77 Ill. 17. This question again arose in the case of Hart v. McElroy, 72 Mich. 452, 40 N. W. 752, and the doctrine laid down in the Rice Case was reiterated, and it was said: "In the present case, therefore, the act is not unconstitutional because the title of the bill as introduced differed from the title of the substitute or the act as passed." An inspection of the title and the act as passed shows that there is no constitutional objection to the sufficiency of the object as stated in the title. The amendments to the bill are germane to the general object stated in the original title. The fact that the amendments were made to the bill does not render the act void under section 28 of article 4 of the constitution. It is not a new bill, within the meaning of that section. It is well-known history in this state that most of the acts passed by the legislature are passed after the first 50 days of the session and many, if not most, of them amended after the first 50 days. That subject has had consideration of this court in many cases. As early as 1878, in the case of People v. Judge of Superior Court of Grand Rapids, 39 Mich. 196, the question was presented. The act there under consideration purported to revise and amend several sections of an old statute, and to add several new sections. The particular provision in question was numbered 7, which corresponded in number to an old section which was not mentioned in the title. The act was upheld. The title to that act is as follows: "An act to revise and amend sections 6, 11, 13, 19, and 21 of an act entitled 'An act to provide for a municipal court in the city of Grand Rapids to be called "The Superior Court of Grand Rapids," being Act 49 of the Session Laws of 1875, approved March 24, 1875, and to add six new sections to the act to stand as sections 24, 25, 26, 27, 28 and 29.'" It will be noted that section 7 was not referred to in the title. The sections added by amendment, to wit, 24, 25, 26, 27, 28, and 29, refer to the stenographer of the court, —a subject in no way germane to that embodied in section 7. The only notice, therefore, of a purpose to introduce an amendment which would affect the provisions of section 7 as they *stood in the original act* was the notice of a title to amend

other named sections of the act, and the law could only have been upheld upon the view that the notice of an amendment to a section of an act admits of the introduction of any amendment within the original title of the act. In Pack v. Barton, 47 Mich. 520, 11 N. W. 367, the objection to the bill was, as here, that it was not introduced until after the expiration of 50 days of the session, although the constitution provides that "no new bill shall be introduced after the first fifty days of the session shall have expired." The facts of the case were shown to be that within the 50 days a bill was introduced for the organization of the township of Montmorency, and after the 50 days had expired the bill was amended to provide for the organization of the county of Montmorency. It was the contention that this was the introduction of a new bill. This court upheld the legislation. The following cases also uphold the general doctrine that, where the amendments are germane to the general objects stated in the title to the original bill, such amendments are valid: Board of Suprs. v. Auditor General, 65 Mich. 408, 32 N. W. 651; Attorney General v. Amos, 60 Mich. 372, 27 N. W. 571; Same v. Rice, 64 Mich. 385, 31 N. W. 203; Hart v. McElroy, 72 Mich. 446, 40 N. W. 750; People v. Howard, 73 Mich. 10, 40 N. W. 789; Holden v. Board, 77 Mich. 202, 43 N. W. 969; Caldwell v. Ward, 83 Mich. 13, 46 N. W. 1024; Toll v. Jerome, 101 Mich. 468, 59 N. W. 816; Davock v. Moore, 105 Mich. 133, 63 N. W. 424, 28 L. R. A. 783; City of Detroit v. Wayne Circuit Judge, 112 Mich. 317, 70 N. W. 894; Fort St. Union Depot Co. v. Commissioner of Railroads, 118 Mich. 340, 76 N. W. 631; Springer v. City of Detroit, 118 Mich. 69, 76 N. W. 122; Renackowsky v. Board, 122 Mich. 613, 81 N. W. 581. In Holden v. Board, supra, it was said: "Most of the great changes in our city organizations have come in under laws which did no more than to indicate by their titles a purpose to incorporate or reincorporate or revise the corporate charter of the municipality dealt with. Anything which is meant to form a permanent element in municipal arrangements is pertinent to the incorporation." In People v. Howard, supra, it was said: "Acts entitled acts to amend a named act are not obnoxious to the constitution if the amendment fairly comes within the scope of the title of the original act." In Fort St. Union Depot Co. v. Commissioner of Railroads, supra, it was said: "The important question is, what is requisite to the title of the amendatory act? Must it call attention to the fact that the scope of section 3 [Act No. 198, art. 3, Pub. Acts 1873] is to be enlarged, and mention the corporations to be included, either by name or generically, or must every one take notice that section 3 is liable to be amended in any particular and to any extent within the terms of the original title? * * * Many authorities support the rule that the title of the amendatory act is sufficient, and will support any legislation that would have been permissible under the original title when

the law amended was enacted, if the amendatory act refers by chapter or section to the act amended, giving its title, although the practice has been criticised. Thus, in the case of People v. Judge of Superior Court of Grand Rapids, 39 Mich. 197, such an amendment was sustained, notwithstanding the title incorrectly stated the number of the section sought to be amended. In People v. Gadway, 61 Mich. 290, 28 N. W. 102, 1 Am. St. Rep. 580, Mr. Justice Champlin says: 'In applying the constitutional test to this law, it must be regarded as if section 15 [Act No. 178, Pub. Acts 1883] was embraced in the original when passed; and if it is not embraced in the title of the act of 1881 it is valid, otherwise not.' It is fair to say that it is not clear that the exact question before us was discussed in that case, as apparently both court and counsel took it for granted that the case must turn upon the title to the original act. The case of Holden v. Board, 77 Mich. 202, 43 N. W. 969, is also in point, Mr. Justice Campbell saying: 'It is undoubtedly competent to introduce by amendment anything which might have been introduced in the original act.' The title to the act in that case, as in this, referred to a section, and not to the act. It was as follows: 'An act to amend section 3 of Act No. 331,' etc., 'entitled,' etc. Act No. 342, Local Acts 1889. The question was before this court again in People v. Howard, 73 Mich. 10, 40 N. W. 789. This was a criminal case, and the title was 'An act to amend chapter 154 of the Revised Statutes of 1846, being chapter 180 of the Compiled Laws, entitled "Of offenses against the lives and property of individuals."' Act No. 116, Laws 1867. The object of this amendment was to create a new offense, and a felony to that, yet the law was held valid." In the case of Renackowsky v. Board, 122 Mich. 613, 81 N. W. 581, the case of City of Detroit v. Wayne Circuit Judge was approved. The Sackrider Case, 79 Mich. 59, 44 N. W. 165, and Plank Road Case, 97 Mich. 590, 56 N. W. 943, which seem to be relied upon by counsel for relators, were distinguished from the other cases by Mr. Justice Montgomery in Toll v. Jerome, 101 Mich. 471, 59 N. W. 816.

It seems, therefore, that the law is fully settled in this state that whatever might have been incorporated into the original act under the title of such original act may be added by way of amendment under the most general title. The substituted bill and title in the present case indicate the same general purpose as the original title. The notice to be imputed from the original title is a change in the city charter of Detroit. It was certainly not to be a re-enactment of section 2, c. 4, but a change, the extent of which could be disclosed only by an inspection of the original bill; and presumptively such inspection would have disclosed the change actually and finally made. Nor would the original title itself have indicated the nature of the change. A proposed amendment to section 2, c. 4, would convey no knowledge of the amendment without an inspection

of the body of the bill. The only information conveyed by such title would be that the charter itself was to be in some manner amended. The notice, therefore, was of a change in the charter. The titles of both the original and substituted bills indicate such a change. Both titles therefore disclose the same general purpose. In Attorney General v. Amos, 60 Mich. 372–379, 27 N. W. 571, the original bill amended sections 3 and 4 of chapter 1 of an act entitled "An act to provide a charter for the city of Detroit," and the substituted bill was entitled "A bill to amend sections 3, 4 and 5 of chapter 1 and to add five new sections to Act 326 of the Laws of 1883, entitled 'An act to provide a charter for the city of Detroit.'" It was said by the court that "the bill had for its object the amendment of the charter of the city of Detroit." A bill to vacate one judicial circuit and to reorganize another was held in Toll v. Jerome, 101 Mich. 468, 59 N. W. 816, to be of the same general purpose as a bill to require the judge of the former circuit to hold court in the latter. In Attorney General v. Rice, supra, it was said: "The journal of the senate positively states that a bill was introduced to organize the township of Au Train. If such a bill was introduced, it would be presumed that the bill substituted to organize the township of Ironwood had in view the same general purpose as the first bill,—to give the inhabitants of the territory described a distinct municipal government." And in Hart v. McElroy, 72 Mich. 446, 40 N. W. 750, it was said: "We have no right to presume that the body of the substituted bill was not germane to the body of the [original] bill." We must therefore hold that the act is not defective, as claimed.

The claim of counsel for relators that the act operates as an appointment of local city officers by the legislature cannot be sustained. Apparently it was not claimed in the court below, and it is not claimed here, that the legislature had no power to change the time of holding elections in the city of Detroit; but the contention is that the effect of the act is to continue in office the present city officers beyond the terms for which they were elected, and this operates as an indirect appointment by the legislature. The constitution directs, by section 13, art. 15, that "the legislature shall provide for the incorporation and organization of cities and villages." Under this provision the legislature directs what the nature of the organization shall be; what officers shall be elected or appointed; their terms of office; their powers, duties, and compensation; when vacancies shall exist, and how they shall be filled. This power to so prescribe is within the scope of the power to organize the municipality. Then follows a provision in section 14 of the same article of the constitution that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." It is argued by Judge Speed, counsel for respondents, that: "It

must be conceded that the authority to organize and the authority to prescribe the time and manner of election and appointment of officers of the city is a continuing power, which may be exercised and re-exercised at the pleasure of the legislature; that, having provided for annual city elections, the legislature may abolish the annual city elections and substitute biennial elections, and may fix the time and prescribe the manner of conducting such biennial election; that such change must necessarily involve or require some legislation or bring into operation some existing provisions as to the officers whose terms may be affected by the change. It is, however, claimed [by relators] that there is in this language granting an express power to fix the time of holding such election an implication which forbids the fixing of such time for holding the election that the officers then in office would hold over, for the reason that such holding over violates a further implication that officers of cities or villages shall be elected or appointed by local authority, and a holding over by authority of the legislature is in effect an appointment by the legislature; that is to say, the express power to prescribe the time and manner of election is limited or controlled by the implication that the legislature shall not fix a time which would have the effect to leave any one in office for a time beyond that for which he was elected. A concession to the claim of relators would require the legislature, if it fixed the time, as in the present instance, for holding the election after the expiration of the terms of existing officers, to provide for the holding of an ad interim election of officers for the time intervening between the expiration of present terms and the new election; and the constitution, notwithstanding its very plain language, must be read as if it contained this requirement." There is great force in these suggestions, and they lead to an inquiry as to the terms for which the present city officers were elected. Section 5, c. 4, of the charter of the city of Detroit provides: "All officers whether elected or appointed shall hold their officers respectively until their successors shall be duly elected or appointed and qualified and shall enter upon the discharge of their duties." The act under consideration nowhere refers to the existing officers, and makes no express extension of their terms of office. If such officers are continued in office, it is not by virtue of this act, but by virtue of the above provision of the charter of Detroit. This was the unanimous decision of the court below. It was said by that court: "We do not think the question of local self-government is involved in these cases at all. The present city officers were elected by the people, under the law that then existed, and with full knowledge of the law, to hold their offices for the term for which they were elected. What was that term, under the law? It was just this: That they should hold their offices for the full term specified in the law for each officer, *respectively, and until their* successors were elected and

qualified. Under the law they hold their offices, not by legislative appointment, but by the votes of the people constitutionally recorded, and from no other authority. That the legislature has the right to change the time of holding elections was not questioned on the argument, nor can it be successfully questioned. By the change a contingency has arisen whereby either new officers have to be elected or the officers remain vacant, or the present officials hold over during the interim. It is not necessary to discuss the first two of these propositions, for the answer to the third eliminates them from the discussion. The present officers hold over because the law says so, and the people elected them knowing that in such a contingency they would hold over." People ex rel. Ruoff v. Common Council of City of Detroit, 8 Det. Leg. N. 583. We fully agree with the court below in this statement, and with the contention made by Judge Speed in his brief. This seems to be the established and unquestioned rule wherever the question has arisen. In State v. Menaugh, 151 Ind. 260, 271, 273, 51 N. E. 117, 357, 43 L. R. A. 408, 418, a similar question is discussed. It appears that the Indiana constitution expressly prohibits the legislature from creating any office for a longer term than four years, but under the constitution an officer holds until his successor is elected and qualified. The constitution also provides that the officers in question shall "be elected or appointed in such manner as may be prescribed by law." Article 6, § 3. The legislature changed the time of the election, the effect of which was to continue the incumbent officers in office for a period of two years beyond the constitutional limit, and this legislation was attacked on that ground. The court said: "An examination of the act will readily disclose that it does not profess to create the office of township trustee, nor to extend the term thereof beyond the constitutional limit. It proceeds upon the theory that the office has been previously created, and it merely declares as the legislative will that the time of holding an election for township trustees, etc., shall be changed from the general election from the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and on such day 'of every fourth year thereafter.' The statute in question makes no reference to present incumbents. It neither pretends nor attempts to abridge nor enlarge their tenure. * * * Consequently, if incumbent trustees are permitted to hold beyond four years, it cannot, in legal contemplation, be attributed to the act in controversy, but will be due to the force and effect of the provisions of the constitution last mentioned." Again the court said: "In consideration of this constitutional provision the electors of this state, when by their ballots they designate a person to hold a public office the tenure of which is prescribed either by the constitution or some statute, must be presumed to understand and

know that the contingent holding of the office until his successor is elected and qualified is as much a part of the term for which he is elected as is that which is expressly prescribed and fixed." In State v. Ransom, 73 Mo. 78, the hold-over provision was apparently a statutory and not a constitutional one. The Missouri constitution provided that the term of an officer should "not be extended for a longer period than that for which such officer was elected or appointed." The legislature changed the time of holding the election so that no election could be had until two years after the end of the term of the officer in question. It was held that the time intervening between the end of the term of an officer and the election of his successor "is as much a part of his term of office as the four years that preceded it." In Jordan v. Bailey, 37 Minn. 174, 33 N. W. 778, it was held that the legislature may make reasonable charges by amendments to existing laws in respect to the time of holding elections for the offices then under consideration, to wit, municipal judges, and in such case incumbents previously elected for an existing term and until their successors are elected and qualified may hold over during the interval; that such act would not be unconstitutional unless the change left the incumbent in office for such unreasonable time as to raise the presumption of design to deprive the office of its elective character. The following cases lay down the same doctrine: State v. McCracken, 51 Ohio St. 123, 36 N. E. 941; State v. McGovney, 92 Mo. 428, 3 S. W. 867; Christy v. Board, 39 Cal. 3.

It is said by counsel for relator, however, that, if the legislature can place the election two years beyond the term for which such officers were elected, it can extend it ten or any number of years. That question was referred to in Jordan v. Bailey, supra, by the Minnesota court, and the court said: "The constitution is satisfied if provision is made by law for the election of such officers at stated periods, unless these periods are fixed at times so far remote from each other as to raise the presumption of a design substantially to deprive these offices of their elective character." In that case the election was put off for more than one year, and it was said by the court: "The legislature is not at liberty to abuse its authority in such cases, and we cannot presume it has done so in this case. * * * We are not authorized in holding this to be an unreasonable change, and we are not warranted in imputing to the legislature any unworthy purpose in making it; nor is the incidental result that the respondents hold over in the interval by virtue of the terms of the previously existing statute in itself sufficient to show an intention to deprive the office of its elective character." In the present case the period fixed for holding the election continues the incumbents in office under the terms of the charter one year. This is not unreasonable, especially as it saves the city of Detroit the expense of an election *in* November, 1901, and the spring

of 1902, and places the election at times when the general state elections are to be held. Counsel for relators, however, cite several cases which he claims hold the doctrine for which he contends. We think the cases cited by him may be readily distinguished. In the case of People v. Bull, 46 N. Y. 57, 7 Am. Rep. 302, the statute under consideration (Laws N. Y. 1866, c. 217, p. 471) was entitled "An act to extend the term of the office of the justice and clerk of the district court," etc.; and Mr. Justice Folger, in deciding the case, says: "He [respondent] placed his title to it after the expiration of the six-year term explicitly upon the legislative continuance of him in it by the act of 1866. Such is his answer in the case, and no other right of title is set up, and upon this he must stand." In People v. McKinney, 52 N. Y. 374, the claim was made that the relator was entitled to the continuance of his office of collector of taxes by virtue of "An act for the extension of the term of office of collector of taxes in the several towns of Kings county." Chapter 364, Laws 1870. In State v. Krez, 88 Wis. 135, 59 N. W. 593, it also appears that the legislature by express provision sought to extend the term of office of city attorney, and the court held that this could not be done. None of these cases is in conflict with the rule laid down by the circuit judges in the present case.

We think the act valid, and that the mandamus was properly denied. The order will be affirmed.

In the Ruoff case a vacancy exists by the resignation of the alderman in the Fifteenth ward of Detroit. It follows from what we have said that that vacancy cannot be filled by general election until November, 1902. The court below ordered a special election to be held to fill such vacancy on the 8th of the present month. That order must be affirmed. That time having now elapsed, the council will undoubtedly call the special election at some future date.

MONTGOMERY, C. J., and HOOKER, J., concurred with LONG, J.

O'CONNOR *v.* CITY OF FOND DU LAC.

(*Supreme Court of Wisconsin, Feb. 26, 1901.*)

[85 N. W. Rep. 327.]

Action against City—Condition Precedent—Effect of Failure to Perform Condition Which Goes to Existence of Right.

Failure to perform a condition precedent to the existence of a right, as that prescribed by section 1339, Rev. St. 1898, prevents the requirement thereof, and may be insisted upon at any stage of judicial proceedings in respect thereto.

Same—Same—Effect of Failure to Perform Condition Which Merely Affects the Remedy.

Failure to perform a condition of the use of a judicial remedy to enforce a right having no dependence thereon for its existence—such as the condition requisite to the continued existence of a claim against a

railway for the negligent killing of stock by a railway train, or damages for the negligent setting of fires by a locomotive engine, under section 1816b, Rev. St. 1898—is waived if objection is not taken by answer or demurrer, the statute, to all intents and purposes, being a statute of limitations and governed as such.

Same—Same—Notice of Claim—Statute Requiring, of Same Effect as Statute of Limitations.

Failure to perform a statutory condition precedent to the commencement of an action—as one that no action shall be commenced to enforce a city liability until notice shall have been given of the existence thereof and the common council of the city have had an opportunity to pass upon the same—has the same effect as failure to comply with a statute of limitations. It is in the nature of such a statute, though failure to comply with it may only abate the action if objection be taken by answer or demurrer. If not so taken, the objection is waived.

Time—Computation—Day from Which Reckoning Is Made to Be Excluded.

The words "from and after," used in a statute in regard to time, are ordinarily held to signify exclusion of the day from which reckoning is to be made; and such meaning should prevail in the absence of some clear legislative intent to the contrary.

Same—Same—Same—Where Statute Is to Take Effect from Publication.

Publication of an act of the legislature prior to its taking effect, being for the purpose of enabling persons affected to shape their course accordingly, a provision therefor in the form, the act shall take effect from and after publication thereof, is consistent with such words being used exclusively and inconsistent with their being otherwise used.

Chief of Police—Entitled to Hold Office and Receive Emoluments under Valid Statute Extending Term of Office.

Chapter 247, Laws 1897, which attempted to extend the term of office of the chief of police in the defendant city, among other such corporations, beyond the term for which he was specifically elected, if valid, entitled him to hold such place and receive the emoluments thereof till succeeded by a person appointed to his place under such act.

Local Self-Government—Municipal Officers to Be Chosen by Electors of Municipality—Legislative Interference Unconstitutional.

Section 9, art. 13, of the constitution, prohibits the legislature from interfering in any way with the question of what person shall hold any office in any city in this state of a character known at the time of the adoption of the constitution, whether then known by the same name as subsequently or not, and limits all power in that regard to the electors of the particular locality interested, to be exercised directly or by some municipal agency selected directly or indirectly by them.

Same—Same—Same—Police Department.

City governments, at the time of the adoption of the constitution, commonly included a police department, and all offices pertaining thereto, whether now known by the names they bore prior to such adoption or not, must be considered as in the class which the constitution expressly declares must be filled by election by the electors of the particular localities interested, or by appointing by such authority of such localities as the legislature shall designate.

Same—Same—Same—Constitutional Provision Construed.

The idea expressed in the constitution is not that all officers of towns, cities and villages whose election is not provided for in the constitution may be elected or appointed in such manner as the legislature may deem best, but that all officers corresponding to town, city and village officers as regards official duty, that were known at the time of the adoption of the constitution, shall be elected or ap-

pointed by some authority of the particular locality interested, designated by the legislature.

Same—Police—Appointment by Legislature an Unconstitutional Interference with Local Affairs.

An act of the legislature appointing members of a police force in a city is an unconstitutional interference with local affairs.

Same—Same—Legislative Act Extending Term of Office—Unconstitutional.*

An act of the legislature, so far as it expressly, or by its effect, extends the term of office of a member of the police force of a city beyond that for which he was specifically elected or appointed by legitimate municipal authority, so as to keep such officer in place for any period of time regardless of such authority, is unconstitutional and void.

(Syllabus by the Judge.)

Appeal from circuit court, Fond du Lac county; Michael Kirwan, Judge.

Action by Sealy F. O'Connor against the city of Fond du Lac. Judgment for plaintiff. Defendant appeals. Reversed.

Action to recover for services rendered defendant as chief of police. Plaintiff was elected such chief May 1, 1896, for the year ending May 1, 1897, and till his successor should be legally elected and qualified, the salary of the office being fixed at $50 per month, payable monthly. He qualified for the office and performed its duties till excluded therefrom as hereafter mentioned. April 17, 1897, an act of the legislature, known as chapter 247 of the General Laws of 1897, was duly published. It provided, among other things, as follows: In cities of the third class, to which defendant belonged, a board of police and fire commissioners, consisting of four citizens, shall be appointed, in a manner indicated, before the first Monday of May, 1897, one to hold his office for the term of one year, one for two years, one for three years, and one for four years, from the said first Monday of May following, and until his successor should be appointed and qualified. No person shall be appointed to any position on the police force or in the fire department in any such city except with the approval of said board, after said act goes into effect. Said board shall, as soon as practicable, prepare and adopt rules and regulations governing the selection and appointment of persons to be employed on the police force and in the fire department of any such city. Whenever the term of office of any chief of police or chief engineer of a fire department heretofore appointed or elected in any such city shall expire after the act goes into effect, and before the board of police and fire commissioners shall have adopted the necessary rules and regulations with reference to the appointment of police officers,

*See Common Council of Detroit v. Schmid, and Ruoff v. Common Council of Detroit, ante, p. 515. As to the power of the legislature to interfere in the appointment or election of municipal officers, or to extend or shorten their terms, see Cook Farm Co. v. City of Detroit, 4 Mun. Corp. Cas. 715; Collins v. Russell, 2 Mun. Corp. Cas. 279, and note.

or when any such officer is holding over at the time the act goes into effect, such officer shall hold his office until his successor shall have been duly appointed in accordance with the rules and regulations of the board. All other members of the police force in any such city, at the time the act goes into effect, shall hold their respective positions for six months from the date when the rules and regulations adopted by the board shall go into effect, and thereafter under certain specified conditions. The act further provided for the suspension of police officers by the board of police commissioners under certain circumstances. In defendant city, prior to May 1, 1897, a board of police commissioners was duly appointed, and the members thereof duly qualified, and on the first Monday of May, 1897, entered upon the duties of their offices. About May 24th, thereafter, said board, in compliance with said act, promulgated its rules for the appointment of members of the police department of the city and other employees and officers affected by said act. In April, 1897, the common council of the city appointed Thomas McGrath chief of police thereof for the year commencing May 1, 1897. He took the oath of office of such chief April 17, 1897, and filed such oath and his official bond with the clerk of said city. Such bond was not presented to or approved by the council of the city until April 22, 1897. On May 1, 1897, defendant caused plaintiff to be excluded from the office of chief of police upon the pretense that his term of office expired on that day and that said McGrath was entitled to enter upon the duties thereof. From the time of such exclusion until November 1st thereafter plaintiff held himself in readiness to perform the duties of chief of police of said city, and offered to perform such duties, but was not allowed to do so. At the end of each month during said period, plaintiff in due form of law made his claim against the city for $50 as salary of chief of police of said city, all of which claims were rejected by the common council thereof. Plaintiff was never removed from his office by the said board of police commissioners, or displaced by any other person under its rules and regulations.

The pleadings raised merely the issue of whether the city of Fond du Lac was indebted to plaintiff for salary of chief of police for the six months subsequent to May 1, 1897. There was no dispute but that the facts were as above stated. The court found, as a matter of law, that plaintiff was chief of police of the defendant when the act of 1897 went into effect, and was entitled to hold said office till November 1st thereafter, since he was not removed or displaced by the board of police and fire commissioners; that his exclusion from the office was wrongful, and that he was entitled to recover the salary of the office claimed. Judgment was rendered accordingly.

O. H. Ecke (Maurice McKenna and E. J. Phelps, of counsel), *for appellant.*

Edward S. Bragg, for respondent.

MARSHALL, J. (after stating the facts). Section 5 of the city charter of the appellant provides as follows: "No action shall lie or be maintained against the city of Fond du Lac on contract until the claimant shall have presented to the common council a statement of the claim and the amount thereof, and the circumstances out of which it arose, duly verified on the oath of the claimant, and the council shall have allowed a regular meeting to pass without an adjustment with such claimant of such claim or demand." Laws 1883, c. 152, subc. 18. The complaint does not show that such charter condition to the maintenance of this action exists. No objection was taken by appellant on that ground, either by answer or demurrer. The record does not show that evidence of the existence of such condition was produced. The point is now made that such situation is fatal to the judgment, the following cases being cited in support thereof: Stocks v. City of Sheboygan, 42 Wis. 315; Hill v. City of Fond du Lac, 56 Wis. 244, 14 N. W. 25; Kelley v. City of Madison, 43 Wis. 638; Manufacturing Co. v. Whitcomb, 101 Wis. 226, 77 N. W. 175. Stocks v. City of Sheboygan is unlike this case, because there the question of the existence of the condition was raised by demurrer. In Hill v. City of Fond du Lac, the question here raised was not involved, because the action sounded in tort and was held not to be included in the charter provision. Kelley v. City of Madison is unlike this case for two reasons: First, because the question was raised by a demurrer to the complaint; second, because it was held that the action was one sounding in tort and not affected by the charter provision against the maintenance of an action on a claim or demand till the same should be first filed as therein required. In Manufacturing Co. v. Whitcomb, a statutory condition to the enforcement of a common-law right was treated as a condition of the right itself, confusing a limitation statute acting on the remedy only, which may be and is waived by a failure to insist upon it by answer or demurrer (section 2654, Rev. St. 1898), with a statutory condition to the existence of a right, as, for instance, one necessary to a cause of action against a municipality for compensation for an injury caused by a defective highway under section 1339, Id. The same error was committed in Ryan v. Railway Co., 10 Wis. 506, 77 N. W. 894. It was corrected, as far as possible, in Relyea v. Pulp Co., 102 Wis. 301, 78 N. W. 412, which was affirmed in Meisenheimer v. Kellogg, 106 Wis. 30, 81 N. W. 1033, and Malloy v. Railway Co. (Wis.; decided Feb. 1, 1901) 85 N. W. 130.

So we see that none of the cases cited by counsel support their proposition, while Relyea v. Pulp Co., and Meisenheimer v. Kellogg, are to the effect that charter provisions of the kind under consideration are in the nature of statutes of limitations and governed by rules applicable thereto. If not complied with, the objection must be taken by answer or demurrer or

be considered waived. Care must be taken not to confuse such statutes with one imposing a condition to the existence of a right. Noncompliance with the latter condition goes to the cause of action, not to the remedy for the redress of the wrong. The distinction between the two classes of rights is so clear that no one need go astray. In one case the right depends on the statute; in the other the right is independent of the statute, but its enforcement is regulated and limited by law. In the former, failure to comply with the statute prevents the creation of the right, hence it is not waived by failure to raise the point by demurrer or answer, while in the latter the condition relates to the remedy only, and is waived unless insisted upon by answer or demurrer. That was the rule at common law, and the statute (section 2654, Rev. St. 1898) expressly preserves it. Failure to comply with a statutory condition of the use of a remedy does not go either to the jurisdiction of the court or to the cause of action.

The foregoing is in harmony with Sheel v. City of Appleton, 49 Wis. 125, 5 N. W. 27, and Benton v. City of Milwaukee, 50 Wis. 368, 7 N. W. 241. In Benware v. Town of Pine Valley, 53 Wis. 527, 10 N. W. 695, the court said that failure to comply with the condition of section 1339, as regards a claim for damages caused by a defective highway, and to allege such compliance in the complaint, was fatal to plaintiff's cause of action, though the point be not raised by answer or demurrer; and that anything said to the contrary in the other two cases above referred to is wrong. The idea seems to have been in mind that the cases were somewhat in conflict in that the court fell into the error of not observing clearly the distinction between compliance with a statute which is the foundation of a right, and compliance with one which merely regulates or limits the enforcement thereof. The Benware Case was decided right, because service of the notice of the injury under section 1339, Rev. St. 1898, was a condition of the right there in question. The other two cases were also decided right, because the statutory condition involved operated only upon the remedy. Those cases were affirmed in Bradley v. City of Eau Claire, 56 Wis. 168, 14 N. W. 10; Collette v. Weed, 68 Wis. 428, 32 N. W. 753; Lombard v. McMillan, 95 Wis. 627, 70 N. W. 673; and Bigelow v. Town of Washburn, 98 Wis. 553, 74 N. W. 362.

The case, on the merits, turns on the effect of chapter 247, Laws 1897, on respondent's right to hold the office of chief of police of the appellant, from the 1st day of May, 1897, till the 1st day of November thereafter. On that, these questions are presented for solution: When did the act take effect? Was McGrath the legal successor of respondent by the terms of the act and entitled to the office in dispute from the 1st day of May, 1897, at least till displaced by an appointee of the board of police and fire commissioners? If not, and the law by its terms took from appellant the power to elect a successor

of respondent, or extended his term of office beyond the 1st day of May, 1897, was it in that regard constitutional? We will consider each of such propositions, though it pretty clearly appears that the first is immaterial.

1. Appellant contends that the act in question became a law on the 18th day of April, it having been regularly published on the previous day; that the day of publication should have been excluded in determining when the law became effective. That turns on the meaning of the words "from and after" in the last section, which says: "This act shall take effect and be in force from and after its passage and publication." The word "from" and that in connection with the word "after" is sometimes used inclusively and sometimes exclusively. They have no certain literal or legal meaning that can be accepted as a guide under all circumstances. They are open to construction in many cases, so that courts sometimes hold that they are used exclusively, and at other times inclusively, as seems best calculated to effect the legislative intent; though it has come to be quite generally accepted as the rule that the meaning of the words in connection, "from and after," excludes the day from which the reckoning is to be made, and in order to avoid the application of it as a rule of construction, there must be something in the act, or the result of a literal application of the words to the subject treated by it, to indicate a contrary intent. Sedg. St. & Const. Law, 356; Smith, Const. Constr. § 616. That has been recognized as the law by this court. Stewart v. McSweeney, 14 Wis. 468; McGinley v. Laycock, 94 Wis. 205, 68 N. W. 871. There is no reason why "from and after," in the act in question, should not be considered as having been used in what we say has come to be regarded as their literal sense. On the contrary the purpose of the publication strongly supports that view. That purpose was to give notice, to persons affected by the law, of its existence, before it went into effect. Clearly, such purpose could not be accomplished without a completed publication. That would exclude the day on which the act was done, as fractions of a day are not ordinarily counted. The contrary view would lead to the absurd result that an act designed to give notice of the existence of a law in advance of its going into effect might occur subsequent thereto. It cannot be held that any such an absurdity was intended, by mere judicial construction. The other view accords with the literal sense of the words. It gives significance to the use of the word "after" in connection with the word "from," and makes the meaning sensible in the light of the purpose of the publication. That idea has been adopted elsewhere. Duncan v. Cobb, 32 Minn. 460, 21 N. W. 714; Parkinson v. Brandenburg, 35 Minn. 294, 28 N. W. 919.

2. There is no controversy but that McGrath was regularly elected as respondent's successor by the common council of appellant before the act in question went into effect. The

learned trial court does not appear to have regarded the date of such election as of sufficient significance to require a mention thereof in the findings of fact, but he gave prominence to the date of the circumstance of qualification by the approval of the official board. The latter circumstance does not appear to have been made material by the law of 1897 in any view of it. If the act was valid it took from the common council power to elect a chief of police after the 17th day of April, 1897, not before. Election to an office is one thing; a condition precedent to the person elected taking possession thereof is quite another thing. It was with the first circumstance that the law dealt, and that is the significant one on this branch of the case. Those provisions of the law affecting McGrath's right to the office are in the main as follows: "After this act goes into effect no person shall be appointed to any position, either on the police force or in the fire department, * * * except with the approval of the board." "Whenever the term of office of any chief of police * * * or other officer performing the duties of chief of police * * * by whatever name designated, heretofore appointed or elected, * * * shall expire after this act goes into effect and before the board of police and fire commissioners shall have adopted the necessary rules and regulations with reference to the appointment of police officers and members of the fire department, * * * or when any such officer is holding over at the time this act goes into effect," he shall hold his office "until his successor shall have been duly appointed by the board." "All other members of the force in either department named, * * * at the time this act goes into effect, shall hold their respective positions for six months from the date when the rules and regulations adopted by the board shall go into effect, and thereafter," under certain conditions mentioned. It seems quite clear that the legislative idea was that the persons elected to official positions affected by the act, before it took effect, whose terms of office should expire thereafter and before the board of police and fire commissioners should be competent to fill their places, should remain in such places till that time, regardless of the specific terms for which such officers were elected or appointed. It says distinctly, as to the particular office in question, if the term of an officer elected or appointed before the taking effect of the act shall expire thereafter, he shall nevertheless continue in office till the place shall be filled by the board according to rules and regulations to be adopted by it, as soon as possible after the first Monday of May, 1897. That contemplated, as to such office, these circumstances in combination: A person elected or appointed prior to the taking effect of the act, the expiration of the term for which he was elected or appointed prior to the creation of the board of police and fire commissioners, and its qualification to act pursuant to the rules and regulations adopted for its government. We should say in

passing that the making of such rules was not contemplated till after the 1st day of May, 1897, and that the terms of office of the members of the board did not commence till that time. The respondent satisfies the conditions mentioned, and McGrath does not. The latter was elected before the act in question went into effect, but the term for which he was elected did not expire prior to the time when the board of police and fire commissioners were required to be in readiness to fill the place by appointment under its rules and regulations. It follows that the second proposition advanced by appellant must be resolved in favor of respondent. By the wording of the law his term of office was extended beyond that for which he was elected, and since his place was not sooner filled by the board of police and fire commissioners, such extension included the six months from May 1 to November 1, 1897. He was therefore entitled to recover of appellant the salary for which this action was brought, if the legislative extension of his term of office was valid.

3. The validity of the legislation extending the term of office of respondent, regardless of the will of the appellant, must be tested by section 9, art. 13, of the constitution, which provides that, "all city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some subdivision thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct." Counsel for both sides seem to appreciate fully that such constitutional provision was adopted here from New York, it having existed there as early as 1846; that it was construed by the highest courts of that state at an early day, and that such construction has been approved here so far as the subject has been presented to this court; but they draw very different conclusions from the decisions.

It will be observed that the language of the constitution deals with several classes of officers: First, city, town and village officers whose election or appointment is provided for by the constitution; second, such officers not provided for by the constitution; third, all other officers whose election or appointment is not provided for by the constitution; fourth, all officers whose offices were created by law subsequent to the adoption of the constitution. It was absolutely taken out of the power of the legislature to appoint any officer of the second class mentioned, such power being expressly conferred upon the people of the municipality served by such officers. The purpose of that is plain and has often been declared by the courts. It was to render secure the important right of local self-government,—to give to the people of each locality

the power to say and determine as directly as practicable who shall perform the governmental functions that concerns such localities only as organized subdivisions of the state. That right, under our system of government, has from the start been regarded as the very foundation thereof, and absolutely necessary to its success. The New York court, in a very recent case, expressed the idea indicated, thus: "As to offices known and in existence at the time of the adoption of the constitution, this provision is absolute in its prohibition of an appointment by the central government or its authority, or by any body other than the local electors or some local authority designated by law. This right of self-government lies at the very foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or invasion of it is to be promptly met and condemned by the courts when such acts become the subject of judicial investigation." Rathbone v. Wirth, 150 N. Y. 459, 469, 45 N. E. 15, 24, 34 L. R. A. 408, 419. That language is none too strong. It voices correctly the views of the framers of the constitution as they were unmistakably written into it. Therefore, if it appear that the office in question in this case was one of the class the legislature was rendered powerless to fill, and that the law, so called, extending appellant's term was in effect an appointment thereto, the duty of the court to condemn the usurpation of power is plain.

We shall not take time to analyze at length the constitutional provision under consideration, because the questions in regard to it are too well settled to require or justify such labor. The class of officers which the legislature is prohibited from directly interfering with, includes, as indicated, all city, town, and village officers known and in existence at the time of the adoption of the constitution, whether known by the same names as they now bear or not. All of the New York authorities on the subject so hold. People v. Draper, 15 N. Y. 532; Same v. Batchelor, 22 N. Y. 128; Same v. Woodruff, 32 N. Y. 355; Same v. Bull, 46 N. Y. 57; Same v. Albertson, 55 N. Y. 50; Same v. McKinney, 52 N. Y. 374; Same v. Foley, 148 N. Y. 677, 43 N. E. 171; Rathbone v. Wirth, supra. This court has likewise passed upon the same question. State v. Krez, 88 Wis. 135, 59 N. W. 593.

The learned counsel for respondent argues that all officers whose election is not provided for by the constitution are mere legislative creations, and belong to the fourth class mentioned in section 9, and may be filled by legislative appointments. That overlooks the fact that power is not left with the legislature in its discretion to appoint or elect all officers whose election or appointment is not provided for in the constitution, and

that it has never been so understood from the earliest treatment of the subject by Mr. Justice Denio in People v. Draper, supra. From the fact that provision is not made in the constitution for the appointment of an officer to serve a town, city or village in the performance of some duty as regards local government therein, it by no means follows, as suggested, that such appointment or election can be made directly by the legislature. The language of the constitution clearly indicates the contrary. Town, city and village officers whose election or appointment is provided for in the constitution are mentioned as a class only to exclude them from officers generally that have to do with the government of such local governmental subdivisions of the state. After making such exclusion, the balance of such local officers is put in the class to be selected only by the electors of the particular localities affected, by the direct vote of such electors or by some local agency designated by the legislature for that purpose. The idea, as we understand the counsel, that all officers whose election or appointment is not provided for in the constitution may be elected or appointed by the legislature, is as novel as it is contrary to the plain meaning of the constitution. If adopted, one of the fundamental ideas of the framers of that instrument would certainly be lost sight of. They intended that all local officers, according to the then known schemes for local self-government, should be chosen by the people of the localities affected. That such was the idea intended to be embodied in the constitution is voiced by every court that has spoken on the subject. "The presence of the provision in the constitution in regard to the election or appointment of local officers by the people, evidences the importance which the people, when the constitution was framed, attached to the preservation of their right to the management of their local affairs. It means the right to choose their local officers in all its reality, or it means nothing. If it does not mean that the people have reserved the right of administering local offices by officers of their own choosing, whether it be done directly through an election or indirectly through the method of an appointment by some of their local authorities, I am at a loss to understand its significance or in what consists its peculiar value." Justice Gray in Rathbone v. Wirth, supra. "The obvious purpose of that provision of the constitution was to secure to the people of the cities, towns and villages of the state, the right to have their local offices administered by officers selected by themselves." Andrews, J., in People v. McKinney, supra. "Faithfully observed, and effect given to such provision in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers, without let or hindrance from the state government, and none can be deprived of the rights and franchises thus granted to all." Allen, J., in People v. Albertson, supra. The offices of

policeman and chief of police or city marshal (the particular name of the office being immaterial) in cities and villages, were as well known at the time of the adoption of the constitution as any other. Such offices were understood to be essential to good order in large communities, and they were universally provided for in all city and village organizations. So there can be no question but that the power of electing or appointing such officers was prohibited to the legislature by the provision of the constitution under consideration.

But it is said that the mere continuance in office by legislative enactment, of a person whose installation in the position was by a constitutional agency is not a legislative appointment, and that the term of office of respondent, regardless of the law of 1897, having commenced by a municipal appointment and being for one year and until his successor was elected and qualified, strictly speaking and in a constitutional sense, it was not extended by such law. That proposition was advanced in People v. Batchelor, supra, and was there adopted, but the case was soon overruled, and has not been considered authority for nearly half a century. The rule in New York is the same as that declared in State v. Krez, 88 Wis. 135, 59 N. W. 593, that the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office and void if the office be one that the legislature cannot fill by direct appointment or election. People v. Bull, supra; Same v. McKinney, supra; Same v. Foley, supra. The right to fill an office by a new selection at the expiration of each term thereof is secured to the people of the locality specially concerned, the same as the power to fill the place in the first instance, and any attempt to interfere with that right, working a continuance of an incumbent in office, under the general rule that his incumbency shall continue till a successor is elected and qualified, is held to be as much a legislative appointment and usurpation of power as an express appointment to the place. In People v. Foley, supra, it was said that the power to appoint in such cases cannot be directly exercised by the legislature, nor indirectly by extending the term of an officer after his election. It is clear, it would seem, that if an officer be kept in office by legislative interference for any period after he could, but for such interference, be displaced by the power that originally selected him for the place, is to all intents and purposes one of the very legislative intermeddlings with local affairs that the constitution was designed to prevent.

It follows that it is the duty of the court to declare the act in question, so far as the effect thereof would otherwise be to extend the terms of office of any officer mentioned in it, either expressly or by taking from cities the power to elect and install his successor, an excess of legislative authority and void.

Before leaving the subject we should refer to State v.

Douglas, 26 Wis. 428, which the learned counsel for respondent contends supports the power of the legislature to do the thing called in question in this case. That case affirms the power of the legislature to shorten the term of an office not fixed by the constitution. That is quite a different question from the one considered here. It is one thing to elect or appoint a person to an office, or to extend the term of one already elected or appointed; that is what section 9, art. 13, in the cases covered by it, prohibits. It is quite another thing to shorten a term of office, leaving the power of the people of the locality affected unimpaired to fill the place anew, if it is to be filled at all. There is no constitutional restriction upon legislative power as to that, where the term of office is not fixed by the constitution.

Some other questions are suggested by appellant's counsel for consideration, but they do not appear to possess sufficient merit to call for special notice. The attempted extension of respondent's term of office was invalid. McGrath was entitled to take possession of the office at the time he did. The term of office of the respondent then expired.

The judgment is reversed and the cause remanded with directions to render judgment in favor of the defendant for costs.

OREN, Attorney General, *ex rel.* MAYBURY, Mayor, *et al.* *v.* BOLGER.

(*Supreme Court of Michigan, Oct. 1, 1901.*)

[87 N. W. Rep. 366.]

Constitutional Law—Statute—Not Invalid as Embracing More Than One Object—Appointment of Municipal Officers.

Act 1901 entitled "An act to amend sections 1, 2, 3, 4, etc., of an act entitled 'An act supplemental to the charter of the city of Detroit and relating to parks, boulevards, and other public grounds in said city,' and to repeal Act No. 374 of the Local Acts of 1879 entitled 'An act to provide for the establishment and maintenance of a broad street or boulevard about the limits of the city of Detroit,'" etc., abolishes the board of commissioners of parks and boulevards of Detroit as appointed by the mayor, and provides for a single commissioner, to be appointed by the council: *held*, that the power granted the council was within the title of the amended act, and such act was not violative of Const. art. 4, § 20, prescribing that no law shall embrace more than one object, to be expressed in its title.

Same—Local Self-Government—Municipal Officers—Power of Council to Appoint.

Act 1901 abolishing the board of commissioners of parks and boulevards of Detroit appointed by the mayor, and providing for a single commissioner, to be appointed by the council, does not take away from the citizens of Detroit the right to local self-government by empowering the council to appoint an officer other than ministerial.

Same—Same—Same—Same.

As power of appointment to office is not essentially an executive function in the absence of any constitutional provisions, and may be delegated to a city council, Act 1901 authorizing the council of Detroit to appoint a commissioner of parks and boulevards is valid.

Oren *v.* Bolger

Same—Same—Same—Authority of Legislature to Delegate Power of Appointment to City Council.*

Const. art. 4, § 1, vesting the legislative power in a senate and house of representatives, does not prevent the legislature from conferring the power of appointing a city administrative officer on the city council, the constitution having received this construction since 1850.

Same—Municipal Officers—Authority of Legislature to Devest Mayor of Power to Appoint Administrative Officers.

Since the territorial legislative act of 1824 placed the power of appointing administrative officers of Detroit in the common council, consisting of the mayor, recorder, and five aldermen, which power continued at the adoption of the constitution of 1850, a contention that the mayor was vested with the sole power of appointing administrative officers prior to the adoption of the constitution, and that the legislature could not devest this power, is unfounded.

Quo warranto by Horace M. Oren, attorney general, on relation of William C. Maybury, mayor, and others, against Robert E. Bolger. Writ refused, and proceedings dismissed.

Jasper C. Gates (Alfred Russell, of counsel), for relators.

John J. Speed and Robert T. Speed (Fred A. Baker and John W. Beaumont, of counsel), for respondent.

LONG, J. This proceeding is brought in this court by the attorney general by information in the nature of quo warranto on the relation of William C. Maybury, mayor of Detroit, and others, to oust the respondent from the office of commissioner of parks and boulevards of the city of Detroit. Prior to 1891 there existed in the city of Detroit a board of commissioners of parks and boulevards, consisting of four persons nominated by the mayor and approved by the common council. The legislature in 1901 abolished this board, and provided for a single commissioner, to be appointed by the common council. It is claimed by counsel for relators that the body of the act of 1901 provides for radical changes not mentioned in the title, thus rendering the act void under the provisions of section 20, art. 4, of the constitution of this state, which provides that "no law shall embrace more than one object, which shall be expressed in its title." The title of the act is: "An act to amend sections 1, 2, 3, 4," etc., "of an act entitled 'An act supplemental to the charter of the city of Detroit and relating to parks, boulevards and other public grounds in said city,' and to repeal act number 374 of the Local Acts of 1879 entitled 'An act to provide for the establishment and maintenance of a broad street or boulevard about the limits of the city of Detroit,'" etc. The act fixes the term of the office of the commissioner at four years. It also provides that at the end of that term, or in case of a vacancy, the mayor shall appoint. We find nothing in the act that might not have been

*As to the powers of the legislature in regard to the appointment and control of municipal officers, see Cook Farm Co. *v.* City of Detroit, 4 Mun. Corp. Cas. 715; Collins *v.* Russell, 2 Mun. Corp. Cas. 279, and note; Common Council of Detroit *v.* Schmid, and Ruoff *v.* Common Council of Detroit, ante, p. 515; O'Connor *v.* City of Fond du Lac, ante, p. 526.

incorporated in the original act. The power granted to the council under the new act is fairly within the title of the act amended. The act giving the council the power to appoint the commissioner of parks and boulevards has a natural connection with, and is not foreign to, the act amended "relating to parks and boulevards and other public grounds in said city." It was said in Holden v. Supervisors, 77 Mich. 204, 43 N. W. 970: "Most of the great changes in our city organizations have come in under laws which did no more than to indicate by their titles a purpose to incorporate or reincorporate or revise the corporate charter of the municipality dealt with. Anything which is meant to form a permanent element in municipal arrangements is pertinent to the incorporation." It was held in City of Detroit v. Donovan, 112 Mich. 319, 70 N. W. 894, that "it is competent to introduce by amendment anything which might have been introduced in the original act"; and the same rule was also laid down in Fort St. Union Depot Co. v. Commissioner of Railroads, 118 Mich. 340, 76 N. W. 631. The contention made cannot be sustained.

It is contended by relators that "the city of Detroit enjoys the right of local self-government by means of a mayor vested with the executive power of nomination of all city officers other than ministerial, and by means of a council vested with legislative powers, but not with the power of appointment of city officers other than ministerial; that the city of Detroit has enjoyed this right of local self-government with this division of powers at and before the time of the adoption of the constitution of 1850, which instrument recognizes and confirms this right, and was adopted subject to that right; so that the legislative power of the state cannot be exercised to take away that right, or to take from the mayor any part of the executive power, and bestow it upon the common council; that consequently the act under which the respondent claims title to his office by appointment of the council is not of constitutional validity." The legislature has not attempted by the act to deprive the citizens of Detroit of their right to local self-government. The members of the common council of the city, as much as the mayor, are the immediate representatives of the citizens. They are elected by the direct vote of the people, and represent the people, and are in as close touch with the people as is the mayor; and since the citizens of any community cannot perform any function of government in a collective capacity, and can act only through their agents, it would seem impossible to confer the power to act upon any municipal agents more nearly representative than the common council. It was said by Mr. Justice Campbell in Park Com'rs v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202: "A city is and must be, as I conceive, a unit for the purposes of government; and all bodies employed in the service of the municipality, and not

directly representing the freemen, must act as agencies subordinate to the council." But counsel for relators contend that the common council of Detroit is a legislative body, and cannot constitutionally be vested with the power to appoint an administrative officer; that the power to appoint is an executive function, and can be exercised only by the mayor. That question was discussed in People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103. Mr. Justice Christiancy, speaking for the court, said: "As to this mode of appointment being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard in the abstract. What would come within the executive power in our form of government would fall within the legislative in another, and vice versa. The question here is whether, under our constitution, it is executive or legislative; and, as the constitution has not confided the appointment of these or like officers to the executive authorities, and has left it to the legislative discretion whether to create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than a legislative power." It has been repeatedly held in other states that the power of appointment to office is not essentially an executive function, and may, therefore, in the absence of constitutional restriction, be vested in departments other than the executive. State v. Swift, 11 Nev. 128; People v. Morgan, 90 Ill. 558; People v. Freeman (Cal.) 22 Pac. 173; People v. Langdon, 8 Cal. 16; Mayor, etc., of Baltimore v. State, 15 Md. 376, 455, 456, 74 Am. Dec. 572; Fox v. McDonald, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; People v. Woodruff, 32 N. Y. 355, 356; Briggs v. McBride, 17 Or. 640, 648, 21 Pac. 878, 5 L. R. A. 115; State v. George, 22 Or. 142, 151, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; People v. Hoffman, 116 Ill. 587, 601, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; State v. Boucher, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539. These cases support the rule laid down by Mr. Justice Christiancy in the Hurlbut Case. The legislature of this state has many times conferred upon the common council of Detroit the absolute right to appoint administrative officers independently of any action of the mayor. The act creating the board of water commissioners, passed in 1853, vested in the common council the authority to appoint members of the board. Sess. Laws 1853, p. 180. At this time the mayor was a member of the common council, but in 1857 he ceased to be a member. Notwithstanding this, the appointment of the members of the water commission was still retained in the hands of the common council, and the mayor had no voice in the appointment. Id. 1857, p. 74. This was the condition of the city charter up to 1880 Charter 1880, § 77, p. 64. In 1881 an act was passed for the express purpose of giving the mayor the right to nominate the members of the water commission. Local Acts 1881, p. 379. It

also appears that under the city charter of 1857 the common council was authorized to appoint a city controller. Sess. Laws 1857, p. 74. At this time the mayor was a member of the council. Id. p. 91. The common council continued to appoint the city controller by resolution, and independently of the right of the mayor to nominate, up to 1880. In 1881 an act was passed giving the mayor the right to nominate the city controller. Laws 1881, p. 324. But up to 1881 the authority to appoint the city controller and members of the board of water commission was vested absolutely in the common council. The mayor had no voice in the selection of these administrative officers. The common council was also authorized to appoint one or more street commissioners and a marshal. Sess. Laws 1857, p. 74; Id. 1861, p. 181. There is no provision of the constitution which makes it imperative that the selection of these administrative officers must be confided to the executive officer of the city. The constitution does provide by section 14, art. 15, that "judicial officers in cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." The constitution does not provide, however, either directly or indirectly, the manner in which city and village officers shall be appointed. People v. Hurlbut, 24 Mich. 63, 9 Am. Rep. 103. It follows that the right to appoint them is not inherent in the executive or any other branch of the city government. That question is left to the discretion of the legislature to determine which branch of the local government shall exercise the power of appointment.

Counsel for relators cite the case of Commissioners of Parks & Boulevards of Detroit v. Common Council of Detroit, 80 Mich. 663, 45 N. W. 508, as sustaining the contention that the power of appointment could not be given by the legislature to the common council. That case does not sustain such contention. There the authority had been conferred by the legislature on the park commission, and under the act could not be directly exercised by the council; but the power of the legislature to confer upon the common council appointive power was not questioned. Section 1, art. 4, of the constitution, provides that "the legislative power is vested in a senate and house of representatives." Counsel for relators contend that this includes the whole legislative power within the state, including that delegated to the legislative bodies of municipal corporations; and that, as the legislature cannot exercise any but legislative powers, it can delegate only such powers to the common council, and that an act conferring administrative functions upon it would be void under the provisions of the constitution above quoted. The history of legislation in this state shows that the legislature has never so construed this provision, and any such construction would overturn most of the city charters in the state. The general act for the incorporation of cities and villages provides: "The following officers shall be appointed by the common council,

viz.: A city attorney, city surveyor, engineer of fire department and three school inspectors." 1 How. Ann. St. § 2427. It is true that in most cases the mayor is the presiding officer of the council, but he is allowed to vote only in case of a tie. It is also true that during a long period the mayor of Detroit was a member of the common council, but as such he was a member of the legislative body of the municipality, and was not then performing executive duties. Mr. Justice Cooley said in Park Com'rs v. Common Council of Detroit, 28 Mich. 228: "The constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state from considerations of general policy as well as of those which pertain to local benefits and local desires." We find no provision of the constitution which prohibits the legislature from conferring upon the common council of Detroit the power to make this appointment, and certainly the legislative construction of the constitution from 1850 to the present time has been in favor of such power.

But it is contended by counsel for relators that the city of Detroit enjoyed the right of local self-government at the time of the adoption of the constitution of 1850 with the division of powers, vesting the mayor with executive power of nomination of all city officers other than ministerial, and vesting the council with legislative powers, but not with the power of appointment of city officers other than ministerial; that, therefore, the mayor's power of appointment then existing must now be recognized, and the legislature cannot, by legislative enactment, take such power from him. We think there is no force in this contention. As early as 1824 the territorial legislature placed the power of appointment of administrative officers in the city of Detroit in the common council. At that time the common council consisted of the mayor, recorder, and the five aldermen of the city; and the majority of the council was given the power to make by-laws and ordinances, and was also empowered to appoint the adminstrative officers of the city. This power continued in the council at the time of the adoption of the constitution of 1850. The mayor was a member of the legislative body, and in the naming of the administrative officers of the city was not acting in any executive capacity. It cannot be said that the people, in adopting the constitution, recognized the exclusive right in the mayor of Detroit to appoint the administrative officers of the city. It would be as logical to claim that the right in 1850 to make such appointment rested in the common council, and that the legislature could not take away that right from it. That question, we think, needs no further consideration. We are satisfied that the act is valid, and that it was the legitimate exercise of legislative discretion in taking the power of appointment from the mayor and placing it in the common council. The respondent's title to the office must be confirmed with costs. The other justices concurred.

GOOCH *v.* TOWN OF EXETER.

(*Supreme Court of New Hampshire, Rockingham, March 15, 1901.*)

[48 Atl. Rep. 1100.]

Municipal Officers—Statute Authorizing Governor to Appoint Police Commissioners Not Unconstitutional.*

Laws 1895, c. 188, creating a board of police commissioners for the town of Exeter, to be appointed by the governor, and authorizing the board to appoint, remove, and equip the police officers of the town, who are to be paid by the town, is within Const. pt. 2, art. 5, authorizing the general court to provide by fixed laws for the naming of all civil officers within the state, except as otherwise provided in the constitution, and to define their duties, powers, etc., and to impose taxes.

Same—Same—Same.

The statute is not subject to the objection that it is taxation without representation, since it is presumed that the town was represented in the general court enacting the statute.

Same—Same—Same.

The statute is not objectionable as subjecting the town to unequal and unreasonable taxation, since it only requires it to pay its proportionate share of the total expenses of policing the state, by requiring the payment of the officers within its own limits.

Same—Same—Same—Right of Policeman Appointed by Such Commission to Recover Salary from Town.

A police officer employed by the police commissioners appointed under Laws 1895, c. 188, authorizing the appointment by the governor of such a commission for the town of Exeter, and authorizing the commission to appoint police officers, to be paid by the town, may recover for his services from the town on the obligation so imposed by statute, though there is no contract relation between the town and such officer.

Municipal Officers—Police—Authority of General Court to Fix Salary.

Under Const. pt. 2, art. 5, authorizing the general court to provide by general laws for naming and settling all civil officers, the general court may fix the compensation of the police officers of a town.

Same—Same—Same—Authority of General Court to Delegate Power to Police Commissioners.

The right of the general court to fix the compensation of such police officers may be delegated to a police commission created for a town by the general court.

Action in assumpsit by one Gooch against the town of Exeter to recover compensation as a police officer. Cause submitted on agreed facts. Case discharged.

Arthur O. Fuller, for plaintiff.

Eastman & Hollis and Frink & Marvin, for defendants.

CHASE, J. The statute creates a board of police commissioners for the town of Exeter, consisting of three members, appointed by the governor with the advice and consent of the council. The board is empowered to appoint, remove, and

*As to the powers of the legislature in regard to the appointment and control of municipal officers, see Cook Farm Co. *v.* City of Detroit, 4 Mun. Corp. Cas. 715; Collins *v.* Russell, 2 Mun. Corp. Cas. 279, and note; Common Council of Detroit *v.* Schmid, and Ruoff *v.* Common Council of Detroit, ante, p. 515; O'Connor *v.* City of Fond du Lac, ante, p. 526; Oren, Atty. Gen., ex rel. Maybury *v.* Bolger, ante, p. 538.

equip the police officers of the town, and fix their pay, and to make and enforce reasonable rules for their government. The police force is to consist of regular officers, not exceeding five, and of special officers as occasion requires. They hold office during the pleasure of the board, possess the powers of police officers and constables, and are not be paid by the town. Laws 1895, c. 188. The defendants challenge the constitutionality of the statute on these grounds: That it takes from the town control of local affairs, to which the town is entitled, that it subjects the inhabitants of the town to taxation without representation, and that the taxation so imposed is unequal and unreasonable.

The constitution confers upon the general court power "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof and of the subjects of the same, for the necessary support and defense of the government thereof; and to name and settle, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits of the several civil and military officers of the state; * * * and to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and residents within, the said state, and upon all the estates within the same." Const. pt. 2, art. 5. These terms are sufficiently comprehensive to include power to enact a statute like the one under consideration. Police officers are civil officers. Their principal duty is to assist in the preservation of the public peace,—a matter of public concern. They are state or public officers, not town or private officers. 1 Dill. Mun. Corp. §§ 58, 60, 210. The election or appointment of such officers is not provided for in the constitution otherwise than by the grant to the general court of power "to name and settle, or provide by fixed laws for the naming and settling," of all civil officers within the state. The legislature may delegate to towns or town officers authority to select police officers for their respective localities, or place upon them the duty of doing so. State v. Noyes, 30 N. H. 279. Although the power of delegation is not expressly granted by the constitution, it "is implied from the principle of local self-government." Gould v. Raymond, 59 N. H. 260, 276; State v. Hayes, 61 N. H. 264. The legislature may withdraw at will authority thus delegated or imposed, and exercise it directly or through other agencies. State v. Griffin, 69 N. H. 1, 30, 39 Atl. 260, and authorities cited. While a town possesses the authority, its right to the authority is the right of an agent,

not that of an owner. As parts of the governmental machinery (Wooster v. Plymouth, 62 N. H. 193, 208, 209), towns may be intrusted with the authority, or required to exercise it, but they cannot demand it. The legislature has made provision for having police officers or constables in all towns. Authority is given to towns and cities generally to elect, or, through their officers, to appoint, such officers, and to regulate local police affairs. Pub. St. c. 43, § 25; Id. c. 48, § 15; Id. c. 249. Early in the history of the state the legislature began to exercise its power over such matters directly in reference to particular places. In 1807 an act was passed for regulating the police in the town of Portsmouth. Laws 1811, p. 74. The act of June 28, 1823, required the selectmen of Portsmouth to appoint annually not exceeding seven police officers, and prescribed certain police offenses for the town. It went into effect in Portsmouth without action by the town, and other towns were authorized to adopt any of its provisions. Laws 1823, p. 76. If affords a good illustration of the exercise of legislative power, both directly and indirectly. Recently acts have been passed establishing boards of police commissioners for particular cities and towns, and giving the boards control over local police matters. Laws 1893, cc. 182, 202; Laws 1895, cc. 162, 188, 205. These special statutes seem to create an inequality in the rights and privileges enjoyed by towns and cities, but, when it is considered that the corporations have no inherent rights in the matter of electing or appointing police officers and prescribing police regulations, the seeming inequality fades away. It was said by Carpenter, C. J., in State v. Griffin, 69 N. H. 1, 30, 39 Atl. 260: "The equality of the constitution is the equality of persons, and not of places,—the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts penalties on every person who violates it, is an equal law, though no one can enjoy the right, be subjected to the burden, or infringe its provisions, without going to or being in a particular part of the state. It does not discriminate in favor of some at the expense of others." The circumstances pertaining to a town,—its size, the character of its inhabitants, the public sentiment prevailing among them, the nature and extent of the business carried on in the town, its educational and other institutions, its situation with reference to other communities,—these or other circumstances may make it advisable that the agencies for preserving the public peace in it should differ from those employed generally. Whether legislation of this character in a particular case "be wise, reasonable, or expedient is a legislative, and not a judicial, question." State v. Marshall, 64 N. H. 549, 550, 15 Atl. 210, 1 L. R. A. 51; State v. Griffin, 69 N. H. 1, 31, 39 Atl. 260. Dillon says: "It had been several times determined that the legislature may, unless specially restricted in the constitution,

take from a municipal corporation its charter powers respecting the police and their appointment, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature." 1 Dill. Mun. Corp. § 60. See, also, Cooley, Const. Lim. (6th Ed.) 203, 227–230, 281, 282; People v. Common Council of Detroit, 28 Mich. 228, 235, 236; Mayor, etc., v. State, 15 Md. 376; State v. Covington, 29 Ohio St. 102; Police Com'rs v. City of Louisville, 3 Bush, 597; State v. St. Louis County Court, 34 Mo. 546; State v. Hunter, 38 Kan. 578, 582, 583, 17 Pac. 177; State v. Seavey, 22 Neb. 454, 35 N. W. 228. A statute of Massachusetts creating a board of police commissioners for the city of Boston, in all essential particulars like the statute under consideration, was held to be constitutional, under a provision almost literally the same as that of the constitution of this state. Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224.

The objection that the statute subjects the inhabitants of the town to taxation without representation is not tenable. Presumably, Exeter was represented in the general court which enacted the statute. See People v. Mahaney, 13 Mich. 481, 500. Nor is the town subjected by the statute to unequal or unreasonable taxation, within the meaning of the constitution. In common with all other towns of the state, it is required to bear its proportional share of the burden of preserving the public peace. It cannot decline to perform the duty, nor refuse to raise the necessary taxes for the purpose. Cooley, Const. Lim. 282. This burden is not distributed by apportioning to towns taxes to provide money with which to meet the expense, but by requiring towns to support the local officers reasonably necessary for preserving the peace within the town limits. This statute requires Exeter to pay the police officers necessary for the town; and other statutes, general and special, require the other towns of the state to pay the corresponding officers in their towns, respectively. The duty in this matter closely resembles that in regard to highways. Cooley, Tax'n, 476–478. Towns are bound to build and maintain, wholly or partially, the highways within their borders, although laid out without their consent, or even against their strenuous opposition. If the selectmen laid out any of the highways, they acted, not as town agents, but as public officers. The only voice towns had in deciding whether they would assume the burden was in the legislature, through their representatives, when the statutes which imposed it were under consideration. The money raised by towns for the repair of highways is largely expended by public officers, over whose actions towns have no control. Laws 1893, c. 29; Laws 1899, c. 29; Ball v. Town of Winchester, 32 N. H. 435, 440; Hardy v. Keene, 52 N. H. 370; Gross v. City of Portsmouth, 68 N. H. 266, 267, 33 Atl. 256. It is said in a recent

case in Massachusetts, where, as previously remarked, the constitutional provision is similar to that of this state: "No doubt, the legislature might provide for the appointment of public road masters entirely independently of the towns, and still require the towns to pay the expenses of keeping the roads in repair." In re Kingman, 153 Mass. 566, 575, 27 N. E. 778. The burdens thus placed upon towns are not exactly equal. Some towns have relatively a longer line of highways in the aggregate, or highways that are more expensive to maintain, than other towns. But this method of apportioning the public duty of maintaining highways has been practiced from the early history of the state, and does substantial justice. And so towns are bound to pay local police officers, although they have no direct voice in the appointment of the officers, and although the public burden is not thereby distributed in mathematical proportion. If the plaintiff had been elected by the towns or appointed by its selectmen under legislative authority, probably no question would be made regarding the obligation of the town to pay for his services. The transaction then would have the appearance of an employment of the plaintiff by the town. It would have the semblance of a contract. Yet when it is considered that the seeming employment is not such in fact, but is the designation of a person to perform the duties of a public office, and that it is made by the town not on its own account, but as an agent of the state, the immateriality of the town's act upon the question of its obligation to pay for the officer's services becomes apparent. The obligation does not arise from a contract, but, like the obligation to build and repair highways, is imposed by the general court. 1 Dill. Mun. Corp. §§ 73, 74. The pay of an officer is an incident of his office. Obviously, power to "name and settle" an officer and set forth his duties includes power to fix his compensation. The general court may fix the compensation directly, or delegate authority to fix it to a governmental agency. The salaries of county solicitors, sheriffs, and county treasurers are instances in which the compensation of public officers has been established directly by the legislature, although paid from the county treasuries. Pub. St. c. 286, §§ 17–20. The county conventions have no voice whatever in the matter. The salaries of the judges of police courts in cities are generally fixed by the same authority, although payable from the city treasuries. The act establishing the board of police commissioners of Portsmouth provides that the compensation of the marshal shall be $1,000 a year, and of the other police officers $2.50 a day, to be paid by the city. Laws 1895, c. 162, § 4. The acts relating to Concord, Manchester, and Laconia, respectively, delegate to the city councils of the city authority to fix the pay of officers appointed under them, and provide that the amounts so expended shall not exceed the amounts appropriated for the purpose. Laws 1893, c. 182, § 8; Id. c. 202, § 5; Laws 1895, c. 205, § 8. The

act under consideration delegates the authority to the board of commissioners. Laws 1895, c. 188, § 5. There appears to be nothing in this fact that renders the act unconstitutional. Case discharged.

YOUNG, J., did not sit. The others concurred.

MICHIGAN CENT. R. CO. *v.* CITY OF BAY CITY.

(*Supreme Court of Michigan, Jan. 7, 1902.*)

[88 N. W. Rep. 638.]

Dedication of Highway—Recorded Plat—Subsequent Deed of Right of Way to Railway Crossing Same Not Operating as Withdrawal.

A third person, owning a tract of land, made and recorded a paper purporting to be a plat thereof, showing, among other streets, First street, running east and west. He afterwards quitclaimed to a railroad company a right of way 50 feet in width, 25 feet on the east and 25 feet on the west side of the line which it should thereafter construct through certain described land; the addition platted being part of the tract described. The railroad company had already made provision for occupying First street, the council having authorized it to occupy "any street in the city," and several persons already owned lots including a right to the fee to the center of First street: *held* to indicate an intention of the part of the parties that First street was to be occupied by virtue of the resolution passed by the council, and that the right of way conveyed by the deed was to be confined to the balance of the tract owned by the third person, which had not been platted by him; and therefore that the deed did not operate as a withdrawal of the offer to dedicate, even if such offer had not been accepted.

Same—Acceptance*—Resolution of Council Authorizing Construction of Railway in Same Operating as Acceptance.

A resolution of the common council authorizing the construction of a railroad through land dedicated to the city as a street is effective as an acceptance by the city of the offer to dedicate.

Appeal from circuit court, Bay county, in chancery; Theodore F. Shepard, Judge.

Bill for an injunction and to quiet title by the Michigan Central Railroad Company against the city of Bay City. From a judgment dismissing the bill, complainant appeals. Affirmed.

E. A. Cooley (Henry Russel and Ashley Pond, of counsel), for appellant.

James E. Duffy (A. McDonnell, of counsel), for appellee.

HOOKER, J. One Fitzhugh, being owner of a large tract of land contiguous to or within the limits of Bay City, made and caused to be recorded on March 22, 1869, a paper, purporting to be a plat of a portion of the tract, as an addition to the city. This plat is bounded on the easterly side by Park avenue, also mentioned in the record as the "Carney Road,"

*As to what constitutes the acceptance necessary to complete the dedication of a street or highway, see notes appended to Moffatt *v.* Kenney, 2 Mun. Corp. Cas. 727; City of Seattle *v.* Hill, 5 Mun. Corp. Cas. 191; Downend *v.* City of Kansas City, 4 Mun. Corp. Cas. 238.

and upon the westerly side by Trumbull street, both admitted to be public highways at the time complainant's railroad was constructed. Extending from east to west and across the addition, intersecting both Park avenue and Trumbull street, the map shows seven streets; viz., Nebobish avenue, upon the northern boundary of the plat; next, North street; and then, at regular intervals, streets numbered from first to fifth. The lots averaged about an acre in area, and fronted streets at both ends. Upon December 18, 1871, a corporation known as the Detroit & Bay City Railroad Company obtained permission from the common council of Bay City to locate its line of railroad through any street in the city that it might elect to use for the purpose, by a resolution reading as follows: "Resolved, that in the opinion of this council it is for the best interests of the city to grant the right of way to the Detroit & Bay City Railroad through any street in the city that they may select, and that we do hereby grant the same subject to the ordinances now in force, or may be hereafter adopted." It is claimed that there is testimony tending to prove that it was understood by all that First street would be occupied under this resolution, if it should be adopted. As already stated, Fitzhugh owned much land contiguous to this addition, and on June 29, 1872, he made a deed of a right of way to the railroad company mentioned of land "fifty feet in width; i. e., twenty-five feet on the east and twenty-five feet on the west side of its line which would be thereafter established across sections 22, 23, 26, and 27, in township 14 N., range 5 east." This addition was upon a part of the land described. In the summer of 1873 the railroad company acknowledged and recorded its map, showing the location of the route of its road, upon which its line was shown as located in First street, between the Carney road and Trumbull street; and during the same summer the iron was laid, and the road was operated, and it has been continuously since, though it has changed hands, and now is operated by the complainant under a lease for a long term. Fences have been constructed and maintained by the railroad company upon each side of the track 25 feet from the center line, and across the strip upon the confines of Trumbull street and the Carney road. Cattle guards were also maintained at the crossings of these streets. Previous to the location of the railroad, Fitzhugh had contracted a number of lots fronting upon First street, and most of them were subsequently deeded by him. Under these contracts and conveyances the fee was granted to the center of the street. At the time the railroad was built there had been one house erected upon one of the lots, and others were built afterwards. The date of the erection of the fences built by the railroad company is in dispute; some witnesses for the company testifying that they were erected about the time the road was built, while many witnesses think it was done at a much later date, in which they seem to be corrobo-

rated by the fact that many of the lot owners erected and maintained fences upon the street line, which was some five feet outside of the railroad fence when constructed. These private fences had small gates opening upon the street, and some bars permitted ingress and egress in one or more instances. When the railroad fence was built, we understand that there is evidence that in some cases small gates were left to correspond with those theretofore existing in the private fences, and that in one instance a gate or pair of bars was left. Also a pair of bars was made in the fence running from the cattle guard to the line fence, and was continued for a time, and at all times the alleged street was commonly used by the inhabitants of the locality to walk on; and there is evidence that teams occasionally traversed a portion of it to reach adjoining premises, though, as the street was never improved, it was not in a condition to invite much use by vehicles. It seems evident to us that the persons owning adjoining premises were desirous of having the street opened, and in June, 1890, they induced the common council to take action, and the following notice was served upon the railroad company: "Bay City, Mich., July 7, 1890. Michigan Central Railroad Co., W. J. Martin, Esq., D. Superintendent—Dear Sir: I am instructed by the common council to notify you to remove the fence on the east side of First street between Johnson and Park avenue, where the same crosses the street. The city desires to grade the same so as to enable the people residing on either side to get in and out. In case you are at a loss to understand just what is wanted, I would be pleased to confer with you at any time. Yours, etc., John C. Weadock, City Attorney." Mr. Weadock testified upon the trial that he knew that the notice reached the officers of the company, and that he was informed that the company would comply, and, soon after, it removed the cattle guards and end fences. A few months later they were replaced, and this brought on a conflict between the railroad and city authorities, which culminated in the filing of this bill by the former to restrain the interference with its fences and to quiet its title. None of the adjoining proprietors were made parties. The learned circuit judge dismissed the bill, and the complainant has appealed.

The railroad company claims title under its deed from Fitzhugh to a strip of land 50 feet wide through the center of First street, and, to prevail, it must prove such title. It is possible that the description in the deed is broad enough to include a right of way over platted lands belonging to Fitzhugh upon either of the sections mentioned, in the absence of any circumstances indicating a contrary intent; but it cannot be supposed that Fitzhugh intended to grant a right of way over lands which he had sold, or in highways which he had dedicated. Furthermore, the deed was a quitclaim deed, and the title conveyed was only what Fitzhugh had. Again, the

fact that the railroad company had already made provision for getting through First street, which the resolution of the council was broad enough to cover, and the fact that several persons owned lots, including a right to the fee to the center of First street, so that such deed would not convey any valuable right to such portion, beget a strong presumption that neither party understood that Fitzhugh intended to convey title by this deed across the platted ground, and to allow the railroad company to cut a series of lots in two by building its road across them, and that he did not intend to convey lots already sold, but that all understood that the right of way conveyed by the deed was confined to the acreage property, and that the street should be occupied under the resolution already passed.

It is urged that the street was not dedicated by the plat because of defective acknowledgment, and that a common-law dedication was not effected, because the offer to dedicate (which is patent enough) was not accepted by the city, and must be treated as withdrawn. There is nothing to indicate a withdrawal by Fitzhugh, unless it be the deed of the right of way or the bare lapse of time, and we have already indicated that we think that deed was not intended to have such effect. There is evidence, uncontradicted, that the council understood, when its resolution was passed, that First street was to be used. If that is so, its action was significant upon the question of acceptance. Indeed, to provide for the construction of a railroad through land dedicated would be as effective a way for the public to make use of the land as a highway as to do a little grading upon it. This testimony is supplemented by the railroad map, from which it appears that the company understood that First street was accepted, and that its line was to occupy a portion of it. There is no broad equity which demands the conclusion that Fitzhugh withdrew his offer. On the contrary, he owed a plain duty to every man to whom he had sold not to do it, because he was under contract obligations with them to maintain a street if the public did not. He lost the power to withdraw his dedication as to such of the lands as he sold to others. The city plainly declared its intent in 1890, and, without holding that the railroad company recognized the dedication, or lost any rights by taking down the fence when required, we are satisfied that it never took a title superior to the rights of contiguous owners in the fee, nor was it ever in a situation to deny the rights of the public in the street. Some claim is made of title by adverse possession, but we think it clearly disproved.

The decree of the circuit court is affirmed, with costs. The other justices concurred.

CITY OF INDIANAPOLIS *et al.* *v.* BOARD OF CHURCH EXTENSION OF UNITED PRESBYTERIAN CHURCH.

(*Appellate Court of Indiana, Division No. 2, Feb. 5, 1902.*)

[62 N. E. Rep. 715.]

Exceptions to Conclusion of Law as Waiver of Objections to Findings of Fact.

An exception to the conclusions of law on findings of fact admits the findings of fact to be true.

Dedication of Highways—Estoppel of City to Claim Entire Width of Street after Accepting and Improving Less Than Entire Width*—Laches.

The owner of certain land platted it for a city, and designated thereon a certain street as 80 feet wide. A subsequent owner replatted it, and designated the street as 90 feet wide. The city permanently improved the street to a width of 80 feet, and the abutting lots were improved, used, and fenced up to the line of the street as improved. The city for over 40 years assessed and collected taxes on such abutting lots, and treated the street as 80 feet wide, never objecting to the lot owner's use of the 10-foot strip: *held*, that after 40 years the city could not, as against the lot owners, claim the 10-foot strip that had not been opened and used as a street, for the city had only accepted the part of the street used, and not the whole width intended to be dedicated by the owner making the second plat.

Same—Same—Standing of Mortgagee to Maintain Suit to Remove Cloud from Title.

A mortgagee, after conveying the mortgaged estate with a warranty of title, may maintain a suit in equity to relieve the estate from a cloud affecting the rights under the mortgage, thus protecting the title conveyed and warranted.

Same—Same—Estoppel of Party to Suit to Quiet Title to Object to Decree Vesting Title in Himself.

A party to an action to quiet title cannot complain of a judgment settling in him title to the land in dispute.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by the Board of Church Extension of the United Presbyterian Church against the city of Indianapolis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Kern, J. E. Bell, John F. Carson, and Charles M. Thompson, for appellants.

Bell & Purdum and Blackledge, Shirley & Wolf, for appellee.

WILEY, J. The controversy involved in this appeal is over the title to a strip of ground 10 feet wide and about 60 feet long at the intersection of Massachusetts avenue and East street in the city of Indianapolis. Appellee was plaintiff, and appellants, as defendants, answered separately by denial. Trial by the court, and upon proper request the court made a special finding of facts, and stated its conclusions of law

*As to the repairing or improving of part of the land dedicated as a street operating as an acceptance of the whole, see notes appended to Downend *v.* City of Kansas City, 4 Mun. Corp. Cas. 252; City of Ashland *v.* Chicago & N. W. Ry. Co., 4 Mun. Corp. Cas. 288.

thereon. Though the conclusions of law were favorable to appellant Weiss, yet he has appealed. Each of the appellants moved for a new trial, which motions were overruled. The errors assigned bring before us for review the conclusions of law and the overruling of the motions for a new trial.

The real point in issue depends upon whether Massachusetts avenue, immediately in front of the real estate in controversy, is 90 or 80 feet wide. If it is 90 feet wide, then said real estate is a part of the highway, and not a part of the abutting lots. On the contrary, if the avenue is only 80 feet wide, then said 10-foot strip is not a part of the highway, but a part of the abutting lots. The court found as a fact that the avenue at that point was only 80 feet wide. Massachusetts avenue, as originally laid out and improved, up to the point where it intersects East street, is 90 feet wide. It is the contention of appellee that said avenue, as extended northeast beyond East street, is only 80 feet wide. In 1836 one John Wood was the owner of outlot 41. Outlot No. 41 was at the intersection of East street and Massachusetts avenue, and formed the northeast corner of said intersection. Massachusetts avenue was shown on the original town plat, which plat showed said outlot No. 41, and on which said avenue was marked and designated as 80 feet wide in front of said outlot. November 7, 1836, said Wood made and executed a plat of said outlot, together with other lands, into 25 lots, numbered from 16 to 40, which plat was duly recorded. In this plat Massachusetts avenue, as extended northeast, was designated as 90 feet wide. Upon said plat, fronting west on East street, was marked three lots, viz., 27, 28, and 29, which lots were immediately north of Massachusetts avenue. Said lot No. 27 was triangular in shape, and was immediately in the angle formed by the intersection of said avenue and street. Lot 27 had a frontage on East street of 88 feet, and the strip of land in controversy was between the north line of said avenue as shown by the original plat and the south line of said lot No. 27 as shown on Wood's plat. By subsequent conveyances one David G. Cale became the owner of said lots 27, 28, and 29. February 19, 1872, said Cale subdivided said lots, by a duly executed and recorded plat, into seven lots, numbered from 1 to 7, inclusive, all of which lots fronted on Massachusetts avenue. At the rear of lots 1 and 2 of Cale's subdivision an alley is designated on the plat, and dedicated to the public. On said plat the width of Massachusetts avenue is not designated. February 19, 1872, said Cale executed his corrected plat of subdivisions of lots 27, 28, and 29, and on December 22, 1883, caused the same to be recorded. Said corrected plat divided said lots into eight instead of seven lots. By successive conveyances the title to lots 1 and 2 in Cale's subdivision was vested in appellee June 7, 1872. June 19, 1896, appellee conveyed to appellant Weiss said lots 1 and 2, in which conveyance they were described as follows: "Com-

mencing at the southwest corner of lot 1, at the intersection of the east line of East street and the northwest line of Massachusetts avenue, running thence north along the east line of East street one hundred (100) feet; thence east at right angles with said East street fifty (50) feet, to the east line of lot number two (2); thence south along the east line of lot number two (2) to the northwest line of Massachusetts avenue; thence southwest along the northwest line of said avenue to the place of beginning, as shown by the corrected plat," etc. Since 1872 the city of Indianapolis has made improvements upon the roadway and sidewalks of Massachusetts avenue at various times in front of said lots, and in all of said improvements the city treated and improved said avenue as being 80 feet wide, treating the northwest line of said avenue as the original line, as shown on the original plat, opposite said lots 1 and 2. During all of said time persons owning and occupying said two lots have maintained a fence on said line of Massachusetts avenue along the northwest line of said sidewalk as so improved, and during said time used and occupied the lands lying within the limits described by said fence. The said avenue, at the time this case was tried, had been permanently improved in the roadway by asphalt, and the sidewalks with cement. Since said subdivision the city of Indianapolis has assessed and collected taxes on said lots 1 and 2, and during all of said time said 10-foot strip has been treated by said city as a part of said lots. During all these improvements the city treated said avenue opposite said lots as being 80 feet wide, and the north line thereof as originally shown on the city plat of outlot 41, and the same as the fence line has at all times been, which fence line is the same as it has been for 40 years. In 1873 a blacksmith's shop was built on the north line of said avenue, on the line as above described, covering said 10-foot strip, and has since remained there. A dwelling house stands on lots 1 and 2, and one corner thereof rests on said 10-foot strip, and has so rested since 1884. During all this time appellant city never objected to such use of said 10-foot strip as a part of said lots. Under the various conveyances of said lots 1 and 2 the successive grantees, including appellant Weiss, took possession of said 10-foot strip to said fence line, and have at all times maintained such possession without objection from the city. The description in the deed to Weiss was intended by the parties to the deed to cover as a part of the lots said 10-foot strip, the southwest corner of said land being the corner made by the intersection of the east line of East street and the north line of Massachusetts avenue, as originally indicated in the original plat of outlot 41, and said Weiss took possession of said strip, and still holds such possession. The court specifically found that said 10-foot strip was not dedicated to the city as a part of the highway; that the same was never accepted by the city as a part of the highway; and that said city never

at any time or in any manner or extent possessed, controlled, or used the same as a part of the highway, or for any other purpose. The last finding of the court is as follows: "That the parties have, by agreement, excluded all questions from the issues and trial herein, except the question as to whether said ten (10) foot strip is a part of a public highway of the city, or whether the same is a part of said lots, and conveyed as such to said Weiss, reserving all questions as to other matters than the title thereto." Upon the facts so found the court concluded as a matter of law that said 10-foot strip was a part of said lots, that it was conveyed to said Weiss as such, and that the title to it should be quieted in him.

In view of the facts found, we do not see how the court could have reached any other conclusion. By excepting to the conclusions of law, appellants admitted, for the purpose of their exceptions, that the facts found are indisputably true. Railway Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264; Blair v. Curry, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; Insurance Co. v. Koontz, 17 Ind. App. 625, 47 N. E. 233. The court found as a fact that Massachusetts avenue, opposite lots 1 and 2, was only 80 feet wide; that the city had recognized said fact by improving it to that width, and had caused to be constructed permanent cement sidewalks and an asphalt roadway, the width of all of which is only 80 feet. There is an abundance of evidence to support this fact, notwithstanding the fact that the Wood plat designates the avenue as 90 feet wide. It is clear that the city never accepted a dedication of the avenue 90 feet wide at the point in controversy; while, on the contrary, all the facts show that it only accepted a dedication of 80 feet. Even Wood's plat, although designating the avenue as being 90 feet wide, was made with express reference to the "original plat of the town of Indianapolis and its environs, as filed in the recorder's office of Marion county July 5, 1831." Wood's subdivision of outlot No. 41 was a part of the original plat, and in the original plat Massachusetts avenue opposite outlot No. 41 was designated as being 80 feet wide. By referring to the original plat, he made it a part of his plat, and in this manner adopted the width of the street as thereon indicated opposite his subdivision. So we must read the Wood plat in connection with the original plat. If there is a conflict, we must try and reconcile it. The fact that on the original plat the avenue was designated as 80 feet wide, while on the Wood plat it was designated as 90 feet wide, makes the conflict in the plats themselves irreconcilable. In such case we must look to the practical construction given to them by all the parties interested. Truett v. Adams, 66 Cal. 223, 5 Pac. 96; McCormick v. Barnum, 10 Wend. 104. As construed by the parties in interest,—the successive grantees, and especially the city of Indianapolis,—there can be no doubt but what they have been guided by the original plat, and accepted and

recognized the avenue opposite the land in controversy as being 80 feet wide. By a reference to the evidence we find that the officers of the city recognized the avenue as being of that width, and for the improvement of the roadway and sidewalks assessed lots 1 and 2 as abutting property, and as adjoining the original north line of said avenue as shown by the original plat. Such assessment of necessity included the 10-foot strip. So far as the record shows, the city of Indianapolis never claimed this 10-foot strip as a part of the highway until after this litigation was commenced. The city never needed it for a street, and does not now. The roadway and sidewalks are permanently improved to the width of 80 feet, as shown by the original plat. It is unreasonable to believe that if, by this litigation, it should be determined that this 10-foot strip was a part of Massachusetts avenue, the city would tear up the permanent improvements it has caused to be made, and widen the avenue at this point for a distance of about 67 feet. We are clearly of the opinion, in the light of the facts, that the city never accepted a dedication of a 90-foot roadway in front of this property, and the validity of the dedication depends upon an acceptance. Steinauer v. City of Tell City, 146 Ind. 490, 45 N. E. 1056. See, also, Booraem v. Railway Co., 40 N. J. Eq. 557, 5 Atl. 106. A dedication of a public highway may be accepted in part and relinquished in part. So, if it be conceded, for the argument, that Wood dedicated to the public a street 90 feet wide, it does not necessarily follow that the entire width had to be accepted. There may be an acceptance and appropriation in part, and not for the whole. A piece of land may be dedicated to public use, and yet the public convenience may not require the whole of it. In such event the part needed may be accepted and appropriated, and the residue, by common consent, be relinquished. See State v. Trask, 6 Vt. 355, 27 Am. Dec. 554; Town of Carrollton v. Jones, 7 La. Ann. 233; In re One Hundred and Sixtieth St., 48 Hun, 488, 1 N. Y. Supp. 237. The case of Bell v. City of Burlington, 68 Iowa, 296, 27 N. W. 245, is directly in point. There two proprietors of two adjacent additions to the city together dedicated a strip 90 feet wide for a street. The city used and improved only the east 60 feet, and the purchasers of the lots on the west line of the street occupied, inclosed, and improved the land up to the west line of the 60-foot strip improved and used as a street, and continued for 30 years to occupy the west 30 feet originally dedicated for street purposes. It was held that it must be conclusively presumed that the city occupied for street purposes only the east 60 feet so dedicated, and that it could not claim the right by virtue of the original dedication to occupy the whole 90 feet with the street. See, also, Davies v. Huebner, 45 Iowa, 574; Incorporated Town of Cambridge v. Cook, 97 Iowa, 599, 66 N. W. 884; Uptagraff v. Smith, 106 Iowa, 385, 76 N. W. 733; Jordan v. City of Chenoa, 166 Ill.

530, 47 N. E. 191. In the last case cited it was held that a city has no rights in streets and alleys shown on a recorded plat till an acceptance thereof, and that taking control of certain streets and alleys shown on a recorded plat is not an acceptance of others. By a party of reasoning, it seems clear to us that an acceptance by city of a part of a street shown on a recorded plat, and repeated improvements of such part, for over 40 years, is an abandonment or relinquishment of that portion not occupied or improved, and must be held to be an acceptance only of the part so occupied and used. In the case of Hamilton v. State, 106 Ind. 361, 7 N. E. 9, it was held that, where a public highway through a given district or neighborhood or along a particular line had been maintained for more than 20 years substantially of a uniform width less than that at which it was laid out and established, and valuable improvements—as fences, etc.—have been made in good faith on the appearance of things, the law will presume an abandonment of so much of the highway as has been thus occupied. So in this case, if there was any evidence to show an acceptance of Massachusetts avenue as 90 feet wide, as designed by the Wood plat,—which there is not,—yet, under the rule declared in the Hamilton Case, the city of Indianapolis could not now assert any right to the entire 90 feet, in view of the established facts. Upon the question of abandonment see Railroad Co. v. O'Connor, 37 Ind. 95; Railway Co. v. Shanklin, 98 Ind. 573; Town of Freedom v. Norris, 128 Ind. 377, 27 N. E. 869. The court finds that the city never accepted any dedication of the strip of land in controversy for highway purposes, although by the Wood plat Massachusetts avenue was designated as 90 feet wide opposite outlot No. 41, which would include the strip in controversy. It is also found that by the original plat said avenue was designated as 80 feet wide. The evidence shows that the city accepted and improved the avenue to a width of 80 feet. There is no evidence or finding that the public or any individual ever acquired, for any public use or purpose, any right in or to said 10-foot strip. It follows, therefore, that the court's findings upon all material facts are amply supported by the evidence. The rights of the city, and consequently the rights of the public, are not in any manner infringed by the conclusion reached by the trial court.

We see no good reason why a mortgagee cannot maintain a suit in equity to relieve the mortgaged estate which he has conveyed from any cloud or embarrassment which might affect his rights under the mortgage, and thus protect the title which he has conveyed and warranted. The following authorities seem to recognize such right: Polk v. Reynolds, 31 Md. 106; Wofford v. Board, 44 Miss. 579. The court finds as a fact that doubt had arisen and that a controversy was threatened between appellee and appellant Weiss as to the title to said 10-foot strip of land. Under these facts

appellee had a right to resort to the courts to have the question determined, to the end that it might protect the title and make good its warranty. Appellant Weiss is certainly not in a position to complain of the result reached, for the judgment of the court settles in him the land in dispute.

Appellants' motions for a new trial each question the sufficiency of the evidence to support the decision, that the decision of the court is contrary to law, and that the several special findings are not sustained by sufficient evidence. In our judgment, none of the reasons for a new trial are well founded, and the foregoing discussion substantially dispose of all of them adversely to appellants.

Judgment affirmed.

BROWN *v.* CITY OF WEBSTER CITY.

(*Supreme Court of Iowa, Feb. 1, 1902.*)

[88 N. W. Rep. 1070.]

Street Commissioner—An Agent of the City—Acts Done in Excess of His Authority—Liability of City Where It Ratifies Same.

Under a city ordinance providing that "it shall be the duty of the street commissioner to superintend all improvements upon the streets," and that in the discharge of such duty he shall be under the direction of the city council, etc., as to time and place of expending work, the street commissioner is an agent of the city, and in doing the work is acting within the scope of his authority, so that if he exceeds it the city may by adoption be bound by his acts.

Evidence—Municipal Records—Admissibility of Other Evidence Where No Records Are Kept.

The records of a city council are not the only evidence of its acts, and where no record is kept the next best evidence is admissible.

Grading Streets—Failure of City Employees to Follow Statute—Sufficiency of Evidence to Show Ratification by City of Employees' Wrongful Acts.

In an action against a city for excavating a street without following the statute as to the establishment of grades, plaintiff's evidence showed, not only that the street commissioner did the work according to a grade fixed by the surveyor employed by the city and under the directions of the chairman of the committee on streets, but that the city paid the commissioner, the surveyor, and others during the work; that the street commissioner made monthly reports to the council; and that grade stakes were set with the aid of the chairman and other members of the street committee and of the council, and that nearly all the members of the council saw the work while it was being done: *held* sufficient to establish defendant's connection with the wrong done as matter of law, notwithstanding its evidence that the acts were done in the first instance without express authority.

Same—Same—Elements of Damage*—Trees—Grass—Shrubbery—Well on Premises.

In an action against a city for excavating a street without follow-

---

*As to the right to recover damages for injuries caused by the grading of streets, and the measure of such damages, see notes appended to Ehrsam *v.* City of Utica, 1 Mun. Corp. Cas. 70; McGar *v.* Borough of Bristol, 1 Mun. Corp. Cas. 538; Chatham St., In re, 2 Mun. Corp. Cas. 555; Philadelphia Ball Club, Ltd., *v.* City of Philadelphia, 2 Mun. Corp. Cas. 738; New Haven Steam Sawmill Co. *v.* City of New Haven, 3 Mun. Corp. Cas. 65; Mayor, etc., of City of Macon *v.* Wing, 5 Mun. Corp. Cas. 680.

ing the statute as to the establishment of grades, evidence as to the damage, caused by the excavation, to trees, shubbery, grass, and to a well on plaintiff's premises, was properly admitted.

Appeal from district court, Hamilton county: J. R. Whitaker, Judge.

Action at law to recover damages for excavating a street in front of plaintiff's premises without following the statute with reference to the establishment of grades. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Richard and Wesley Martin, for appellant.
D. C. Chase, for appellee.

DEEMER, J. All the controlling questions involved in this appeal save one were decided adversely to appellant in Richardson v. City of Webster City, 111 Iowa, 427, 82 N. W. 920, and Millard v. City of Webster City (Iowa) 84 N. W. 1044, to which cases reference is made for a statement of the essential facts. The one question which it is claimed was not disposed of relates to an instruction given by the court on the trial of this case to the effect that the evidence conclusively established defendant's connection with the wrong done and its liability for any damages which might be proved. The same instruction was given in the Millard Case, but it is contended on this appeal that no issue was made in that case regarding defendant's connection with the wrong, and no evidence introduced by it tending to show that the work was done without its direction or knowledge. The record does not justify the first of these contentions. In the Millard Case, the question of defendant's responsibility was in issue.

Regarding the testimony, it is enough to say that each side added something on this trial additional to the facts shown in the Millard Case relating to this issue. Plaintiff adduced evidence to show not only that the street commissioner did the work according to a grade fixed by a surveyor employed by the city and under the directions of the chairman of the committee on streets and alleys, but that the city paid the commissioner, the surveyor, and others at regular intervals during the progress of the work for the labor performed by them; that the street commissioner made detailed monthly reports of the work to the city council, and that grade stakes were set by the surveyor, with the aid of the chairman and other members of the street and alley committee and other members of the city council; and that nearly all the members of the council saw the work as it was being done, and made no objections thereto. True, defendant offered evidence to show that it passed no resolution or ordinance authorizing or directing the work to be done; that the engineer had no authority to set grade stakes, but made his survey for the purpose of establishing a sewer system, and filed his report with reference thereto; that he was not regularly employed

by the city council for the purpose of establishing a grade, and that what he did in this connection was under the direction of the chairman of the street and alley committee alone; that this chairman had no authority to establish grade lines or to grade streets, and that the street commissioner had no such authority. Of course, the city should not be made liable unless it is shown that it in some manner counseled or authorized the work, or ratified it after it was done. But it must be remembered that this is an action sounding in tort, and that the degree of proof required is not as great as if the city were sought to be held on contract. All who contribute to a tort, whether personally present or absent at the doing of the act, are personally liable to the person injured for the entire damage, and if a trespass is done ostensibly for the benefit of another, and to his use, and that other agrees to the act, his subsequent agreement has the same effect as if he had originally commanded it. The mere approval of a wrong done by one's agent in excess of his authority is often equivalent to express authorization. As a rule, ratification must be with knowledge of all the facts, or with the purpose on the part of him who is sought to be held to take the consequences upon himself without inquiry. But, where an act is simply in excess of authority, mere approval of the wrong is generally held sufficient. These rules are elementary, and are fully sustained by Cooley on Torts (pages 145–149). In applying them to the instant case, it must be remembered that the city council has the care, supervision, and control of all streets, and that it is made its duty to keep the same open and free from nuisances (Code, § 753); that it has power to provide for the grading of streets (Id. § 782); and that it has power to abate nuisances (Id. § 696). It should further be borne in mind that the street commissioner is appointed by the city council, and as its agent has such power, and is required to perform such duties, as are prescribed by law or ordinances. The ordinance of defendant city provides that "it shall be the duty of the street commissioner to superintend all improvements upon the streets, alleys and public grounds within the city; and in discharge of said duty he shall be under the directions of the city council or the committee of streets and alleys, as to time and place of expending work on streets and alleys." He is thereby made an agent of the city, and in doing work the city is authorized to perform presumptively does so with authority. In other words, such work is within the scope of his employment, and if he exceeds his authority the city may by adoption be bound by his acts. Generally speaking, the acts of a city council can only be shown by its records, ordinances, and resolutions. But these are not conclusive, nor are they the only evidence of what is done. If this were not so, the city might escape liability simply through failure to make a record. As to third persons, its records are by no means controlling. The primary ques-

tion is, what did it do? Ordinarily, the records are the "mind and memory" of a corporate body, but, if there be no record, we go to the next best evidence. The work done by the street commissioner in this case was within the apparent scope of his authority, and was done ostensibly for the benefit of the city and by its direction, and not for his individual pleasure or profit, or because of independent statutory or municipal authority, as in Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373. There the highway surveyor was a public officer charged by law with the duty of doing the work performed by him, independent of any action on the part of the city. In this case the work was done with the knowledge of the chairman of the street and alley committee, whose knowledge in this respect is in all cases imputed to the city. It was done after a survey was made under the directions of this chairman, so that it is clear the city had full and explicit knowledge of what was being done in its behalf. With this knowledge, it approved the act by paying the bills therefor, by assuming the benefits derived therefrom, and by adopting the reports made by the street commissioner showing the condition of the work. These facts are all undisputed, and the question, reduced to its last analysis, is this: Assuming all these facts to be true, does the fact that the acts were done without express authority make such a conflict in the evidence as to require the court to submit to the jury the question of defendant's liability? We think not. Under the undisputed evidence, the street commissioner was assuming to act for the city, and the city unquestionably approved of what he did by paying the bills for the work, and by accepting his reports showing what was done. These acts of adoption were made of record in so far as any record could properly be made thereof. But, if this were not so, we think adoption and approval may be shown by facts not made of record. If the chairman of the street and alley committee is chargeable with notice of what he sees is being done on the street, as it must be conceded he is, then the city is required to act on this notice or be bound by the consequences resulting from inaction. Surely, a formal meeting of the street and alley committee, or of the city council, is not needed to charge defendant with notice of what is being done on the streets, nor can defendant escape liability, through failure to call a formal meeting of the proper governing body. With this record before it, we think the trial court did not err in assuming that defendant was responsible for the damage, if any was done. Our conclusions find support in Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481; Woodcock v. City of Calais, 66 Me. 234; Platter v. City of Seymour, 86 Ind. 323; City of Chicago v. Chicago & W. I. R. Co., 105 Ill. 73.

Testimony was admitted, over defendant's objections, tending to show the effect of the excavation on trees and shrubbery on plaintiff's lot, and on a well located thereon, and

the court instructed that these matters, together with the effect on plaintiff's means of ingress and egress to his said lot, might be considered in determining whether or not plaintiff's lot was injured. Testimony as to the effect of the cut on trees growing on the opposite side of the street from plaintiff's premises, and which afforded shade for his yard, was brought out by defendant on cross-examination of plaintiff, and, while plaintiff said that in his estimate of damages he took these into account, defendant did not move to strike out his evidence, or in any other manner bring this to the attention of the trial court, that it might rule thereon.

The evidence as to damage to trees, to shrubbery, and to grass, and to the well, was all competent and relevant to the issues made by the pleadings, and there was no error in admitting it, or in the giving of the instruction with reference thereto. Millard v. City of Webster City, supra.

There is no error, and the judgment is affirmed.

YEAGER v. INCORPORATED TOWN OF SPIRIT LAKE.

(*Supreme Court of Iowa, Feb. 6, 1902.*)

[88 N. W. Rep. 1095.]

Defective Sidewalk—Personal Injuries—Evidence of Other Injuries as Tending to Show Knowledge of Defect.*

Where the evidence in an action for injuries received from a defective sidewalk tends to show that the entire sidewalk along a certain block was out of repair at the time of the injury, it is not error to admit evidence that another person was injured on the same sidewalk, and served notice of injury on the town.

Damages—Instructions—Evidence—Harmless Error.

Where the instructions in an action against a town for injuries received from a defective sidewalk eliminate all claims for damages except for physical pain and suffering, and medical and nursing services, and medicine, the admission of evidence of the number of plaintiff's family, and that she had been a weaver, is not reversible error.

Evidence—Condition of Walk—Opinion of Plaintiff.

The plaintiff in an action against a town for injuries received from a defective sidewalk may be asked whether she thought, on attempting to pass over the walk, that she could do so with safety, in view of her knowledge of its condition.

Same—Evidence of Condition of Walk Prior to Time of Accident as Tending to Show Knowledge of Defect.†

Evidence is admissible, in an action against a town for personal injuries resulting from a defective sidewalk, to show the condition of the walk and repairs thereof for many years prior to the accident, to show not only the actual condition of the walk, but defendant's knowledge thereof.

Same—Same—Admissibility of Municipal Records Made Subsequent to Time of Plaintiff's Injury—Harmless Error.

Where the evidence in an action against a town for personal injuries received from a defective sidewalk shows prior accidents occurring on the walk, the admission of the record of the city council showing

---

*See Gable v. City of Kansas City, 1 Mun. Corp. Cas. 491, and note.
†See Lyons v. City of Red Wing, 1 Mun. Corp. Cas. 483, and note.

the appointment of a committee to look up claims of other persons injured thereon is harmless error, though the record was not made until after plaintiff's accident.

Same—Evidence of Condition of Walk Prior to Accident—Whether Statement of Fact or Conclusion.

Evidence in an action against a town for personal injuries received from a defective sidewalk that the walk was in the same condition at various times is admissible as a statement of fact, and is not a mere conclusion.

Same—Admissibility of Declarations Showing Present Suffering.

Declarations of plaintiff showing present suffering are admissible in an action for personal injuries.

Same—Damages—Expense of Nursing*—Services of Nurse Cannot Be Shown to Have Been Gratuitous.

Where plaintiff in an action for personal injuries attempts to recover a bill for nursing, the defendant cannot show on cross-examination that such services were rendered gratuitously.

Contributory Negligence—Insufficiency of Evidence to Show Contributory Negligence as Matter of Law—Case at Bar.

Plaintiff, 69 years of age and nearly blind, was injured by falling on a defective sidewalk while going to church. She knew that the walk was in a defective condition, but there was nothing which indicated that it was especially dangerous, and it was the only walk to the church: *held* not sufficient, as a matter of law, to show that plaintiff was guilty of contributory negligence.

Same—Question of Fact.

The question whether a person receiving injury from a defective sidewalk was in the exercise of due care is to be determined from all the circumstances in the case.

Appeal from district court, Dickinson county; W. B. Quarton, Judge.

Action at law to recover damages for personal injuries sustained by plaintiff while passing along and over a sidewalk in the defendant town. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

V. A. Arnold and Cory & Everett, for appellant.

St. Clair & Reigard and Milt. H. Allen, for appellee.

DEEMER, J. While passing along and over one of the sidewalks in defendant town, plaintiff, an old lady, 69 years of age, tripped and fell thereon, and, because of her fall, claims that she was severely and permanently injured. It is charged that the sidewalk was old and rotten, that the boards and timbers of which it was constructed were weak and insufficient to sustain the weight of persons passing along and over the same, and that defendant was neglect in not repairing it. All these matters are denied in the answer, and on the issues thus joined the case was tried to a jury, resulting in a verdict and judgment for plaintiff.

1. The first point made is the lack of evidence to support the verdict. The testimony is conflicting, and with the finding of the jury we should not interfere. The charges of negligence were couched in general terms, and are not specific,

*See Keyes *v.* City of Cedar Falls, 1 Mun. Corp. Cas. 1, and note at p. 19.

as defendant contends. The sidewalk in question was on the east side of lots 2, 3, and 4 in block 20. Plaintiff was permitted, as a part of her case, to show that another lady, who was hurt on this same sidewalk, served notice of her injury on the defendant town. It is said that this notice was erroneously admitted, because it did not appear that this other was injured at the same place where plaintiff fell. As plaintiff contended that the entire walk was out of repair, the testimony was admissible. This may also be said of other testimony adduced by plaintiff tending to show that the entire walk along block 20 was out of repair. Hoover v. Town of Mapleton, 110 Iowa, 572, 81 N. W. 776; Bailey v. City of Centerville, 108 Iowa, 23, 78 N. W. 831, and cases cited. Over defendant's objection plaintiff was permitted to show the number of the members of her family. As the court, by its instructions, eliminated all claims for damages except for physicial pain and suffering, and medical services and nursing, and medicine, no prejudice resulted, even if the ruling is conceded to be erroneous. Testimony was also offered by plaintiff to show that she had been a weaver. In view of the instructions just mentioned, there was no prejudicial error in the admission of this evidence. Plaintiff was asked whether or not she thought, when she attempted to pass over the walk, that she could do so with safety in view of her knowledge of its condition. Her thought about the matter was a material inquiry. If she knew the walk was unsafe, and that it was imprudent for her to attempt to pass over it, it was her duty to take another one. But knowledge of its unsafe condition was not enough, as a matter of law, to require her to take another route. It should also appear that she knew, or ought to have known, that it was imprudent for her to attempt to pass over it. Owen v. City of Ft. Dodge, 98 Iowa, 289, 67 N. W. 281. Evidence was adduced to show the condition of the walk, and repairs made of the same, for many years prior to the accident. This evidence was proper, as tending to show not only the actual condition of the walk from time to time, but defendant's knowledge thereof. A record of the city council, showing that a committee was appointed to look up claims of two others who were injured on this same sidewalk, was introduced by plaintiff. This record was not made until after plaintiff received her injuries, but it related to claims filed before. Evidence as to these prior accidents were properly admitted under the rule heretofore stated; and the record to which we have referred, although not, perhaps, admissible, created no prejudice. The only effect it could have had would be to show that the city had notice of these prior accidents. That was definitely shown by other evidence, and no prejudice resulted. We do not reverse because testimony is admitted out of its proper order. Although not strictly rebuttal in character, the trial court may admit it as evidence in chief, and the mere fact that it is improperly admitted in rebuttal

will not be ground for reversing the case. Witnesses were interrogated as to the relative condition of the walk at different times, and generally stated it was in the same condition at one time as another. This called for a fact, and not a conclusion, and was properly admitted in evidence. Testimony as to declarations made by plaintiff showing present pain and suffering was properly admitted. The court would not permit defendant to show on cross-examination of some of plaintiff's witnesses that the nursing bill sought to be recovered was for services rendered gratuitously. The ruling seems to be correct. Varnham v. City of Council Bluffs, 52 Iowa, 698, 3 N. W. 792. Statements made by plaintiff to her physician were properly given in evidence by the physician himself. Several other rulings on the admission and rejection of evidence are complained of, but they are not of sufficient importance to demand separate consideration. Generally the rulings were correct. Where incorrect, there was no prejudice.

2. Defendant contends that plaintiff was, as a matter of law, guilty of contributory negligence. It appears that she was 69 years of age at the time she met with the accident, and that she was nearly blind; that with her husband she started on the evening in question to go to church; that they took the sidewalk to which we have referred,—that being the only one leading from their house to the church; and that while passing over the same the plaintiff's foot caught therein, and she received the injuries of which she complains. There was nothing in the condition of the weather or of the walk which indicated that it might be specially dangerous to pass over it on the evening in question. Notwithstanding plaintiff's knowledge of the walk, and her own defective eyesight, it was not negligence, as a matter of law, for her to pass over the walk. Sylvester v. Incorporated Town of Casey, 110 Iowa, 256, 81 N. W. 455; Hoover v. Town of Mapleton, 110 Iowa, 572, 81 N. W. 776, and cases cited. Sidewalks are made for the use of the lame, the halt, and the blind, as well as for persons in the full possession of their faculties. The standard of care owing to them is not ordinarily increased by reason of defects of sight or of hearing, but these defects do not of themselves prevent one possessed thereof from going onto the public streets. Ordinary care under the circumstances is all that is required of them, and whether or not it has been exercised is generally a question of fact for a jury. Stewart v. City of Ripon, 38 Wis. 584; Davenport v. Ruckman, 37 N. Y. 568. The trial court left this matter to the jury under proper instructions, and its action is approved.

Certain of the instructions are complained of, and error assigned on the refusal of the court to give certain requests made by the defendant. The law in such cases is too well settled and understood to need amplification. It is sufficient to say that the charge given contained a clear exposition of the law, and that such of the requests as announced correct

principles were embodied in charge, and those which were incorrect were properly refused. The court instructed that plaintiff was required to exercise ordinary care to avoid the injury, and that whether or not she used this degree of care must be determined from all the circumstances in the case. This instruction was correct. Langhammer v. City of Manchester, 99 Iowa, 301, 68 N. W. 688. Greater watchfulness may be required under some circumstances than under others, but the measure is the same in every case, to wit, ordinary care and watchfulness. Whether or not this was exercised depends, of course, very largely, on the surrounding circumstances. Hall v. Incorporated Town of Manson, 90 Iowa, 588, 58 N. W. 881. This was the fair purport of the charge given by the court, and defendant is in no position to complain of the court's refusal to give the instructions asked by it relating to this subject.

The size of the verdict is complained of. It was for $750. Viewed in the light of the record before us, it does not seem to be unreasonable.

There is no prejudicial error, and the judgment is affirmed.

GAGNIER *v.* CITY OF FARGO.

(*Supreme Court of North Dakota, Jan. 17, 1902.*)

[88 N. W. Rep. 1030.]

Defective Sidewalks—Bicycles—City Liable to Bicycle Rider Injured by Defect in Sidewalk While Lawfully Riding Thereon.

Under the ordinances of the city of Fargo quoted in the opinion, it is *held* that the plaintiff was rightfully riding his bicycle upon the sidewalk in question when injured, and that the city would be liable for damages to the plaintiff, if, without fault on his part, he was injured by reason of the fact that such walk was not in reasonably safe condition for travel by pedestrians.

Same—Same—Public Travel on Sidewalk Includes Person Riding Bicycle.

The trial court instructed the jury that the city would be liable for injuries suffered under such circumstances if the sidewalk was not in reasonably good and safe condition for public travel: *held* error, as public travel on such walk includes traveling by persons by riding on a bicycle.

Same—Same—City Not Liable to Wheelmen if Sidewalk Was Reasonably Safe for Pedestrians.*

The duty of the city is fulfilled, so far as bicycle riders are concerned, if the sidewalks are in condition for reasonably safe travel thereon by pedestrians.

(Syllabus by the Court.)

Appeal from district court, Cass county; Chas. A. Pollock, Judge.

Action by N. D. Gagnier against the city of Fargo. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

---

*See Lee *v.* City of Port Huron, ante, p. 301, and foot-note.

H. F. Miller, for appellant.
Pierce & Von Neida, for respondent.

MORGAN, J. On October 18, 1899, the plaintiff was riding on his bicycle on the sidewalks of the defendant city, and was thrown therefrom and injured. He brings this action to recover damages for such injury. The complaint alleges that the city "negligently suffered and permitted the sidewalk on which the injury occurred to be and remain unsafe, unsuitable, and insufficient for the public use and travel thereon," and that such sidewalk was "rendered unsafe, unsuitable, and insufficient * * * by reason of the fact that many bricks had been removed therefrom, leaving a large, deep, and dangerous hole therein, * * * and also by reason of the fact that other bricks in said sidewalk, around the borders of said hole therein, were then and there loose, and not properly bedded upon the surface of the ground, so that pressure upon them would overturn them." The complaint further states, in substance, that while riding on such sidewalk on his bicycle on said day, and while in the exercise of due care, and without fault of his own, plaintiff was thrown from such bicycle by reason of such defective and unsafe conditions of such sidewalk, and injured. After a trial a verdict was rendered in his favor for the sum of $300. The defendant duly moved for a new trial upon a statement of the case duly settled, and such motion was denied. The city appeals from the order denying the motion for a new trial.

The assignments of error relate to alleged errors in giving instructions to the jury, errors of law in admitting testimony, the refusal to direct a verdict for the defendant, and the insufficiency of the evidence to justify or sustain the verdict. A consideration of two of the assignments will suffice to decide the case as presented on the appeal. These two assignments pertain to the question whether the city is liable, in any event, for damages growing out of injuries caused while riding a bicycle on the sidewalks of the city, and whether the instructions to the jury, duly excepted to, correctly laid down the law as to the liability of the city for injuries to persons caused by defective sidewalks while such persons are riding thereon on bicycles.

The city of Fargo was incorporated as a city under the general law for the incorporation of cities. Under such general law the city council is vested with power to lay out streets, and to regulate the use of the same. Like power is vested in the council "to regulate the use of sidewalks." Section 2148, Rev. Codes. Under such general law the city council of Fargo enacted the following ordinances:

"Sec. 5. No person shall place, push, draw or back any wagon, cart or other vehicle on any sidewalk, or use, drive or ride any horse or other animal, wagon, sleigh or other vehicle thereon, unless it be in crossing the same to go into a yard or

lot where no other suitable crossing or means of access is provided."

"Bicycle Ordinance.

"(1) Bicycles on Sidewalks of What Streets. No person shall ride any bicycle or tandem on the sidewalk of that part of any street or avenue upon which the roadway of such street or avenue is paved or on the west side of Eighth street South between Front street and Eighth avenue South or on Roberts street between Northern Pacific avenue and Second avenue South.

"(2) Shall Have Alarm—How Given—Speed. No person shall ride any bicycle or tandem on any street or avenue at any time without carrying an alarm bell or whistle, which shall be rung or sounded at least 75 feet before meeting or passing a person on a similar vehicle or on foot upon any sidewalk * * * and the speed of all bicycles or tandems shall be reduced to not more than five miles per hour while meeting or passing any person on any sidewalk."

In our opinion, section 5, given above, was not enacted with a view to prohibit the riding of bicycles on the sidewalks of the city of Fargo. The use of the word "vehicles" in the ordinance, it is claimed, gives it a sufficiently broad meaning to include bicycles. That the bicycle is now classed as a vehicle is true. Had the ordinance forbidden the use of all vehicles on the sidewalks, it would, without question, be a prohibition of the use of the bicycle on the sidewalks. But if that ordinance prohibits the use of bicycles on the sidewalks, it must be by virtue of the fact that the word "vehicle" includes in its meaning a bicycle. The word "vehicle" is here used in connection with the words "wagon," "cart," and "sleigh," and was intended to include, and should be construed as limited to, other vehicles of a like character with those mentioned. This construction seems the more reasonable in view of the provisions of the bicycle ordinance quoted above. If section 5 was intended to include within its provisions bicycles, then the passage of the ordinance prohibiting the use of bicycles on certain streets was unnecessary and accomplished nothing, and was an enactment the subject of which was already covered by ordinances already in force, or enacted at the same time. Construing the three ordinances together, effect can be given to all of them only by construing the first as not intended to include bicycles within its prohibition.

Coming now to a consideration of the bicycle ordinance, it is clear that section 1 is an express prohibition against riding the bicycle on the streets and avenues therein described. The injury of which the plaintiff complains occurred on Sixth avenue North, between the points of intersection with Second and Third streets North. Sixth avenue North is not paved, and is not included within the district on which the riding of bicycles is prohibited under section 1. This brings us to the consideration of the provisions of the ordinance, in section 2

thereof, defining the conditions under which it shall be unlawful to ride bicycles on streets or avenues not included within the district in which the use of bicycles is absolutely prohibited. Under the language of such section, it cannot be said that the use of bicycles is absolutely prohibited or authorized. In effect, and by necessary implication, the language permits their use there if the conditions named are complied with. To ride a bicycle on the avenue where the accident occurred was not unlawful in itself, nor prohibited by an ordinance. The plaintiff was rightfully riding his bicycle there under a conditional authority given by the city, and therefore with its assent. The matter of authorizing or prohibiting the using of the sidewalks by persons riding bicycles is within the powers delegated to city councils. Such councils may license the use of the sidewalks by such persons, or may entirely prohibit their use to persons riding bicycles. Although the sidewalks are primarily constructed and to be used by pedestrians, and the bicycle is a vehicle, that under some circumstances more properly belongs to the highway or street, still the council is empowered to regulate the conditions under which the sidewalks may be used by bicycles, or to prohibit the use of the sidewalk by them entirely. This power is left to the discretion of city councils, as they can easily determine when the use of the sidewalks by persons riding bicycles is or may be dangerous, and when not dangerous, and necessary for the convenience, business, or pleasure of the traveling public. The following cases will be found instructive upon the question of the powers of city councils to regulate the use of streets and sidewalks for bicycles: Lechner v. Village of Newark (Sup.) 44 N. Y. Supp. 556; Jones v. City of Williamsburg (Va.) 34 S. E. 883, 47 L. R. A. 294; Swift v. City of Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; Lee v. City of Port Huron (Mich.) 87 N. W. 637; Holland v. Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307.

The city having by these ordinances permitted persons to ride on the sidewalks under certain conditions and regulations, it follows that the plaintiff was not unlawfully riding his bicycle on the walk in question when the injury occurred. The city having thus permitted this sidewalk to be used by bicycle riders, what, if any, duty did it owe to such persons, so far as maintaining such walk in such condition that such use of it would not be attended with danger? In this state it has been held that cities owe it as a duty to pedestrians to keep the sidewalks in condition for safe travel, and that such cities are liable for damages occurring by reason of the negligence of the city in not keeping such walks in proper repair for safe travel thereon, and are so held liable although not made so by express statute. Ludlow v. City of Fargo (N. D.) 57 N. W. 506. That sidewalks are not intended for use by vehicles in general cannot be disputed. That such walks

are built to be used by pedestrians may be taken as true, also. That the bicycle is classed as a vehicle is also true. The authorities so hold, we believe, without exception. 4 Am. & Eng. Enc. Law, page —, and cases cited; also cases hereinbefore cited; Myers v. Hinds (Mich.) 68 N. W. 156; Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533. The city, by its enactments, made it rightful for the plaintiff to ride on the walk in question upon his bicycle. It did not thereby, nor is there any general law to that effect, assume any new obligation or duty to him while riding the bicycle on such walk. Its duty is to maintain the walk in suitable condition for pedestrians, and its duty to bicycle riders, to any greater degree than to pedestrians, cannot be predicated upon the mere fact of having granted permission to use the walks with bicycles. It is a matter of common knowledge and observation that a sidewalk in suitable condition for safe travel by pedestrians would not be safe for bicycle riders traveling thereon. A very slight defect in the walk or road often causes an accident to the bicycle rider, which could under no circumstances interfere with travel by pedestrians. The test whether the sidewalk is in safe condition for travel is that it must be safe for pedestrians, and not for those using bicycles. The trial court instructed the jury as follows: "Under the law, it is the duty of the defendant city to keep its sidewalks in reasonably good order and condition for the safe use and convenience of the traveling public. The defendant's duty to keep its sidewalks in a reasonably safe condition for travel applies to a defect in the construction, as well as the neglect to repair any injuries found therein. If you find from the evidence that the sidewalk in question was in an unsafe condition, and that the plaintiff was injured thereby without any contributory negligence upon his part, * * * then your verdict will be for the plaintiff." The defendant duly excepted to the giving of each of these instructions. The objection urged against them is that the city is to be held liable, under the rules therein laid down, if the sidewalks are not safe for travel by bicycle riders. The evidence in the case shows that this walk was used by persons while riding on bicycles, and the jury must have understood from such instructions that these walks must be kept in condition for safe travel by the traveling public, including those persons riding bicycles. Such is not the law, and a different rule has been upheld even in cases where permission was granted to persons to ride their bicycles upon sidewalks upon payment of a sum of money as a license. The court, in Sutphen v. Town of North Hempstead (Sup.) 30 N. Y. Supp. 128, said: "It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, * * * but under the present highway laws a road in a condition which is rea-

sonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain." In Leslie v. City of Grand Rapids (Mich.) 78 N. W. 885, the supreme court of Michigan has said: "Where a street is kept in a reasonably safe and fit condition for ordinary vehicles, such as wagons and carriages, a town is not liable for injuries received by one thrown from her bicycle by reason of its defective condition." The same court reaffirmed the doctrine of the last case in Lee v. City of Port Huron, 87 N. W. 637, and used this language: "Comp. Laws, § 3441, requiring sidewalks to be kept in reasonable repair, and in a condition reasonably safe for travel, only requires that a sidewalk shall be kept in such repair as to render it safe for ordinary uses, and does not mean that it shall be kept in a safe condition for bicycle riding, though a lawful city ordinance authorizes such use." In Morrison v. City of Syracuse (Sup.) 61 N. Y. Supp. 313, the court said: "One injured while rightfully riding a bicycle on the sidewalk cannot recover, if the sidewalk was in a reasonbly safe condition for pedestrians, though it was not in a reasonably safe condition for bicycle riding." In Wheeler v. City of Boone (Iowa) 78 N. W. 909, 44 L. R. A. 821, the court says: "One injured while riding a tricycle on a sidewalk can recover only if the city was negligent in failing to keep the walk in suitable condition for people to walk over," etc. The instructions given by the trial court to the jury failed to inform the jury, directly or indirectly, that, if the sidewalk in question was in a reasonably safe condition for travel by persons walking thereon, then the city would not be liable for plaintiff's injuries caused while attempting to travel over the walk on his bicycle. Because the city has permitted the use of this street by persons riding a bicycle cannot be a ground for holding that such permission imposed upon the city additional responsibility to keep the walks in that extra good condition of repair required for safe travel by bicycle riders. It is well known that a higher degree of perfection in building and keeping sidewalks in repair would be required than at present if the city were compelled to keep the walks in condition for riding upon bicycles. A person riding a bicycle has a right to assume that the walk is in safe condition for pedestrians to use, and, if he is injured when the walks are in such condition, he cannot complain, and he must bear the loss, as he assumed the risk. If not in such condition, he can recover for injuries, if he acted without contributory negligence.

For these reasons, the order is reversed, a new trial granted, and the cause remanded for further proceedings according to law. All concur.

WOOD *v.* BOROUGH OF STAFFORD SPRINGS.

(*Supreme Court of Errors of Connecticut, Jan. 29, 1902.*)

[51 Atl. Rep. 129.]

Defective Sidewalks—Personal Injuries—Notice of Injury*—Sufficiency of Description of Place Contained in Notice.

A notice to a borough stating that the subscriber was injured on the sidewalk or highway called "G. Street," at a point in said highway on the south side of said street west of a certain house, and "at the junction" of G. street with a certain avenue, sufficiently described the place where the injury occurred, within Pub. Acts 1895, c. 172, requiring such description, where the westerly line of the avenue as extended intersected the southerly line of G. street about 12 feet east of the place of injury, though the east line of the avenue intersected the north line of G. street 75 feet away.

Same—Same—Same—Sufficiency of Description of Defect and Injury Caused Thereby.

A notice to a borough respecting a personal injury, stating that "the defect in said street consisted in this, to wit: In that snow and ice had accumulated on said walk, and the same was then in a dangerous condition, and had so remained for an unreasonable time," and that at a certain time, "by means of said defect, the subscriber fell, and was greatly injured, in that the back of his head was badly cut and bruised, and he was injured internally," sufficiently describes the injury and its cause, within Pub. Acts 1895, c. 172, requiring such description.

Same—Snow and Ice—Admissibility of Former Notice of Defect to Prove Defendant's Knowledge of Defective Condition at Time of Accident.

In an action against a borough for injuries due to an icy sidewalk, a third person's testimony that, a month before, she told the street commissioner that, owing to snow and ice, "it was dangerous there for man and beast," was admissible in order to show notice to the authorities.

Appeal from superior court, Tolland county; Ralph Wheeler, Judge.

---

*As to the necessity of giving notice of claim and the sufficiency of such notice, see Bancroft *v.* City of San Diego, 1 Mun. Corp. Cas. 274, and note; Seamons et ux. *v.* Fitts, Town Treasurer, 1 Mun. Corp. Cas. 465, and note, 478; Lyons *v.* City of Red Wing, 1 Mun. Corp. Cas. 483; Roberts *v.* Village of St. James, 2 Mun. Corp. Cas. 331; Ziegler *v.* City of West Bend, 2 Mun. Corp. Cas. 333; Frost *v.* City of Casselton, 2 Mun. Corp. Cas. 521; Harris *v.* City of Fond du Lac, 2 Mun. Corp. Cas. 650; Missano *v.* Mayor, etc., of New York, 2 Mun. Corp. Cas. 654; Sheehy *v.* City of New York, 2 Mun. Corp. Cas. 684; Sachs *v.* City of Sioux City, 2 Mun. Corp. Cas. 732; Engstrom *v.* City of Minneapolis, 3 Mun. Corp. Cas. 34; City of Lincoln *v.* Pirner, 3 Mun. Corp. Cas. 233; Finnegar *v.* City of Sioux City, 4 Mun. Corp. Cas. 413; Neal *v.* Town of Marion, 6 Mun. Corp. Cas. 346; Welsh *v.* City of Franklin, 6 Mun. Corp. Cas. 496; Wilkins *v.* City of Flint, 6 Mun. Corp. Cas. 608; Wheeler *v.* City of Detroit, 6 Mun. Corp. Cas. 650; Barret *v.* City of Mobile, 6 Mun. Corp. Cas. 652; Broffee *v.* City of Grand Rapids, 6 Mun. Corp. Cas. 772; Terryll *v.* City of Faribault, 6 Mun. Corp. Cas. 773; Teryll *v.* City of Faribault, 6 Mun. Corp. Cas. 774; McLean *v.* City of Boston, 6 Mun. Corp. Cas. 776; Fiske Wharf & Warehouse Co. *v.* City of Boston, 6 Mun. Corp. Cas. 776; Saunders *v.* City of Fitzgerald, 6 Mun. Corp. Cas. 777; Foster *v.* Village of Bellaire, 6 Mun. Corp. Cas. 778; Brown *v.* City of Owosso, ante, p. 379; Tattan *v.* City of Detroit, ante, p. 382; Wilton *v.* City of Flint, ante, p. 384.

Wood *v.* Borough of Stafford Springs

Action for personal injuries by James Wood against the borough of Stafford Springs. Judgment for plaintiff, and defendant appeals. No error.

The appeal, which was filed November 16, 1901, was by mistake taken to the January term, 1901, instead of 1902. For this defect the appellee filed a plea in abatement in this court, whereupon the appellant requested permission to amend the appeal by substituting "1902" for "1901" which, after a brief consultation by the court, was granted, and the appeal was amended accordingly.

Joel H. Reed and William A. King, for appellant.

Charles Phelps and Thomas F. Noone, for appellee.

TORRANCE, C. J. The complaint in this case alleged, in substance, that the plaintiff, without fault on his part, had been permanently injured physically through the negligence of the defendant in failing to make reasonably safe for public travel a certain highway dangerous to such travel on account of ice and snow. One of the important questions in the case relates to the sufficiency of the statutory notice given by the plaintiff to the defendant. The defendant claims that said notice does not sufficiently describe the injury, nor the cause of it, nor the place where it occurred. Because of these claimed defects the defendant in the trial court objected to the admission of the notice in evidence, and to certain evidence offered under it, and asked the court to instruct the jury that by reason of the defective notice the plaintiff was not entitled to recover. The court overruled the objection, admitted the notice in evidence, and the evidence offered under it, and instructed the jury that the notice was sufficient. The statute under which the notice was given required the plaintiff to give to the defendant a written notice of his injury, "and a general description of the same, and the cause thereof, and of the time and place of its occurrence." Pub. Acts 1895, c. 172. As bearing upon the claim that the notice given did not sufficiently describe the place where the injury occurred, the following facts were in evidence: The street in the borough upon which the injury occurred was Gold street. This street, 25 feet wide, runs from Main street almost due east for a little over 200 feet, then in a northerly direction for a short distance, and then turns and runs almost due east again. Just where Gold street thus turns to the eastward again, its northerly line, or its easterly and northerly lines, are intersected by the east and west lines of Fiske avenue, a later built street running northerly from Gold street; and near where Gold street turns in a northerly direction stands a house called the "A. F. Werner house," being the first house on the southerly side of Gold street after leaving Main street, and the nearest house to the place where the injury occurred. The injury occurred on the sidewalk on the southerly side of Gold street at a point 163 feet easterly from

Main street, between that street and the Werner house, and westerly or southwesterly of that house. This point was marked "B" on a map or plan of the locality which was in evidence, and which showed the junction of Gold street with Fiske avenue. From B to the intersection of the east line of Fiske avenue with the north line of Gold street the distance in a straight line was about 75 feet; while in the same way the distance from B to the intersection of the west line of the avenue with the north line of Gold street was considerably less. The west line of Fiske avenue prolonged southerly intersects the south line of Gold street "westerly of the Werner house about twelve feet easterly of the point where the accident occurred"; while the east line of said avenue prolonged southerly cuts the south line of Gold street "almost directly in front and north of the Werner house." These facts were substantially undisputed, and it is in view of them that the claim is made that the notice does not sufficiently describe the place of the injury. The notice was addressed, "To William H. Heald, Clerk of the Borough of Stafford Springs," and it described the place of the injury as follows: "You are hereby notified that on the 12th day of January, A. D. 1899, the subscriber hereto fell and was injured on the sidewalk or highway, known and called 'Gold Street,' at a point in said highway on the south side of said street, west of the house owned by A. F. Werner, and at the junction of Gold street and Fiske avenue." The phrase "junction of Gold street and Fiske avenue" was here used in a loose, popular, practical sense, as including the open space made where these highways met and mingled, as it would appear to one on the ground there; and did not mean, and could not well be understood to mean, a fixed mathematical point; and the word "at" in such a connection means "at or near," or other equivalent phrase. The defendant is thus informed that the injury occurred on the sidewalk on the south side of that short stretch of Gold street lying between Main street and the Werner house, and at or near the junction of Gold street with Fiske avenue; and this is just where it did occur, for the place of the injury was on the southerly sidewalk of Gold street, between Main street and the Werner house, and only 12 feet easterly of the junction. For all the practical purposes to be subserved by a notice of this kind, we think the notice in this case contains a reasonably accurate description of the place of injury.

The injury itself, and the cause of it, are set forth in the notice as follows: "The defect in said street consisted in this, to wit: In that snow and ice had accumulated on said walk, and the same was then in a dangerous condition, and had so remained for an unreasonable length of time. On said 12th day of January, A. D. 1899, at about half past six o'clock in the morning, by means of said defect, the subscriber fell, and was greatly injured, in that the back of his head was

badly cut and bruised, and he was injured internally." We think this notice contains a reasonably sufficient general description of the injury and its cause and place of occurrence, within the principles laid down by this court in cases of this kind. Gardner v. City of New London, 63 Conn. 267, 28 Atl. 42; Budd v. Railroad Co., 69 Conn. 272, 37 Atl. 683; Cloughessey v. City of Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Dean v. Town of Sharon, 72 Conn. 667, 45 Atl. 963; Breen v. Town of Cornwall, 73 Conn. 309, 47 Atl. 322. This being so, it follows that most of the assignments of error in this case, all those relating to the rulings and charge of the court with reference to the sufficiency of the notice, are without foundation, and so not available to the defendant.

This leaves for consideration certain rulings upon evidence, and certain parts of the charge of the court which are assigned for error. The objections made by the defendant to the testimony of the plaintiff to the nature and extent of his injuries, and to the testimony of Stebbins and Taft as to the condition of the sidewalk and street on the day of the accident, were all based upon the claim that the notice as to these matters was insufficient, and, as his claim was unfounded, the objections were properly overruled. Evidence had been offered to show that, owing to the conditions existing at the place of the accident, it was peculiarly dangerous to allow ice and snow to accumulate there. Mrs. Wheeler, a witness for the plaintiff, testified that in the month preceding the plaintiff's injury she complained to the warden of the borough, who was also then and at the time of the plaintiff's injury street commissioner, and told him that the presence of snow and ice at the place of the accident rendered public travel there dangerous. She was then asked to repeat what she said to the warden, and said, "I told him it was dangerous there for man or beast." To the question and answer the defendant objected generally, but the court admitted the evidence "simply to show that the borough authorities ought to be regarded as having notice of a condition of things likely to prove a dangerous defect by reason of snow and ice." We think the evidence was admissible for this purpose, and, besides, it was but a repetition of what she had already said in substance without objection.

The defendant claimed that the evidence in the case tended to prove (1) that the plaintiff had been guilty of contributory negligence, and (2) that the condition of the street at the time of the injury was due solely to a storm of the previous evening; and in its reasons of appeal it complains of the charge as given upon these points, and of the refusal of the court to charge concerning them as requested. As to these claimed errors it is enough to say that the trial court complied in substance with the requests, and that the charge upon each of the points in question was correct, and sufficient for the guidance of the jury.

There is no error. The other judges concurred.

DEVINE *v.* CITY OF FOND DU LAC *et al.*

(*Supreme Court of Wisconsin, Jan. 28, 1902.*)

[88 N. W. Rep. 913.]

Defective Sidewalk—Personal Injuries—Contributory Negligence as Matter of Law—Choosing Part of Walk Which Is Obviously Dangerous in Preference to Part Which Is Obviously Safe.

Plaintiff slipped on a stone sidewalk, and sued the city and the abutting owners. The sidewalk was 18 feet wide, and constructed of limestone flaggings of irregular size and shape, their upper surface worn smooth from excessive use. It sloped slightly towards the street, and was very slippery. On the side furthest from the street a plank walk had been laid over the stones, some eight feet wide. The accident happened on a clear, bright day in October, and there was no sleet or snow on the walk. Plaintiff walked a short distance on the plank walk, and then stepped off onto the stones and fell. She testified that she looked down onto the stone walk before stepping onto it, and that it looked rough: *held* to show contributory negligence on plaintiff's part, and that she should have been nonsuited.

Same—Same—Right to Make City and Abutter Joint Defendants*—Construction of Fond du Lac City Charter and Wisconsin Statute.

The city charter of Fond du Lac (Laws 1883, c. 152, subc. 18, § 1) provides that lot owners shall at all times maintain their sidewalks in safe condition, and shall be liable to persons injured where they fail to do so. Section 2 declares that the only cause of action against the city "shall be by reason of the failure * * * to collect a judgment recovered against the owners." Section 3 prescribes that whenever an execution shall have been returned unsatisfied, and there is no fraud or collusion, the injured party may then sue the city. Rev. St. 1898, § 1340a, provides that, where an injury has happened in any city by reason of a defective highway, or from any other cause for which the city is liable, and such injury is due to the neglect of a third person, the latter shall be primarily liable, but the city may be joined as defendant, and judgment entered against all parties found liable, but that execution against the city shall be stayed until the return of execution unsatisfied against the other party: *held*, that section 1340a did not authorize the joining of the city of Fond du Lac with the person primarily liable, its charter expressly requiring that execution against such party be returned unsatisfied before the action against the city is commenced.

Same—Same—Abutting Owner Made Primarily Liable by City Charter.†

The city charter of Fond du Lac (Laws 1883, c. 152, subc. 18, § 2) provides that the city shall not be liable for injuries resulting from defective sidewalks, or any neglect in the keeping of the sidewalks in safe condition, and that the only cause of action against the city shall be by reason of the failure of the injured person to collect judgment recovered against the owner: *held* to make the lot owner primarily liable for injuries resulting from mere lack of repair.

Appeal from circuit court, Fond du Lac county; Michael Kirwan, Judge.

Action by Elizabeth Devine against the city of Fond du

---

*See Dutton *v.* Borough of Lansdowne, 5 Mun. Corp. Cas. 558, and note appended to Brown *v.* Town of Louisburg, 4 Mun. Corp. Cas. 126.

†See notes appended to Brown *v.* Town of Louisburg, 4 Mun. Corp. Cas. 126; City of Denver *v.* Hyatt, 5 Mun. Corp. Cas. 149; Mayor of Wilmington *v.* Ewing, 2 Mun. Corp. Cas. 64; Rushton *v.* City of Allegheny, 3 Mun. Corp. Cas. 32.

Lac and others. Judgment for plaintiff, and certain defendants appeal. Reversed.

This action is brought to recover damages for injuries claimed to have been sustained by plaintiff by slipping on a stone sidewalk in the city of Fond du Lac. The defendants Welch and Mangan are made parties with the city as being the owners of the property in front of which the accident occurred. The sidewalk in question was constructed of limestone flags of irregular size and shape. The defect complained of consisted in the fact that the stones were placed irregularly and uneven, the upper surface being worn smooth and slippery, and by lapse of time and use had become more and more uneven, and dangerous to travelers. The walk was 18 or 20 feet wide. The side next to the buildings for 8 or 10 feet was covered by planks. The plaintiff came out of a meat market adjoining the premises in question, and walked diagonally across the plank walk to the stone walk, where she slipped and fell, and was injured. It was a "nice bright day," and there was no sleet or snow on the ground. The city answered, denying that the walk was defective, and alleged contributory negligence. It also set up that it was not primarily liable under its charter, and that, if the walk was out of repair, the owners of the property, and not the city, were liable to plaintiff. The defendant Mangan answered that he was not the owner of the property mentioned, and only had a mortgage interest therein. The answer of Mrs. Welch is largely by way of denial. The testimony of plaintiff and her witnesses related to the manner in which the accident occurred, the injuries sustained by her, and a description of the walk. Motions for a nonsuit were denied at the close of plaintiff's evidence, and duly excepted to. The defendants' testimony tended to show that the walk was not defective, and that the plaintiff voluntarily went from the plank walk to the stone walk. The defendant Mangan and his witnesses testified that the quitclaim deed to him was intended as security for the amount due on a mortgage he held on the premises and for advances made by him to pay certain attorney's fees for which his daughter was liable. At the close of the testimony the court denied motions to direct a verdict for the defendant, which ruling was duly excepted to. A special verdict of 18 questions was submitted. The jury found the plaintiff was injured by slipping and falling on the walk; that the walk was so insufficient and wanting in repair as to be dangerous to travelers; that such want of repair had existed for two years; that such condition was produced by "the wrong, default, and negligence" of both the lot owners and the city; that such condition had existed for such a length of time that both the lot owner and the city ought to have discovered it and repaired the walk before the injury; that in the exercise of ordinary care both the lot owner and the city ought to have foreseen that persons traveling thereon would

slip and fall and be injured; that the plaintiff was not guilty of contributory negligence; that the quitclaim deed to Mangan was not a mortgage, and that plaintiff's damages were $1,500. Exceptions were taken to the form of the verdict and to portions of the charge. The court denied a motion made by defendant Mangan to set aside the answer to certain questions and for judgment in his favor; also a motion of each defendant to set aside the verdict and to grant a new trial; also a motion by each defendant for judgment in their favor notwithstanding the verdict, and a separate motion by the city for judgment in its favor on the ground that no cause of action had been proven against it. The court made findings of fact supposed to be established by undisputed evidence relating to plaintiff's proof of title in the defendant Mangan, to which numerous exceptions were taken. Plaintiff's motion for judgment on the verdict was granted. From the judgment against all the defendants the defendants Mangan and the city take separate appeals.

J. M. Gooding, Duffy & McCrory, and L. I. Lefebre, for appellants.

R. J. Mathews and T. L. Doyle, for respondent.

BARDEEN, J. (after stating the facts). 1. The first question common to both appeals is that of plaintiff's contributory negligence. The evidence on the subject was offered by plaintiff, and is without dispute. The sidewalk where the accident occurred was 18 or 20 feet wide. It was constructed of limestone flagging, the stones being of irregular size and shape. The upper surface was uneven, varying from an inch to two inches from a level, worn smooth from extended use, sloping to the north and toward the street, and was very slippery. At the place where plaintiff is supposed to have fallen there was a hollow or depression in the face of the stone about 3 by 5 inches in area, and 1½ inches deep. On the side next to the building a plank walk had been laid over the stones, 8 or 10 feet wide, which also extended north and in front of the adjoining building, and perhaps further. The accident happened on a clear, bright day in October. There was no snow or sleet on the walk. The plaintiff came out of a meat market south of the premises in question, and crossed the plank walk diagonally, going north. Her description of the accident is as follows: "I came a few steps out right on the boards. I think about one or two steps, until I stepped on the stones. I went slantwise on the boards, for I remember of not coming on the stones for quite a little distance; and when I stepped on the stones then a few steps, my feet was taken from me, and that is all I know about it. Stepped on something that took my feet from me. I don't think I could have walked only a few steps after I struck the stone walk before I fell, because I am very careful on stones when I come to them. I just stepped on something that was kind of slanting, I imagine,

and my two feet were taken from me so quick, and I can't account for any more. There were boards for me to walk on. I don't know exactly why I didn't continue to walk on those boards that extended right along there. I looked down on the stone walk before I got off the board walk. It appeared to me to be rough. Q. Why did you go on it then? A. Why, I don't know, sir, just to tell the truth about it. I don't know why I did go on it. Just walked down on the stones,—down off the boards. I looked just as I was putting my foot down, and then walked along. When I fell I was looking right ahead of me. I can't say as I was looking on the walk, but was looking right ahead." She testified further that she did not know whether she slipped on the stone or from something that was on the stone. The testimony shows conclusively that she might have passed along on the plank portion of the walk in safety. She saw that the stones of the walk were uneven. Their smooth and slippery condition was perfectly apparent. Every element of danger disclosed by the testimony was before her. There was nothing to distract her attention, or to lull her into a sense of security. If it be conceded that the sidewalk was in a defective and unsafe condition, she knew it to its fullest extent. She might have avoided the danger by keeping on the plank walk. With full knowledge of all the conditions, in open daylight, with nothing to take her mind from what was before her, with no necessity therefor, she voluntarily encountered the danger, and was injured. To say that she may recover for such injuries is to offer a reward for temerity and rashness. If the rough, uneven, and slippery condition of the walk constituted an actionable defect, it must follow, since its nature and character was known to the plaintiff, that it was imprudent for her to venture upon it,—such imprudence as will preclude a recovery under the decisions of this court. Goldstein v. Railway Co., 46 Wis. 404, 1 N. W. 37; Hausmann v. City of Madison, 85 Wis. 187, 55 N. W. 167, 21 L. R. A. 263, 39 Am. St. Rep. 834; Fisher v. Town of Franklin, 89 Wis. 42, 61 N. W. 80; Collins v. City of Janesville, 111 Wis. 348, 87 N. W. 241. We need but repeat the rule stated in the last case cited that, if a person knows of a dangerous defect in a sidewalk, and is injured thereby, it is presumed that he remembered, and was negligent. No explanatory circumstances were offered in this case to rebut the presumption; hence the motions for a nonsuit ought to have been granted.

2. Another question of importance arises upon the contention of the city that under its charter no liability is imposed upon it until all legal remedies have been exhausted against the lot owner. The charter of the city of Fond du Lac is unlike that of any other this court has ever been called upon to consider. With reference to accidents happening in such portions of the streets not included in sidewalks, caused by the wrong or neglect of another, the charter makes such person primarily liable for all damages. This provision (sec-

tion 4, subc. 18, c. 152, Laws 1883) received construction in Schaefer v. City of Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287, and again in 104 Wis. 39, and 80 N. W. 59, and it was held that the injured party must exhaust his legal remedies against the parties primarily liable before the city could be held responsible, although under section 1340a both might be sued in the same action. The provisions of the charter regarding injuries sustained on defective sidewalks are quite different from the one above mentioned, and different from those of any other charter to which our attention has been called. Section 1, subc. 18, of the charter, provides that the lot owner shall at all times keep and maintain the sidewalk in front of his premises "in a safe, convenient, and effective condition." Failing so to do, any person injured is expressly given the right to institute and maintain an action against him to recover for all damages or injuries resulting therefrom, if commenced within one year. Section 2 is as follows: "It is hereby declared to be the true meaning and intent of this act, in the provisions relating thereto, that the said city of Fond du Lac, shall not in any case, be liable to any person or persons, for damages resulting from the defective, unsafe or dangerous condition of any walk or sidewalk, mentioned in the foregoing section, or for any neglect in the keeping and maintaining of the walk or sidewalk of said city in a safe, convenient or effective condition, and the only cause of action to which the said city of Fond du Lac shall be liable, or which shall be maintained in any court against said city, in connection with, or relation to damages resulting from the failure to keep the walks or sidewalks in said city, in a safe, convenient or effective condition, shall be by reason of the failure of any person or persons to collect a judgment recovered against such owner, or owners, or corporation or society, for any such damages, resulting from such injuries, as hereinbefore stated." The following section then provides that whenever an execution upon a judgment against an owner shall have been returned unsatisfied, and there is no fraud or collusion, the injured party may then commence an action against the city, but the latter may interpose any defense it may have on the merits, and the judgment against the owner shall not operate as a bar to its defenses. The section also prescribed certain other limitations and conditions upon the right not material to this litigation. These provisions received consideration by this court in Henker v. City of Fond du Lac, 71 Wis. 616, 38 N. W. 187. An action was brought directly against the city by a person injured on a defective sidewalk. The opinion by Chief Justice Cole in part reads as follows: "The insuperable difficulty in the way of maintaining this action is that it does not appear that the plaintiff has exhausted his remedy against the lot owner, who is made primarily liable by these charter provisions, before this action was brought, but the contrary fact is shown. * * * It seems unnec-

essary to discuss here the question as to the liability of the city, because the intent of the charter is perfectly manifest, and requires the injured party to exhaust his remedy against the lot owner as a condition precedent to the right to maintain the action against the city." It was also asserted that the provisions of the charter were clear and precise as language can express that it is the duty of the lot owner to keep the sidewalk in front of his lot in a safe condition, and make him liable for all damages of every nature resulting from a neglect to perform that duty. They also require the injured party to exhaust his remedy to recover and collect his damages from the lot owner before commencing an action to enforce the liability of the city. The validity of the provisions making it the duty of lot owners to keep sidewalks in repair was affirmed, and the judgment against the city reversed. Under this construction the city stands in the relation of a guarantor, and cannot be made to respond in damages until it is shown that they cannot be collected from the lot owner. We see no reason to question the correctness of this construction. The plaintiff, however, assumes that under section 1340a, and the case of Raymond v. City of Sheboygan, 76 Wis. 335, 45 N. W. 125, she may bring and maintain the action against both city and lot owner, enforcing the judgment against the city only after failure to collect from the lot owner. Reference is also made to Schaefer v. City of Fond du Lac, 104 Wis. 39, 80 N. W. 59, as sustaining that view. This assumption is unwarranted, as we shall now attempt to show. In the first place, section 1340a did not create any new liability or give any new right of action, but was intended merely to regulate the remedy for rights of action otherwise created. Cooper v. Village of Waterloo, 88 Wis. 433, 60 N. W. 714; Fife v. City of Oshkosh, 89 Wis. 540, 62 N. W. 541; Toutloff v. City of Green Bay, 91 Wis. 490, 65 N. W. 168. In the regulation of the remedy it was deemed proper to allow the injured party to join the party primarily liable with the city where there was no express charter provision in the way. In nearly all of the cases where this section has been under consideration, and notably in Raymond v. City of Sheboygan, the charter provisions are to the effect that whenever any person has been injured by reason of any defect in the street for which the city would be liable, and such defect was caused by the negligence of another person, the city should not be liable therefor until all legal remedies had been exhausted against the person through whose negligence the defect was caused. Such is the provision in the Fond du Lac charter in relation to injuries happening in such portions of the street as are not included in the sidewalk which was considered in the Schaefer Case. There being no special charter provision regulating the remedy in such cases, the general law steps in and permits the offending party and the city to be joined in one action. It must be kept in mind that neither the lot

owner nor the city are liable for mere defects in a sidewalk unless made so by statute. It has been many times said that in imposing this liability the legislature may annex such conditions as they may think proper. Daniels v. City of Racine, 98 Wis. 649, 74 N. W. 553; McKeague v. City of Green Bay, 106 Wis. 577, 82 N. W. 708. Under the provisions of the charter in question the absolute duty of maintaining sidewalks is upon the lot owner. He is made liable for all damages happening to travelers in case he neglects to fulfill that duty, and the right to bring an action for that purpose is expressly given to the injured party. The city is also made liable, but only upon the conditions mentioned. Under section 3, subc. 18, no action can be commenced against the city until after a return of an execution on a judgment against the lot owner unsatisfied. The exact method of procedure being mapped out, and the conditions upon which the city's liability is based being the subject of express regulation by the charter, so far as injuries on sidewalks are concerned, we cannot say that it was the intention of the legislature by section 1340a to repeal or wipe out such provisions. It is true that there is language used in Raymond v. City of Sheboygan broad enough to carry that impression, but what was said must be read in connection with the situation there presented and the charter provisions there being construed. Section 4986, Rev. St. 1898, says that the provisions of city and village charters shall prevail over those of the Revised Statutes unless a different intention is plainly manifest. In view of the construction given section 1340a in Cooper v. Village of Waterloo, Fife v. City of Oshkosh, and Toutloff v. City of Green Bay, to the effect that it was not intended thereby to create any new liability or give any new right, but only to regulate the remedy for rights of action otherwise created, we cannot say that the intention is clearly manifested to create a right of action directly against the city in abrogation of the express provisions of the charter. The injured party must exhaust his remedy against the lot owner according to charter requirements before his right to sue the city is enforceable. We desire to emphasize the fact that under the charter, right to sue the city at all is dependent upon the condition precedent that an execution shall have been returned unsatisfied on a judgment against the lot owner. In this connection the defendant Mangan argues that the lot owner, under the charter, is not primarily liable for mere lack of repair. He bases his argument upon the cases of Cooper v. Village of Waterloo, 88 Wis. 433, 60 N. W. 714; Sommers v. City of Marshfield, 90 Wis. 60, 62 N. W. 937; Toutloff v. City of Green Bay, 91 Wis. 490, 65 N. W. 168; and Selleck v. Tallman, 93 Wis. 246, 67 N. W. 36. We need only to say that the charter provisions considered in these cases are entirely different, and much less comprehensive, than the ones under consideration. This difference will be evident on comparison, and is sufficient to indicate that the rule of those cases cannot

apply here. What has been said indicates that the case must be reversed as to both defendants. We deem it unnecessary to treat other questions raised in the briefs.

The judgment is reversed on both appeals. As to the defendant Mangan, the court is directed to grant a new trial. As to the defendant city, the court is directed to dismiss the action.

CITY OF LANSING *v.* DETROIT, L. & N R. CO. *et al.*

(Supreme Court of Michigan, Feb. 11, 1902.)

[89 N. W. Rep. 54.]

Defective Sidewalk—Personal Injuries—Abutting Owner Not Precluded by Notice to Defend Action against City.*

Where, in an action against a city for injury resulting from a defective sidewalk, the adjoining property owner is notified, but denies liability, and refuses to defend, and his attorney assists in the trial under a stipulation with the city attorney that the appearance shall not bind such owner, the stipulation does not relieve the owner from the effect of the notice, but reserves the right to defend if the city should sue him.

Same—Same—Judgment against City Not Conclusive as to Liability of Abutting Owner.

Judgment was recovered against the plaintiff city for injury resulting from falling in a hole in a sidewalk opposite premises owned and possessed by defendants. The declaration alleged that the city "did wrongfully and negligently suffer and permit one of the planks of said sidewalk to be removed and displaced therefrom, leaving a hole," etc. Defendants were duly notified of the action, and asked to defend, but refused to do so. The city paid the judgment, and sued defendants to recover the amount paid, and relied on the judgment as conclusive evidence of defendants' liability: *held*, that the question of defendants' liability was not at issue or litigated in that action, and hence the judgment is not conclusive of that question.

Error to circuit court, Ingham county; Howard Wiest, Judge.

Action by the city of Lansing against the Detroit, Lansing & Northern and Michigan Central Railroad Companies. From a judgment for defendants, plaintiff brings error. Affirmed.

One Leola Sprague, in December, 1899, recovered a verdict and judgment against the city of Lansing for injuries received through a fall upon a sidewalk opposite premises charged to be owned by and in the possession of the defendant railroad companies. The allegation of negligence in the declaration is that the city "did wrongfully and negligently suffer and permit one of the planks of said sidewalk * * * to be removed and displaced therefrom, leaving a hole in such

*Upon the general subject of the liability of abutting owners for injuries resulting from defects in the street or sidewalk in front of their premises, see notes appended to Mayor of Wilmington *v.* Ewing, 2 Mun. Corp. Cas. 64; Rushton *v.* City of Allegheny, 3 Mun. Corp. Cas. 32; Brown *v.* Town of Louisburg, 4 Mun. Corp. Cas. 123; City of Denver *v.* Hyatt, 5 Mun. Corp. Cas. 149.

walk about six feet long, eight inches in width, and six inches in depth." The city paid the judgment, and sued the defendants to recover the amount of the judgment so paid. Plaintiff introduced the records in the suit of Sprague against City of Lansing; certain deeds, claimed to show title in the defendants; the admission by the defendants that the judgment was paid by the city; testimony that the defendants paid taxes upon the land, and controlled it; that the land was abutting upon the sidewalk where Mrs. Sprague was injured, and that the city attorney wrote to each of the agents of the companies at Lansing, and apprised them of the fact that the suit had been brought; that he received no reply by letter; that Mr. Montgomery, the attorney for the railroad companies in this case, came to him, and stated that he wished it distinctly understood that the companies were not to be bound by his action in any way, yet, if the city attorney wished him to sit in the case, he would be glad to do so. On cross-examination he testified that it was agreed that Mr. Montgomery's appearance in the suit against the city should not bind the railroad companies. Upon this record the court directed a verdict for the defendants.

John J. Zimmer (C. P. Black, of counsel), for appellant. R. A. Montgomery, for appellees.

GRANT, J. (after stating the facts). 1. The evidence was sufficient to charge the defendants with notice of the existence of the suit against the city. Robbins v. City of Chicago, 4 Wall. 657, 18 L. Ed. 427. The stipulation between the attorneys that the appearance of the attorney for the defendants should not bind them was not intended to relieve from the effect of the notice of the existence of the suit and the opportunity to appear. The stipulation meant no more than that it should not prevent the railroad companies from raising any defense they had to the suit by the city against them upon any judgment that might be rendered against the city.

2. Is the judgment conclusive against defendants? The question of the liability of the lot owners was not necessarily involved in that suit. The city might have been liable and the defendants without fault. If the city removed the plank, the lot owner would not be liable. How, by whom, and under what circumstances, was the plank removed from the sidewalk? Was it the negligence of the city alone? Did the negligence consist in removing the plank, or in failing to put it in place after notice to its proper officer or knowledge on his part of its removal? The city might have had actual notice immediately, and might have remedied the defect in five minutes. If so, the city would have been liable for the injury occurring within an hour afterwards. But the agents of the defendants, engaged in their usual labor, as they had a right to be, could not be chargeable with notice, and therefore their principals could not be held liable. Many people

leave their homes, to be absent for weeks and months on pleasure, business, or health, leaving the sidewalks in front of their premises in good condition. Should they be suddenly torn up,—as was done in Wilkins v. City of Flint (Mich.) 87 N. W. 195,—when do the lot owners become liable? The city may become liable within a few hours, upon proof that the city officers saw or should have seen the defect, and might have remedied it within that time. To hold a judgment obtained under such circumstances conclusive against a lot owner who owns a small home, without an opportunity to show that he exercised due care, would shock one's moral sense. A different feeling may prevail among some when a corporation is the party defendant, but in the courts the rule of law must be the same as to both. In a suit against the city it is not a question which is liable primarily, the city or the lot owner. The only issue is between the plaintiff and the city. Should the city attempt to show in a suit against it that the lot owner is liable for a defect in the highway, or for the failure to repair it, the objection to such testimony would be that no such issue is raised by the pleadings between the injured party and the city. The sole question is, is the city liable? Whether the lot owner is liable can only arise in a suit when the city attempts to enforce the judgment against him. Such judgment against the city is not conclusive upon him. Plaintiff's counsel, among other authorities, cite Dill. Mun. Corp. p. 790, in support of their contention that the judgment is conclusive. It is there stated that such judgments are held conclusive as to three facts: (1) The existence of the defect; (2) the injury sustained; (3) the amount of damages. The author further says such judgments are not conclusive "as to the lot owner's liability to repair the defect, his neglect to do so or as to his negligence being the sole cause of the injury." The cases cited in the plaintiff's brief upon this point are cases where there was some active wrong on the part of the lot owner, for which he would be liable at the common law. Such is the case of Town of Centerville v. Woods, 57 Ind. 192, where the defect was caused by the lot owner's digging a ditch, and neglecting to fill it up. In City of Lowell v. Short, 4 Cush. 275, the defect was a pile of dirt left in the highway by the lot owner without barriers or lights. In City of Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298, Robbins made an excavation, and left it uncovered, in consequence of which one Woodbury fell into it and was injured. He recovered judgment against the city, whereupon the city sued Robbins. In that case the court said: "Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened." A new trial was ordered, and the same case was again brought before the court in Robbins v. City of Chicago, supra, and the holding was the same. Neither decision held the judgment conclusive

as to Robbins' liability. In addition to the above authorities, holding that the judgment is not conclusive upon the lot owner's liability, see City of Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Knox v. City of Sterling, 73 Ill. 214; Inhabitants of Veazie v. Penobscot R. Co., 49 Me. 119.

This disposal of the case renders it unnecessary to pass upon the other questions raised. The judgment is affirmed.

LONG, J., did not sit. The other justices concurred.

CITY OF COVINGTON *v.* HUBER *et al.*

(*Court of Appeals of Kentucky, Feb. 14, 1902.*)

[66 S. W. Rep. 619.]

Defective Street—Personal Injuries—Cross Petition of City against Property Owners—Trial before Formation of Issue on Cross Petition.

In an action against a city to recover damages for personal injuries resulting from a defective street, in which defendant, after the filing of a reply, filed an amended answer and cross petition, seeking to make abutting property owners parties defendant, and pleading that they were liable, if there was any liability at all, it was not error to require a trial of the issue between the original parties before the formation of an issue on the cross petition, as plaintiff had the right to sue the city alone, and, if there was any right of contribution, it may yet be enforced.

Same—Presumption of Notice from Long Existence of Defect*—Damages for Physical Suffering.†

The court properly instructed the jury that if plaintiff's injuries were caused by a hole or depression in the street which had existed long enough to enable the city to know of its existence, and "such hole or depression being so left was negligence on the part of the city," plaintiff was entitled to recover damages to compensate her for her pain and suffering.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Action by Elizabeth J. Huber against the city of Covington to recover damages for personal injuries. Upon cross petition of defendant, William Beuttel and wife were made parties in the cause. Judgment for plaintiff, and defendant city appeals. Affirmed.

F. J. Hanlon, for appellant.
W. McD. Shaw, for appellees.

WHITE, J. The appellee Huber brought this action to recover damages for personal injuries received by her on a

*See City of Denver *v.* Hyatt, 5 Mun. Corp. Cas. 132, and note, 146; Cowie et ux. *v.* City of Seattle, 4 Mun. Corp. Cas. 417; City of Streator *v.* Chrisman, 4 Mun. Corp. Cas. 225; Devenish *v.* City of Spokane, 2 Mun. Corp. Cas. 46; Corey *v.* City of Ann Arbor, 3 Mun. Corp. Cas. 720.

†See Keyes *v.* City of Cedar Falls, 1 Mun. Corp. Cas. 1, and note at page 17.

sidewalk on Fifth street, between Madison and Scott streets, Covington. Appellee, while going along the sidewalk in company with others at about 2 o'clock in the morning, stepped into a depression or hole in the sidewalk, on a dark, rainy night, with no lights, and fell. She was injured by sprains in her ankle, wrist, and thumb, as well as other injuries to her body caused by the fall. Damages were claimed in the sum of $2,520, upon the alleged negligence of appellant in causing the hole or depression to be made and remain in such dangerous condition, or that the depression or hole had been suffered there to be and remain for many weeks and months; that the officers, agents, and servants of appellant knew of the existence of the dangerous hole, or by the exercise of ordinary care and caution could have known of same, and could have repaired same, but did not do so; and that no notice was given to appellee or to the public of the dangerous condition of the sidewalk. For answer, appellant denied all negligence, and pleaded contributory negligence in appellee, but for which the injury would not have happened. A reply denied contributory negligence. After the reply had been filed, appellant filed an amended answer and cross petition, seeking to make William and Mary Beuttel parties defendant, and to plead, as against them, that, if there was a liability at all to appellee Huber, it was by Beuttel and wife, as the hole or depression, if such there was, was caused and made, and so permitted to remain, by those parties, in digging up the sidewalk to make sewer connection, and that it was the duty of Beuttel and wife to replace the sidewalk in a safe condition. There was a demurrer filed to this cross petition by Beuttel and wife,—that, so far as this record shows, was never acted upon, but is yet undisposed of. A trial was had on the issues presented between the appellant and appellee Huber, which resulted in a verdict and judgment for appellee Huber for $500; and, after the reasons and motion for new trial had been overruled, this appeal is prosecuted.

The reasons for new trial are the action of the court in setting the case for trial on the issues between appellee Huber and the city without waiting the formation of an issue on the cross petition; that the damages are excessive; error in refusing and giving instructions.

We are of opinion that there was no error in refusing a continuance until the pleadings on the cross petition were filed. The issues had already been made before the amended answer and cross petition were filed, and the issues that might have been made on the cross petition could not, in any event, defeat appellee Huber's right to recover of the city. Appellant could not say, as a defense or as a reason for continuance, "There are two of us liable, if either, and you cannot have judgment unless against both." If it be conceded that the defendants in the cross petition were liable, it would not be a defense to another joint tort feasor. Appellee might have elected, as she did, to sue only one, without in the least

diminishing her right to recover full damages for the injury. If there existed a right of contribution or recoupment between appellant and Beuttel and wife, the judgment rendered does not hinder a recovery thereon.

The amount of recovery is not excessive. If appellee was entitled to recover at all, the damages assessed by the jury are within reason.

Appellant asked the court to give to the jury 10 instructions, from "a" to "j," all of which the court refused. The court gave four instructions. No. 1 told the jury that if there existed a hole or depression in the sidewalk, and appellee's injuries were sustained by reason thereof, and such hole or depression had remained for a time long enough to have enabled appellant to know such condition, or if appellant did know of such hole or depression, and such hole or depression being so left was negligence on the part of the city, plaintiff was entitled to recover damages to compensate for her pain and suffering. Instructions Nos. 2 and 3 defined "negligence" and "care." No. 4 simply told them that nine might find a verdict. In our opinion, these instructions presented fairly the whole of the law of the case, and there was no error in refusing either of the 10 offered by appellant. There was no evidence to authorize an instruction as to contributory negligence.

The evidence fully sustains the verdict, and, as we perceive no error in the judgment, the same will be affirmed, with damages.

MAKEPEACE *et ux. v.* CITY OF WATERBURY.

(*Supreme Court of Errors of Connecticut, Jan. 8, 1902.*)

[50 Atl. Rep. 876.]

Defective Highways*—Personal Injuries—Special Law as Affecting City's Liability for Failure to Repair Highway.

The acceptance by the city of Waterbury of 5 Sp. Laws, p. 429, § 1, amending its charter and imposing on the city the duty of repairing all highways, renders the city liable for injuries received from any defect in the highways within the corporate limits, whether established by dedication or otherwise.

Same—Duty of City to Repair Dedicated Highway under Special Law Prohibiting the Opening of Public Ways by Private Persons.

7 Sp. Laws, p. 217, § 27, providing that the city of Waterbury shall be a highway district, and shall have exclusive power to lay out, make, or order new highways or streets within its limits, and prohibiting any person from opening any public way, except by virtue of an order of the common council, does not prevent establishment by dedication of highways within the city, or relieve the city from the liability to repair dedicated highways, incurred by the acceptance of 5 Sp. Laws, p. 429, § 1, though the city be thereby rendered liable for failing to repair highways the dedication of which it could not prevent.

---

*As to the general doctrine of municipal liability for accidents resulting from defective streets, see notes appended to City of Denver *v.* Hyatt, 5 Mun. Corp. Cas. 132; City of Circleville *v.* Sohn, 1 Mun. Corp. Cas. 50; Seamons *et ux. v.* Fitts, Town Treasurer, 1 Mun. Corp. Cas. 464.

Makepeace *et ux.* *v.* City of Waterbury

Appeal from superior court, New Haven county; William T. Elmer, Judge.

Action by Henry Makepeace and wife against the city of Waterbury for damages for injuries caused by a defective highway. From a judgment for nominal damages in favor of plaintiffs, they appeal. Reversed.

It appears from the finding of the trial court, Elmer, J., that on July 20, 1899, the plaintiff, while exercising due care, was injured through a defect in a traveled road situate in the defendant city. This road was known as "Brewster Street." It had not been laid out as a highway by the city authorities in accordance with the city charter. The plaintiff claimed that Brewster street had become, by dedication, a public highway, prior to the accident. Upon the trial, the court made the following rulings, to which the plaintiff duly excepted: First, excluding evidence offered by plaintiff that said street, prior to the accident, had become a highway by dedication, and that said city was therefore in duty bound to keep it in repair; second, excluding evidence that the city had ordered a water main laid through said street and awarded a contract for building the same; third, excluding evidence showing that the street was duly laid out a year after the accident; fourth, excluding evidence that the land within Brewster street had been given by one Platt, for use as a public highway, and had been continuously used by the public as such from 1886 to the date of the accident. The appeal assigns as error the above rulings.

Argued before TORRANCE, C. J., and BALDWIN, HAMERSLEY, HALL, and PRENTICE, JJ.

Albert P. Bradstreet and Michael J. Byrne, for appellants.
John P. Kellogg, for appellee.

HAMERSLEY, J. (after stating the facts). Highways are established by the state (1) through the direct action of the legislature, (2) through authorized proceedings involving an application to a court, (3) through authorized proceedings by agents appointed for that purpose, such as selectmen of towns and specified authorities of cities and boroughs, (4) through private dedication of land for that purpose and its acceptance by the public. The existence of highways established through municipal authorities is proved by appropriate records showing that the prescribed action has been duly taken. The existence of highways established through dedication is proved by evidence directly showing a gift of the owners of land for that purpose, or such action of the owners, or failure to act, as equitably estops them from denying such gift, and by evidence showing such conduct by the public, in the use of land so dedicated, continued for such a time, and under such circumstances, as establishes an acceptance by the public. The acceptance must be by the "unorganized public" and not by formal action of a munic-

pality. Neither town nor city has power to establish a highway by corporate vote, accepting land given for that purpose, when the legislature has not given it specific authority. Acts of a municipality may, however, tend to show a use by the public, as well as its nature and extent; and for this reason such acts may be relevant to the question of acceptance by the public. Noyes v. Ward, 19 Conn. 250, 264; Green v. Town of Canaan, 29 Conn. 157, 163; Guthrie v. Town of New Haven, 31 Conn. 308, 321; City of Hartford v. New York & N. E. R. Co., 59 Conn. 250, 252, 22 Atl. 37. From the earliest settlement of Connecticut the towns assumed some duty in respect to maintaining safe highways within their limits. In 1643 the general court enforced this duty by directing surveyors of highways to impress, one day in each year, every person and team fit for labor, to amend the highways. 1 Col. Rec. pp. 91, 527. In 1672 this duty is formulated as follows: "The several townships within this colony shall keep in sufficient repair all the highways and bridges within their townships;" and is further enforced by providing for impressment of labor when necessary, and also by imposing on the town, as a penalty for failure to perform the duty, a liability to pay damages to any one who may be injured in person or property by means of a defect in a highway which a town is bound to keep in repair. Laws 1672, p. 7. This act of 1672 has from time to time been modified as to details and penalties, but, as affecting the duty and liability of towns, has remained in force until the present time. Bartram v. Town of Sharon, 71 Conn. 686, 694, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225. When cities and boroughs were first established, their charters ordinarily contained provisions authorizing municipal authorities to lay out highways within their limits. This power, however, was not exclusive, and the duty and liability of towns in respect to highways within their limits covered highways within the particular limits of a city or borough. Shortly after the custom of providing for the repair of highways by taxation became general, municipal charters began to be altered, so that the duty of repairing highways within the limits of a city was imposed upon the city corporation, and the town within which the city was situated was relieved therefrom. See amendment to city charter of Hartford, passed in 1829. 1 Sp. Laws, p. 387. Eventually most charters contained these provisions, and the General Statutes provided in a similar manner for the exceptions. It is provided that "the selectmen of each town may lay out necessary highways therein, not being within a city, or within a borough having by virtue of its charter, or by the provisions of this chapter, control of, and liability for, the highways within its limits" (Gen. St. § 2699); "that towns shall build and repair all necessary highways and bridges except where the duty belongs to some particular person" (Gen. St. § 2666); "that any person injured in person or property by means of any defective high-

way, may recover from the party bound to keep it in repair" (Gen. St. § 2673); "that cities and boroughs, not authorized by charter, may lay out highways in the manner prescribed" (Gen. St. § 2702). See, also, sections 2674, 2676, 2679, and Pub. Acts 1856, p. 73.

It is apparent from the course of legislation, general and special, from 1643 until the present time, that the general policy of the state implies the imposition of a duty on each municipality to keep in safe repair the highways within its limits, under penalty of liability to pay damages to persons injured by means of a defect in the highways. The exceptions to this policy under existing statutes are few. From the beginning the duty to repair highways has never been dependent upon the manner in which a highway may have been established. It applies to all existing highways, whether established through proceedings by court, or municipal authorities, or through dedication. See cases above cited. The defendant city of Waterbury was granted a city charter in 1853. This charter authorized the city authorities to lay out new highways, but the power was not exclusive, nor the duty to repair and the penalty of liability for failure to repair defined. 3 Sp. Laws, p. 464, § 39. In 1861 an amendment to its charter was passed imposing upon the defendant city the duty of repairing all highways within its limits, and authorizing it to assume, by contract, the maintenance and repair of turnpike roads within its limits. 5 Sp. Laws, p. 429, § 1. After the acceptance of this amendment, the defendant became liable to pay for injuries received by reason of defect in any existing highway, and in any that should thereafter be established, whether through the action of its own authorities, or through dedication. It is claimed, however, that the defendant was relieved of this liability by an amendment to its charter passed in 1871. The language relied on in support of this claim is this: "Sec. 27. The city of Waterbury shall be a highway district, and the court of common council of said city shall have sole and exclusive authority and control over all streets and highways, and over all parts of streets and highways, now or hereafter existing within the limits of said city, and shall have sole and exclusive power to lay out, make, or order new highways and streets within the limits of said city, and to alter, repair, or discontinue all highways and streets now and hereafter existing within the limits of said city. And no person shall open, within the limits of said city, any public way except under and by virtue of an order of said court of common council." 7 Sp. Laws, p. 217. This language is taken almost verbatim from that contained in an amendment to the charter of the city of New Haven passed in 1862 (5 Sp. Laws, p. 479), and re-enacted in another amendment passed in 1869 (5 Sp. Laws, p. 766). The amendment of 1862 commences with provisions making the city of New Haven a highway district by itself, authorizing the

inhabitants to tax themselves for the maintenance of city highways, apportioning the money theretofore raised by the town for that purpose between the city and the town, and separating for the future the liability of city and town for the maintenance of highways, so that each shall be responsible for those within its own limits. The amendment then goes on in section 3 to give to the court of common council sole and exclusive authority and control over all streets and highways, and over all parts of streets and highways, now or hereafter existing within the limits of said city, using the language quoted and relied on by the defendant, as above stated. It seems clear that the language used in giving the city sole and exclusive control of its streets, and power to lay out and maintain the same, was used with reference to the concurrent control of town and city, theretofore existing, and by this amendment abolished, and cannot be construed as implying any limitation on the establishment of highways by dedication, within the limits of town or city. We think the language, as repeated in the amendment to the New Haven charter in 1869, and again in the Waterbury charter in 1871, is used with the same meaning.

The closing sentence of section 27 is in terms a prohibition against individuals opening a public way within the limits of the city, except under an order from the court of common council. To prohibit an act does not necessarily prevent it from being done. Even if this amendment to the charter made it unlawful thereafter for any unauthorized person to dedicate ground within the city for a public way, it still remained possible to make such a dedication, though it might violate the law. This very thing is contemplated and provided for in the later amendment of 1895, which prescribes a penalty for every day a way so illegally opened shall remain open. Nor is the possibility of such action excluded by the other provisions of the amendment of 1871.

The law, in giving the sole power to the common council to lay out highways, also gives it power over the time and manner of opening the same. Possibly the clause may have a wider scope, but it would certainly be an unauthorized extension of its meaning to construe it as forbidding the establishment of highways by dedication. It is urged, as a reason for so extending this provision, that otherwise the city might become liable for the repair of a highway whose establishment was due to the combined action of private individuals and the unorganized public, without any power to affect or prevent the result of such action. Such want of power is not apparent. In imposing on towns and cities the duty of maintaining highways, the legislature clothes them with implied power commensurate with that duty. City of New Haven v. Sargent, 38 Conn. 50, 53, 9 Am. Rep. 360. It can hardly be that the municipality is powerless to take any steps to retard or prevent the acceptance by the public of a highway not

required by public convenience and necessity. But however this may be, the same considerations have always applied to every town, and their force was considered and disposed of in adopting the policy of establishing highways by dedication. That policy has been firmly established and universally recognized by legislative action and judicial decisions until a time subsequent to the alleged establishment of the highway in question. The amendment to the Waterbury city charter, passed in 1895, which in terms purports to relieve that city from payment of damages for injuries caused by defective highways thereafter established by dedication, does not affect the case before us. 12 Sp. Laws, p. 443. It follows that the trial court erred in excluding all evidence of dedication and acceptance of the defective highway, which was the cause of the plaintiff's injury. The exclusion of this testimony involved the exclusion of that set forth in the second and third reasons of appeal. The court erred in not considering the possible relevancy of that evidence to the question of acceptance. The question of its relevancy and materiality in case any evidence of dedication and acceptance had been admitted, was not passed upon.

There is error in the judgment of the superior court, and a new trial is ordered. The other judges concurred.

CITY OF SAN ANTONIO *v.* BALL.

(Court of Civil Appeals of Texas.)

[66 S. W. Rep. 713.]

Defective Bridge*—Personal Injuries—Notice of Defect to Officer Not Charged with Care of Bridge, Not Notice to City.

Notice to officers of a city not charged with the care of a bridge that it is defective, and the failure of the city to repair the bridge, does not render it liable for an injury resulting from its defective condition.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by one Ball against the city of San Antonio for personal injuries resulting from an accident alleged to have been caused from the defective condition of a bridge maintained by the city. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

Geo. C. Altgelt and I. C. Baker, for appellant.

Frank C. Davis and Ogden & Terrell, for appellee.

---

*As to how far bridges are considered a part of the highway, and the extent of a city's liability for defects therein, see Sachs *v.* City of Sioux City, 2 Mun. Corp. Cas. 732, and note, 737; Bradbury *v.* Inhabitants of City of Lewiston, 6 Mun. Corp. Cas. 588; Stainback *v.* Mayor, etc., of Meridian, 6 Mun. Corp. Cas. 763; Crawford *v.* Mayor, etc., of City of Griffin, 6 Mun. Corp. Cas. 618; Mayor, etc., of Sandersville *v.* Hurst, 4 Mun. Corp. Cas. 230.

City of San Antonio *v.* Ball

NEILL, J. Appellee, Joseph Ball, on the 18th day of January, 1897, brought this suit against the city of San Antonio, claiming damages in the sum of $10,000 for personal injuries alleged to have been received by being thrown from a buggy. He averred in his petition that the injuries were caused by the negligent acts of appellant in permitting a certain wooden bridge on Morales street to become defective and unsafe for traffic, and that while driving over said bridge his horse stepped upon a defective plank, which gave way, the horse's front feet going through the bottom of the bridge, thereby breaking the bridle bit, and causing the horse to run away with the buggy, and to throw plaintiff violently to the ground, causing his injuries. The appellant answered by a general demurrer, general denial, and specially denying that said bridge was defective, but alleged that the same was reasonably safe, and built of suitable material. The case was tried before a jury, and the trial resulted in a verdict in favor of the appellee for $700 damages. From the judgment entered upon the verdict this appeal is prosecuted.

This part of the court's charge is assigned as error: "If you believe from the evidence that the defendant had a bridge on Morales street, and you believe that the defendant permitted said bridge to become out of repair by allowing the timbers therein to become thin upon the edges and decayed, so as to render the same not reasonably safe for teams to cross; and you believe that said condition was known to the defendant, its officers, agents, or employees, or could have been known by the use of ordinary diligence; and you believe that it was negligence for the city to allow said bridge to remain in such condition, should you find it was in such condition; and you believe the plaintiff attempted to cross the bridge, and that in so doing his horse's weight caused the timbers of said bridge to give way, and that thereby the plaintiff's horse's forelegs went through, causing him to fall, and that the force of said fall caused the bit in said horse's mouth to break, and thereby plaintiff's horse was caused to take fright and run away, and you believe that thereby plaintiff was thrown out of his buggy and injured; and you further find that defendant's negligence, if any, was the proximate cause of plaintiff's injury, if any,—then you will find for the plaintiff. If you believe from the evidence that said bridge was not defective, as claimed in the petition, or that the defendant used ordinary diligence to keep said bridge in a reasonably safe condition, or you believe that said bridge was in a reasonably safe condition, or that the plaintiff was not injured in the manner alleged, or that the defendant, its agents, and employees, did not know and could not have known of said defect, if there was any defect, by the exercise of ordinary care, then you will find for the defendant,"—upon the ground that it makes appellant's liability depend upon notice of the alleged defects in the bridge upon the part of

the city's officers, agents, and employees generally, or their ability to have known of said defects by the use of ordinary diligence. Section 60 of the charter of the city of San Antonio vests in the city council the power to construct and maintain bridges in the public streets of the city. From this and other provisions of the charter, as is said in the case of City of Austin v. Colgate (Tex. Civ. App.) 27 S. W. 896: "It is clear that it was the duty of certain city officers to keep the bridge in question in proper repair, but that duty did not devolve on all of appellant's officers, agents, and employees. Therefore notice of the defect in the bridge to some officers, agents, or employees, and the failure of such officers, agents, or employees to repair the defect, would not constitute notice to appellant, nor show negligence on its part." Notice to an officer or employee who had no authority in the premises, and who was charged with no duty in relation to such matter, would not affect the city with notice. City of Dallas v. Meyers (Tex. Civ. App.) 55 S. W. 742. A city's liability in a private action for an injury from defects or obstruction of a highway is not for maintaining or permitting a nuisance, but for culpable neglect of a duty; and such neglect can only be predicated on the fact that its officers upon whom the duty devolved either knew, or by ordinary diligence might have known, of the existence of the defect, and that the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated. Shear. & R. Neg. (5th Ed.) § 367; 2 Dill. Mun. Corp. (4th Ed.) §§ 1024, 1025. We conclude, therefore, that the assignment points out an error in the part of the charge quoted that requires a reversal of the judgment.

Reversed and remanded.

FINK v. CITY OF DES MOINES.

(*Supreme Court of Iowa, Feb. 8, 1902.*)

[89 N. W. Rep. 28.]

Coal Chute—Personal Injuries to Child*—Contributory Negligence of Child.

Where a child less than four years of age is injured by pulling over a coal chute which was leaning against an engine house, she cannot be charged with contributory negligence, though repeatedly warned about playing there.

Same—Same—Negligence of Parents Not Imputable to Child.†

Where a child less than four years of age is injured by pulling over a coal chute at an engine house, the negligence of her parents, who have been warned about her playing there cannot be imputed to her.

Same—Same—City's Negligence a Question for the Jury.

Where a coal chute 5 feet long, with a cleat near each end, and

*See City Council of Augusta v. Tharpe, 5 Mun. Corp. Cas. 560, and note; Ritz v. City of Wheeling, 1 Mun. Corp. Cas. 360, and note.

†See City of Roanoke v. Shull, 2 Mun. Corp. Cas. 667, and note.

weighing 200 pounds, when not in use was leaned, with cleats out, against the side of a city engine house, some 5 feet back from the line of the street, and a small child, stepping on the lower cleat, pulled the chute over, and was injured, the question of the city's negligence was for the jury.

Appeal—Waiver of Errors.

Where certain assignments of error, not argued in appellant's original brief, are argued for the first time in a reply brief, they will be disregarded.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action for damages. Trial to jury resulted in verdict and judgment for the defendant. The plaintiff appeals. Affirmed.

W. G. Harvison, for appellant.

J. E. Mershon and W. C. Strock, for appellee.

LADD, C. J. The plaintiff, when a child of less than four years, was injured when playing on a coal chute leaning against the defendant's engine house. It was about 6 feet long, and from 3½ to 4 feet wide, made of plank more than 2 inches thick, and across it about a foot from each end were cleats 4 inches square. When not in use, the chute was leaned against said house with cleats out, the lower end about 2 feet from the building, which was back some 5 feet from the street line. The cement sidewalk extended from the curb line to the house, the yard of which was not inclosed. The plaintiff was seen standing on the lower cleat immediately before the accident, and probably pulled the chute over on her by taking hold of the upper cleat and throwing herself back. It fell on her, breaking an arm. Doubtless, as contended by appellant, this child, because of her tender age, cannot be charged with contributory negligence, though repeatedly warned about playing near the engine house. Thomas v. Railway Co., 93 Iowa, 248, 61 N. W. 967. Nor can the negligence of her parents, who appear also to have been warned, be imputed to her. Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449. Upon the alleged negligence of defendant the court instructed that the jury must find, in order to entitle her to recover, "that said coal chute, by reason of the place where it stood and the position, was dangerous to persons passing along the sidewalk opposite thereto." Appellant insists that the evidence conclusively established defendant's negligence under this instruction. As said, the chute was several feet back from the street line. It is shown to have weighed about 200 pounds, and therefore not likely to have been blown over by the wind, nor to fall over unless meddled with. It cannot be said that merely leaving it in the position shown was negligence as a matter of law, and whether danger lurked in it to children who might be attracted to play on it, and this was of a character such that defendant's agents ought, in the exercise of reasonable care, to have guarded against, was, at the most, for the jury

to determine. Cason v. City of Ottumwa, 102 Iowa, 99, 71 N. W. 192, and Bliven v. City of Sioux City, 85 Iowa, 346, 52 N. W. 246, relied on by appellant, are not in point. In the former the evidence was held sufficient to sustain the verdict, not to establish negligence as a matter of law; and in the latter the necessity of serving notice only was considered.

What we have said disposes of every point made in appellant's original argument and reply, but in what counsel is pleased to call a supplemental reply the instructions are assailed as erroneous. But assignments of error argued for the first time in the reply will be disregarded. Renwick v. Railroad Co., 49 Iowa, 664; 2 Cycl. Law & Proc. 1018.

Affirmed.

WAGNER *v.* CITY OF PORTLAND.

(*Supreme Court of Oregon, Jan. 20, 1902.*)

[67 Pac. Rep. 300.]

Board of Fire Commissioners—A City Agency for Whose Acts the City Is Responsible.*

The board of fire commissioners appointed under a city charter authorizing the mayor to appoint a board of fire commissioners, which board shall have exclusive power and authority to organize and control the fire department, is not an independent body, but its acts are those of the city, for which it is liable.

Personal Injuries—Repair of Fire Alarm a Ministerial Duty—Liability of City to Workman Injured While Engaged Therein.

A city engaged in the legal duty of repairing its fire alarm system through private and corporate agencies is acting in its corporate capacity in the performance of ministerial acts, and is liable for injuries received by a workman therein.

Same—City Liable for Negligent Omission Only When Acting In Its Private Corporate Capacity†—Effect of Statute.

Hill's Ann. Laws, § 350, providing that an action may be maintained against any incorporated town for an injury to plaintiff from some act of omission of such public corporation, authorizes an action against a city only when it is liable in its corporate capacity, and not when performing a public duty.

Same—Doctrine of Fellow Servants—May Be Invoked by City as in Other Cases.

Workmen jointly engaged with plaintiff in removing an electric wire, who were not under any special directions, but were using their judgment as to the manner of the work, are fellow servants with plaintiff; and a recovery cannot be had from the city, which was performing the work, for injuries received, unless the city was derelict in its duty, in not taking proper precautionary measures for the safety of employees, whereby the injury ensued, without the concurrence of plaintiff's acts, or those of fellow servants.

Same—Same—Negligence of City in Failing to Promulgate Proper Rules—When a Question for the Court.

In an action against a city by a workman injured while taking

---

*See Rhobidas *v.* City of Concord, 5 Mun. Corp. Cas. 91; note appended to Quill *v.* Mayor, etc., of New York, 1 Mun. Corp. Cas. 41; Town of Colorado City *v.* Liafe, 6 Mun. Corp. Cas. 620.

†See note appended to Little *v.* City of Holyoke, 5 Mun. Corp. Cas. 29; note appended to City of Omaha *v.* Croft, 3 Mun. Corp. Cas. 182.

down a fire alarm wire, the question whether defendant was negligent in omitting to adopt suitable rules is for the court, in the absence of any evidence showing the necessity and practicability of such rules.

Same—Same—Same—City Not Precluded from Insisting on Lack of Evidence Showing Necessity for Such Rules Because of Non-Expert Testimony to the Contrary.

Questions asked a witness who was not shown to be an expert as to the necessity of rules for taking down electric wires, and questions regarding the adoption of rules by other companies doing that class of work, but which were not confined to the specific rules which plaintiff insisted should have been adopted, which questions were objected to by defendant, did not constitute such an effort to show the necessity of such rules as to preclude defendant from insisting on a lack of evidence in this particular.

Same—Same—Repair of Fire Alarm—City Not Liable for Failure to Prescribe Rules Regulating Details of Work.

When four or five fellow servants were taking down electric wires, and were not acting under any regulations, the cutting of a wire at the proper place for the convenience of the work, and to insure safety to the employees, is a detail of the work, which was for the judgment and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance.

Same—Same—Same—Contributory Negligence—Assuming the Risk Where City Fails to Furnish Rubber Gloves.

A workman who has worked for two months and a half in taking down electric wires without using rubber gloves, or boards to stand on, knowing the hazards attending the work, will be deemed to have assumed the risk of performing this work without such appliances.

Same—Repair of Fire Alarm Wires—Assuming the Risk*—When Plaintiff's Knowledge of Dangers Will Be Presumed.

A man of mature years, not laboring under any mental disability, engaged in taking down fire alarm wires, who had been warned by a fellow servant of the danger of being killed while working in proximity to an electric company's wires, and who had heard two fellow servants say they had received shocks, and had witnessed the effect of electricity on a horse, will not be deemed ignorant of the danger of electricity, and of the hazards of the employment.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Jr., Judge.

Action by Henry M. Wagner against the city of Portland. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

A board consisting of three commissioners appointed by the mayor is given by the charter of the city of Portland full, complete, and exclusive power and authority on behalf of the city to perform all executive functions thereof in the organization, management, and control of its fire department, and all powers and duties incident thereto. Sess. Laws 1898, p. 132, § 87. In pursuance of this authority, such board had under its control and management a system of fire alarm wires; being the property of the city, and used for communicating alarms of fire occurring therein. R. G. Paddock, who was the city electrician, and superintendent of the system, deriving

*See McDougald *v.* Town of Lumberton, ante, p. 137; Barker *v.* Boston Electric Light Co., ante, p. 143; City of Lasalle *v.* Kostka, 6 Mun. Corp. Cas. 502.

his authority from the board, employed the plaintiff as groundman. While engaged in that capacity, keeping the system in repair, he was injured by receiving a shock from an electrical current, for which injury he brings this action for damages, alleging that it was caused by the negligence of the municipality; and, having obtained a judgment in the trial court, the defendant appeals.

J. M. Long, for appellant.
Thos. O'Day, for respondent.

WOLVERTON, J. (after stating the facts). By defendant's separate defense, which was stricken out on motion, two questions are presented, which lie at the threshold of the controversy. It is maintained with much emphasis (1) that the board of fire commissioners is an independent body, so constituted by the charter, with full and exclusive power and control over the fire department, and the city is in no sense responsible for its acts; and (2) that the board, in prosecuting such improvement, acted in a political and governmental, rather than in a private or corporate, capacity, and therefore it cannot be held amenable for the negligence of its officers and agents. The two positions are not altogether consistent, as the latter seems to assume that the fire department is not an independent body, such as to shift liability from the city. But the purpose is manifest to save both questions, and, if the former is decided adversely to the contention, then the latter becomes a live issue. We think that the charter settles the former. It vests in the board the executive functions of the city pertaining to the organization, management, and control of the fire department, and all powers and duties incident thereto. As to this particular department, therefore, the board stands in the place and stead of the common council, exercising the authority of that body; and its acts become as much the acts of the city as if the common council had performed them, had not the authority in the premises been transferred to the board.

As to the latter question, it is one of more difficulty,—not so much in the finding of general rules governing the liability of municipal corporations for torts committed through their officers and agents, but in determining where the case falls, and by what rules it is governed. Municipal corporations exist in a dual capacity, and their functions are twofold. In one, they exercise the right springing from sovereignty, and while in the performance of the duties pertaining thereto their acts are political and governmental. Their officers and agents, though elected or appointed and paid by them, are nevertheless public functionaries, performing a public service, in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities

through which they derive their authority, but are officers, agents, and servants of the state (that is, the political divisions thereof, or the public at large), and for their acts of omission and commission the municipalities themselves are not liable. In the other, they exercise a private, proprietary, or corporate right, arising from their existence as legal persons; and where the duty is one that rests upon the municipalities in respect of their special or local interests, and not as public agencies, and is absolute and perfect, not discretionary or judicial in its nature, their officers and agents in the performance of the function or duty act in behalf of, or as the alter ego of, the municipalities in their corporate capacity, and not for the state or public at large, and for their acts the municipalities are held to accountability. This has become the settled doctrine in the jurisprudence of this country, about which there is no dissent. Caspary v. City of Portland, 19 Or. 496, 24 Pac. 1036, 20 Am. St. Rep. 842; Esberg Cigar Co. v. City of Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651, and cases there cited; 1 Jag. Torts, 173, 179; Mechem, Pub. Off. §§ 850, 853; 2 Dill. Mun. Corp. (3d Ed.) § 980. Touching the liability of municipalities in their corporate capacity, the rule is succinctly stated in Wright v. City Council of Augusta, 78 Ga. 241, 6 Am. St. Rep. 256, as follows: "Whenever the negligence or nonfeasance of the ordinary agents and servants of the corporation, as distinguished from that of its officers, causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation is exercising, as a corporation, its private franchise, powers, and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public, then, and only then, it becomes liable for the negligent exercise of such powers, precisely as are individuals." Undeniably, municipalities, when acting through their fire departments in the preservation of property from the devastation of fire, are in the exercise of a purely governmental function, and their officers and agents represent the public, as an arm of the state, for whose acts the corporations are not liable. It was so held in Hafford v. City of New Bedford, 16 Gray, 297, where certain of the firemen negligently ran a hose carriage against the plaintiff and injured him. So, in Fisher v. City of Boston, 104 Mass. 87, 6 Am. Rep. 196, where the hose provided by the city, and in use through the fire department, burst, causing the injury complained of. In this case Mr. Justice Gray, now of the supreme court of the United States, says: "But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity; nor is any part of the expense thereof authorized to be assessed upon

owners of buildings, or any other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or a public way. * * * It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from, in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents." And in Mendel v. City of Wheeling, 28 W. Va. 233, 57 Am. Rep. 665, where the city authorities allowed pipes laid to plaintiff's premises for conducting water thereto, to be used for fire and other purposes, to fill up so as not to be serviceable in the extinguishment of a fire, to his damage, the same doctrine was upheld. So, also, in Welsh v. Village of Rutland, 56 Vt. 228, 48 Am. Rep. 762, where the engineer of the fire department, under the direction of the village trustees, in thawing out a hydrant connected with an aqueduct flooded the street with water, which becoming frozen, the plaintiff was injured by falling thereon. And in Wilcox v. City of Chicago, 107 Ill. 334, 47 Am. Rep. 434, where the plaintiff sustained injury by the collision of a hook and ladder wagon with his carriage; also in Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533, where the injury occurred through fright of the plaintiff's horse, caused by a stream of water thrown from a hydrant by the officers of the fire department, at the request of the mayor of the city, for the purpose of testing the capacity of the hydrant; and, again, in Kies v. City of Erie, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867, where the door of an engine house was so negligently operated that, when being opened upon the sidewalk, it struck a pedestrian and injured him. Many other cases might be cited, but these are sufficient to illustrate the doctrine. The nonliability of the municipality is based upon the idea that it is acting in a public or governmental capacity, as an arm of the state, and hence the doctrine of respondeat superior is without application. But the case at bar is distinguishable from any of these cases, or any that we have been able to find applying the doctrine referred to therein. Here the city was acting in the discharge of a legal duty to repair the fire alarm system, and the case is one of common employment for the performance of a special service for and in behalf of the city. The duty was being performed through the instrumentality of private or corporate agencies, and not through the fire

department or its officers, or through officers of the city whose duty it was to perform such work; and it might be added that the work of repairing was an act ministerial in its nature. In a similar case (Mulcairns v. City of Janesville [Wis.] 29 N. W. 565), where the city was engaged in the construction of a cistern for the use of the fire department, and an employee was injured through the negligence of other employees, it was held that the city was liable, under the doctrine of respondeat superior; so, in McCaughey v. Tripp, 12 R. I. 449, where an employee was injured while the city of Providence was engaged in the construction of a city hall. See, also, Donahoe v. City of Kansas City, 136 Mo. 657, 38 S. W. 571; City of Toledo v. Cone, 41 Ohio St. 149. From these latter authorities we are impelled to the conclusion that corporate liability exists in the case at bar, and that the further and separate defense of nonliability was therefore properly stricken out. Plaintiff's counsel contend that the statute settled the question at the very outset. But it only gives the action against the municipality when it is liable in its corporate capacity, as distinguished from its political or governmental capacity, as an arm of the state in the exercise of sovereignty. Hill's Ann. Laws, §§ 349, 350. So the question recurs, in what capacity was the city acting when the injury was sustained?

At the close of the testimony the defendant moved for a nonsuit, but without success, and error is predicated upon the action of the court in that regard. This necessitates a consideration of the testimony adduced, with a view to ascertaining whether the plaintiff proved a cause sufficient to be submitted to the jury. The basis of the action is the negligence of the city, its officers and agents, contributing as a proximate cause to the injury sustained by the plaintiff; and unless acts are shown from which negligence may be reasonably inferred in some particular, and attributable to the city in its corporate capacity, the case is not such a one as should be submitted for the jury's consideration. The Portland General Electric Light Company was operating a system of electric light wires, extending north and south on the east side of Sixth street where it intersects Yamhill, among which are what are known as "primary wires," carrying from 1,000 to 1,200 volts of electricity; one of its poles standing immediately within the curbing at the southeast corner of Sixth and Yamhill streets, and another south of that, at about two-thirds of the distance across the block, near Mr. Corbett's barn. The Oregon Telephone Company had a system of wires on the west side of Sixth street, one of the poles standing a little south of the southwest corner of Sixth and Yamhill; and the Columbia Telephone Company had a system extending east and west on the south side of Yamhill street. The city had its fire alarm wires attached to the Columbia Telephone Company's poles, extending west on Yamhill street to Sixth, at which point and from there south it was attached to the electric

company's poles. Immediately prior to the time of the accident the superintendent directed that the city's wires should be changed in some particulars so as to avoid contact with some shade trees; and in obedience thereto a new wire had been attached along Yamhill, extending across Sixth street, and attached to the Oregon Telephone Company's pole, and thence southward back across Sixth street, and attached to the electric company's pole near Mr. Corbett's barn, whereupon the old wire was cut near the engine house, or at Fourth and Yamhill, and again at the pole where the new one was attached, and the end thrown over into Sixth street. Being detached from the electric company's pole at the southeast corner of Sixth and Yamhill, one of the workmen drove a staple into the top of the pole, with a view of keeping it off the electric company's wires while it was being taken down. The plaintiff, acting in his capacity as a groundman, and with a view to reeling it up at the same time, in conjunction with others, attempted to take it down by pulling it through the staple from a point on Sixth street near the curb on the east side where the end of the wire had fallen when cut. Finding the wire fast, the men with him let go,—one of them to go up the pole to loosen it, and the others across the street, so as to get a view of the situation; but the plaintiff, continuing in his efforts to dislodge the wire, brought it in contact with one of the electric company's primary wires, resulting in his injury. The plaintiff's account of the incident is, in substance, that he was at the time, September 28, 1897, and had been since July 13th preceding, in the employ of the city in the capacity of a common laborer to assist in changing the telephone and fire alarm wires; that his particular service was as a groundman; that he was assigned to the duty of attending the reel and reeling up the wire as it came off the poles, and such other work as was necessary to be done on the ground, digging post holes, helping to set up poles, making connections on the ground, and dropping old wires when the insulation was off; that other men were working with him, namely, Cherry, Fisher, Schad, Baker, and Severian, the latter being the foreman of the gang; that after the wire had been cut he took his reel from the southwest corner of Sixth and Yamhill streets, where it then was, to where the end of the wire lay; that he, Baker, Cherry, and Schad pulled on the wire until they found it was fast; that some one suggested that Cherry go up the pole, which he did, and Baker and Schad crossed over to the corner on the other side of Sixth street, and that the witness, continuing in the effort to dislodge the wire, received a shock; that the wire was above the electric company's wires, and from where he was he could not see the point of contact with them, because of a tree which obscured his vision; that he did not understand, nor was he experienced as to the nature of, electricity; that he was perfectly ignorant of the danger of it; that neither the city nor its officers had ever given him any

advice or instruction touching the danger of his employment, except on one occasion, some four or five weeks previous, when he was warned while adjusting a heavily insulated wire that he had better stand on some boards, as he was liable to get killed; that he had no previous warning by the city or its officers of the existence of the primary wires of the electric company, or that they were charged with electricity; that the city had no rules for the government of laborers in performing their work, and did not furnish boards for them to stand on, or rubber gloves for them to use. On cross-examination he testified that the wire was a very old one, the insulation being off in places, and that he might have taken hold of it where the insulation was off, and that he had assisted in taking down a good many miles of wire. H. H. Cherry testified that the electric company's wires were insulated primary wires, heavily charged, and used for distributing electricity about the city; that the plaintiff, Schad, Baker, and himself started to pull the wire down, when it caught somewhere on the pole; that he went up to take it loose, and plaintiff was shocked; that he heard him make a noise, and saw the wire rocking,—saw it come in contact with the electric company's primary wire,—whereupon he took hold of it and lifted it clear; and that there was a bare connection with the primary wire. On cross-examination he stated that he did not recollect whether he cut the wire on Sixth street, near Corbett's barn, or not, or whether Cullins, one of the men working in the gang, cut it, but whoever it was threw it over into the street; that the men, as a crew, had been taking down the wires for about two months, and that plaintiff had been with them during the time; that it was his custom when he went up to unfasten these wires to look and see if they were going to come in contact with primary wires; that a man would recognize such things; that he knew there was a primary wire there when he unfastened the wire in question and took it off the insulator; that he put a staple in the top of the pole somewhere, and the wire came through, and the men pulled against it; that they could just as well have cut the wire at the pole as not; that the men used their own judgment as to where they should cut the wires; that they were supposed to work under Mr. Severian's orders, and that, if he told them to cut the wire in a certain place, it was done; that Severian was working with the men under Mr. Paddock, the electrician; that Paddock gave the general orders, and the men, under Severian's orders, would execute them; that at the time he fastened the staple he thought it was the best way to keep this wire off the primary wire of the electric company, but it did not suffice for the purpose; that all he had to do when he went up the pole the second time was to lift the wire off the primary wire; that, to the best of his recollection, the covering of the wire was carried up in a bunch at the staple, and that when this was taken out and cut off the wire was pulled down over the

primary wire; that the staples used were big, strong staples; and that he used the one on that occasion according to his best judgment to keep the wire from coming in contact with the primary wire. R. G. Paddock testified that he was superintendent of the fire alarm and police signal wires in the city; that he hired all the men, subject to the action of the board of fire and police commissioners; that he was given authority by these boards to hire such men as necessity required; that no rules had been promulgated requiring the wires to be cut where crossing primary wires, or the electric company to turn off its electricity, nor were there any boards or rubber gloves furnished for the use of the men; that rubber gloves, being nonconductors, were designed to protect the men from receiving a shock from a heavily charged wire, or one carrying a great voltage; that under certain circumstances boards are nonconductors; that all these things are relative, depending upon the voltage; that a dry board is a nonconductor; that if a person is standing on a dry board, and the voltage is comparatively low, the board will act as an insulator, the same as glass, and that 1,000 volts is comparatively low, nowadays,—speaking generally, a dry board, or a piece of dry carpet, or a piece of paper or glass, are all considered nonconductors (in other words, they are very poor conductors of electricity); that none of them are strictly nonconductors, but are relatively high in resistibility, and that if a person would get on some dry boards or a piece of paper, or a piece of dry rubber, or anything like that, he could handle 1,000 volts without danger; that the matter of putting up and taking down these wires was largely a matter of detail with the workmen themselves; in some specific cases, Severian or witness would give special instructions, but, as a general proposition, the cutting or handling of the wires was a matter of detail with the crew. Other witnesses were called, but this is the practical effect of the testimony, and there is nothing to dispute it. It is at once apparent from this testimony that the acts immediately contributing to the injury of the plaintiff were the acts of Cherry or Cullins in cutting the wire at the pole near Corbett's barn, and casting it into the street across the primary wires of the electric company, and the act of Cherry in securing it to the top of the pole in such a manner as to allow it to come in contact with such primary wires. Further than this, the act of the plaintiff and the workmen with him in attempting to pull the wire through the staple from the position where the end of it fell, instead of taking it across the street opposite the pole where it was fastened, may have been a contributing factor. Cherry says he used his best judgment in attaching the staple so as to have the wire come off clear of the primary wires, but failed in his purpose, possibly because of the position of the plaintiff in doing his work. But waiving the feature of plaintiff's position, it is clear that the person who

cut the wire and threw it into the street across the wires of the electric company, and Cherry, who endeavored to make it fast to the top of the pole to which the primary wires were attached, so as to avoid contact with them, were fellow servants with the plaintiff, and he is precluded from recovery on that account, unless the city has been derelict in its duty, by not taking proper precautionary measures looking to the safety of its employees, whereby the plaintiff's injury ensued, without the concurrence of his own acts or those of his fellow servants contributing thereto. As to who are fellow servants and who is the master, has been satisfactorily settled by this court in Mast v. Kern, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, wherein it was said (Mr. Justice Bean announcing the opinion of the court): "The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a coservant, is, was the offending employee in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows. If not, he was a mere coservant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employee who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence." Paddock was the city electrician and the superintendent of the alarm system. He directed the work to be done, and the men under the immediate direction of Severian, as his assistant, were engaged in the service. The linemen used their judgment as to the manner of detaching and taking the wires down, and it was not the master's duty to give specific directions touching the details of the work. Whoever attended to that while engaged in the particular capacity was a fellow servant with the plaintiff, and not a master or vice principal. It is the duty of the master, however, to adopt needful and reasonable rules and regulations for the government and protection of his agents and servants while pursuing their employment; to exercise suitable care and precaution to provide them with a reasonably safe place in which to work, and fit and safe tools and appliances to work with, and to employ suitable and competent fellow servants; and such duty cannot be delegated in any manner so as to shield him from responsibility. Whoever performs this duty performs the master's duty, and, if he is not the master himself, he becomes a vice principal, and the master is still responsible. Now, plaintiff insists that it was the duty of the city to have adopted rules and regulations which, among other things, should have required the wires that were being detached and removed from the poles to be cut wherever they crossed a primary wire, or the electricity

to be turned off the primary wires while the employees were at work in proximity thereto. It may be predicated of the employment in which the plaintiff was engaged that it was dangerous and hazardous, as it is common knowledge that electricity is a dangerous element, and those engaged in and about the instrumentalities and appliances by which it is handled and utilized in any considerable voltage are liable to come in contact with it and be injured. As a general rule, the dangers connected with such a business, that are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment, and are assumed by those who consent to accept employment under the circumstances. Such dangers, however, as are known and can be mitigated or avoided by the exercise of reasonable care and precaution by those engaged in the business are not perils which the employee must encounter as incident to the business, and the master is generally held to accountability for his neglect in this regard contributing to the injury of the servant. "In other words," says Mr. Chief Justice Ruger in McGovern v. Railroad Co., 123 N. Y. 280, 25 N. E. 373, "it is the duty of the master, having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution." See, also, Anderson v. Telegraph Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.

In this connection it should be observed that, although this duty is imposed upon the master, his neglect of it will not always render him liable as against a servant who engages in the employment with full and explicit knowledge of the master's default. The rule is stated thus, by Mr. Justice Devens in Leary v. Railroad, 139 Mass. 580, 584, 2 N. E. 115, 52 Am. Rep. 733: "The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." It is probably best grounded upon the idea that, where two negligent acts conduce to an injury, responsibility attaches to the one that stands as the proximate or immediate cause; and in such a case the servant cannot hold the master responsible, although culpable, because his own negligence is the direct and immediate cause of his injury. Stager v. Laundry Co., 38 Or. 480, 486, 63 Pac. 645, 53 L. R. A. 459; Fitzgerald v. Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537. The question whether the defendant was at fault in omitting to adopt suitable rules is not one for the jury, unless there is something in the testimony from which the inference may be drawn that it was practica-

ble to have provided against the occurrence of the accident complained of by such a rule. The court say in Railway Co. v. Echols, 87 Tex. 339, 343, 27 S. W. 60, 28 S. W. 517: "Whether or not the evidence is sufficient to show a case in which the duty to make rules rested upon the defendant is a question of law for the court. If the facts raised that issue, it should have been submitted to the jury; otherwise it should not." It may occur that the necessity and propriety of making and promulgating rules in a given case are so obvious as to make the matter one of common experience and knowledge. Such a condition would warrant a submission of the question as to whether the defendant was at fault in omitting its duty in this regard to the jury without evidence. But that is not the case here. It is manifestly not a matter of common knowledge and experience that rules such as plaintiff suggests would be practicable, or even useful, in the prevention of an accident of the kind. If notwithstanding they were in fact necessary and practicable, it was a matter susceptible of proof, by showing that other municipalities, companies, or persons engaged in handling electrical machinery and appliances for generating and utilizing electrical currents had adopted and put into operation such rules, with serviceable results, or by the testimony of persons possessing peculiar skill and experience in the construction, repair, management, and operation of such machinery and appliances. No such proof is to be found in the record, and hence a case has not been made in this particular upon which to put the question of negligence of the defendant in omitting the adoption and promulgation of the rules insisted upon to the jury. Berrigan v. Railroad Co., 131 N. Y. 582, 30 N. E. 57; Morgan v. Iron Co., 133 N. Y. 666, 31 N. E. 234; Railroad Co. v. Carruthers (Kan.) 43 Pac. 230; Whalen v. Railroad Co., 114 Mich. 512, 72 N. W. 323. Plaintiff did attempt, however, to establish the practicability and necessity therefor, but says he was not permitted to do so because of the objection of defendant's counsel, and he insists that defendant cannot now complain of error which it invited. The rule sought to be invoked is a wholesome one, authoritatively established. Elliott, App. Proc. § 630; Jobbins v. Gray, 34 Ill. App. 208, 218; Insurance Co. v. O'Connell, 34 Ill. App. 357, 360.

A witness was asked what he would say as to the necessity of having some rules adopted in regard to performing the work, and this question he was not allowed to answer. It does not appear that he was a person skilled touching the matter of injury, so that no error was committed in the ruling upon the objection, and no error could be invited where the objection was well taken.

As to the other inquiry, touching the adoption of rules by other companies for the doing of that class of work, the question put and rejected does not reach the point, as it was not confined to the specific rules which plaintiff insists should

have been adopted for the prevention of the accident. That other companies had adopted rules generally for the regulation and doing of the class of work being done by the city was too general to be of any practical avail. This constitutes the effort made in that behalf, and we find no error of the court respecting it.

Beyond this, however, we are of the opinion that, so far as developed by the evidence in this case, the cutting of wires, and the places where they should be cut so as to take them down conveniently and with the least danger to the workmen, are details of the work, which were for the judgment, discretion, and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance. Ulrich v. Railroad Co., 25 App. Div. 465, 51 N. Y. Supp. 5; Golden v. Sieghardt, 33 App. Div. 161, 53 N. Y. Supp. 460.

With reference to furnishing the workmen with boards and rubber gloves for their use, this may or may not have been the duty of the city. But however that may be, it is a conceded fact that plaintiff worked two months and a half without them, and it is absolutely shown that he still continued in the employment, knowing the hazards attending the work, and he must be deemed, therefore, to have assumed the risk. His negligent act in continuing in the work became the proximate cause of the accident, hence he cannot recover upon that account.

Plaintiff says, also, that he was ignorant of the danger of electricity, and was not warned by any officer of the city that the electric company's wires carried electricity in dangerous quantities. But he was a man sui juris, of mature years and judgment, not laboring under any mental disability; and his admissions show that he had been previously warned by Cullins, a fellow servant, of the danger of being killed while in the same service in proximity to the electric company's wires where they carried 5,000 volts; that he heard two fellow servants say they had each received shocks while in the same employment, and witnessed the effect of electricity on a horse, communicated by a sagging wire; and he must necessarily have known, as Cherry, Cullins, and other fellow workmen knew, not only the dangerous character of electricity, but the nature and condition of the electric company's wires. From his testimony there can be but one opinion touching the matter, and that precludes him from gainsaying knowledge of the danger of electricity, and of the hazards he was incurring while engaged in the service. Under these conditions, there was error in refusing the nonsuit.

Other testimony was offered in the further progress of the trial, but no new features of the case were developed, and nothing shown that would be curative of the matters pertaining to the inquiry.

The judgment of the trial court will therefore be reversed and the cause remanded for such further proceedings as may seem appropriate, not inconsistent with this opinion.

BEAN, C. J., concurs in the result.

SOUTHWORTH v. SHEA.

(Supreme Court of Alabama, Nov. 14, 1901.)

[30 So. Rep. 774.]

Excavation in Street*—Negligence of Contractor†—Wrongful Death—Evidence—Taking Case from Jury.

In an action by an administratrix to recover damages for the death of her intestate, alleged to have been caused by the negligence of the defendant in failing to maintain lights or other signals to give warning of the existence of a hole dug in the streets of a town and of obstructions piled around it, where the injury in the counts of the complaint is attributed to a fall of the plaintiff's intestate into a hole or upon the obstructions surrounding it, but there is no evidence introduced relating to the character of the injury, to the situation in which the intestate was found, or to the other facts of the case which indicate that the proximate cause of the injuries resulting in his death was a fall into the hole, or upon the obstructions surrounding it, rather than from other causes to which the injury could have been attributed, the plaintiff fails to make out her case, in that she does not show a causal connection between the injuries and the negligence alleged, and therefore the court does not err in excluding the evidence of the plaintiff from the jury.

Appeal from circuit court, Mobile county; W. S. Anderson, Judge.

Action by Mary A. Southworth, administratrix of James Southworth, deceased, against Thomas J. Shea. Judgment for defendant, and plaintiff appeals. Affirmed.

Upon the examination of the plaintiff as a witness in her own behalf, and after she had testified that her intestate was her husband, she was asked the following question: "What was his [intestate's] usual time of coming home in the evening?" The defendant objected to this question, the court sustained the objection, refused to allow the question to be answered, and to this ruling of the court the plaintiff duly excepted.

Fredk. G. Bromberg and Bromberg & Hall, for appellant. Gregory L. & H. T. Smith, for appellee.

SHARPE, J. Defendant, working under a contract with the city of Mobile, made a manhole about two feet wide and

---

*As to the liability of a municipal corporation for injuries resulting from excavations in highways made by third persons, see Seamons et ux. v. Fitts, Town Treasurer, 1 Mun. Corp. Cas. 465, and note, 475; Keyes v. City of Cedar Falls, 1 Mun. Corp. Cas. 1, and note, p. 13; Foy v. City of Winston, 4 Mun. Corp. Cas. 391; Compton v. Inhabitants of Town of Revere, 6 Mun. Corp. Cas. 582; Uppington v. City of New York, 5 Mun. Corp. Cas. 366, and note, 374.

†See City of Grand Rapids v. Van Rossum, 6 Mun. Corp. Cas. 510.

five feet deep, close to a car track, and leading from the street surface to an underground sewer that was being constructed, and had piled beside the hole dirt and other material, which obstructed part of the street. The complaint imputes to him negligence in failing to maintain lights or other thing to give warning of the obstructions. According to the first and third counts of the complaint, plaintiff's intestate fell into the hole, and in attempting to get out in the only practicable way, which was next to the car track, he was struck and injured by a passing car. By the other counts the injury is attributed to the fall itself, which as averred in the second count was in the hole, and as averred in the fourth count was on the obstructions. On the trial the evidence was without material conflict. A street car motorman testified to the effect that after dark, when running his car, he discovered the intestate lying with his legs on the car track, and his head near the manhole, and that he (the witness) stopped the car as its front platform got above the intestate, without hurting him. Other evidence tended to show the intestate, when so found, was helped up, said he was not hurt, and, with assistance, walked home, and that his collar bone and some of his ribs were broken, wherefrom, a few days later, he died.

Plaintiff's counsel inquired of a witness "what was his [the intestate's] usual time of coming home in the evening," and an objection made to this question was sustained. This ruling was proper, for the purpose of the question was not stated to the trial court, and the question itself did not suggest that a responsive answer would have thrown any light on the matters in controversy.

The evidence relating to the intestate's injury being substantially as above stated, the defendant moved to exclude the whole evidence. The bill of exceptions recites that "upon the arguing of this motion plaintiff conceded that she had not made out a prima facie case entitling her to recover under the first and third counts of the complaint." The motion was granted, and the propriety of that action is the remaining question here.

The case as presented under the first and third counts need not be considered. If there was error in respect of those counts, its commission was invited by the plaintiff's concession referred to, and is therefore not ground for reversal. Elliott, App. Proc. § 630.

To make a prima facie case for recovery under the other counts, it devolved upon the plaintiff to support their averments, tending, either directly or inferentially, to show the intestate received the injuries which caused his death by falling in the hole or on the obstructions. Proof which goes no further than to show an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur, where from the same proof the injury can, with equal probability, be attributed to some other cause. Such a condition is equivalent to an absence of evidence as to the true

cause, and, when seen clearly to exist, imposes on the court the duty of determining, as a matter of law, against any right of recovery dependent upon the establishment of causal connection between the injury and its alleged cause. Tuck v. Railroad Co., 98 Ala. 150, 12 South. 168; Wintuska's Adm'r v. Railroad Co. (Ky.) 20 S. W. 819; Hughes v. Railroad Co. (Ky.) 16 S. W. 275; Railroad Co. v. Cathy (Miss.) 12 South. 253; Sauer v. Oil Co. (La.) 9 South. 566; Thomp. Neg. p. 364; Bailey, Pers. Inj. § 1672.

Here there is nothing in the evidence, whether relating to the character of the injuries, the situation in which the intestate was found, or other fact or circumstance, which, apart from mere conjecture, indicates that the proximate cause of his death was a fall into or on the obstructions, rather than a collision with some car other than the one testified about by the witness motorman, or still other possible cause. For lack of such essential connecting evidence, the plaintiff failed to make out her case. That her defeat was accomplished by excluding the evidence instead of by a charge directing a verdict is immaterial.

In determining whether the court or jury should pass on the evidence in a given case, decisions involving different evidence are of small value, since the question varies with the variant facts. Principles announced and the conclusion arrived at in Bromley v. Railroad Co., 95 Ala. 397, 11 South. 341, may be conceded to be correct; but the facts of that case, and likewise the facts in the other cases cited in behalf of the plaintiff, are not such as to make the decisions therein controlling as precedents in the present case.

Affirmed.

NICHOLSON *v.* CITY OF DETROIT.

(*Supreme Court of Michigan, Jan. 7, 1902.*)

[88 N. W. Rep. 695.]

Wrongful Death—Negligence of Municipal Officers—Governmental Function*—City Not Liable for Death of One Who Contracts Disease and Dies by Reason of Its Failure to Disinfect Smallpox Hospital.†

Detroit City Charter 1893, §§ 376–381, impose on the city the duty of taking measures for the preservation of public health, through a board

---

*A municipal corporation is not liable for the negligent exercise or failure to exercise its discretionary or governmental powers. Wheeler *v.* City of Poplar Bluff, 3 Mun. Corp. Cas. 20, and note; Jones *v.* City of Williamsburg, 3 Mun. Corp. Cas. 444, and note; Long *v.* City of Elberton, 3 Mun. Corp. Cas. 450, and note; Wood *v.* City of Hinton, 3 Mun. Corp. Cas. 547, and note; Saunders *v.* City of Ft. Madison, 3 Mun. Corp. Cas. 553, and note; Davis *v.* City of Lebanon, 4 Mun. Corp. Cas. 1; Gray *v.* Mayor, etc., of Griffin, 4 Mun. Corp. Cas. 149, and note; Betham *v.* City of Philadelphia, 4 Mun. Corp. Cas. 429; note appended to Decker *v.* McSorley, ante, p. 291; Mayor of Hagerstown *v.* Klotz, ante, p. 303.

†See White *v.* City of San Antonio, 6 Mun. Corp. Cas. 876; Folk *v.*

Nicholson *v.* City of Detroit

of health. Comp. Laws 1897, § 4448, makes it the duty of the board of health of a township to provide a hospital whenever smallpox shall break out. Section 4444, authorizes the establishment of permanent hospitals by townships, and section 4419 makes the law applicable to cities. The city of Detroit, acting through its officers, engaged plaintiff's intestate to tear down a building which had been used as a smallpox hospital; the building being on land belonging to the city. No measures were used in the way of disinfection, nor was plaintiff's intestate warned of the danger of infection, and he died of smallpox: *held*, that the city was not liable for any negligence of its officers.

Error to circuit court, Wayne county; William L. Carpenter, Judge.

Action by Ada Nicholson, as administratrix of the estate of Alfred Cope, deceased, against the city of Detroit. From a judgment for defendant, plaintiff brings error. Affirmed.

Alfred Lucking and Howard B. Bloomer, for appellant.

Timothy E. Tarsney, for appellee.

HOOKER, J. The plaintiff is administratrix of one Alfred Cope, and commenced this action by declaration, under the statute, to recover, for the benefit of Cope's widow and children, for the negligent causing of his death. The declaration is in two counts, the first of which alleges, in substance, that the city was possessed in 1894 of a lot containing 40 acres of land, upon which was an old building that had been used by the defendant as a hospital for contagious diseases,—particularly smallpox. In November, 1894, the defendant began the erection of a new building designed for a similar use, and employed the plaintiff's intestate, who was a carpenter, to work upon the same. The new building was located in close proximity to the old one, and it is alleged that said old building and the surrounding grounds were infected with smallpox germs, making it dangerous for any person to be in or upon them. The plaintiff's intestate was attacked by smallpox, and after an illness of a month's duration, died from the disease. It is alleged that the defendant was negligent in not using reasonable care to furnish him a safe place to work, and in not warning him against said dangers, and in not constructing the new building at a greater distance from the old one, and in not causing the old building and the ground to be disinfected. The second count alleges that the deceased was employed to tear down the old building, and that while so engaged he was exposed to the smallpox, and by reason thereof was seized with said disease and died. This count was otherwise similar to the first, except that it alleges that defendant assured the deceased that it was safe for him to work upon and about said building. A demurrer was interposed, which upon the

City of Milwaukee, 5 Mun. Corp. Cas. 335, and note; Hughes *v.* City of Auburn, 3 Mun. Corp. Cas. 35; note appended to City of Paducah *v.* Allen, 1 Mun. Corp. Cas. 82; Gray *v.* Mayor, etc., of Griffin, 4 Mun. Corp. Cas. 149, and note; note appended to Long *v.* City of Elberton, 3 Mun. Corp. Cas. 455.

hearing was sustained; and plaintiff not having amended the declaration within the time prescribed by the order, judgment followed, and the plaintiff has brought the case to this court by writ of error. The only question presented by counsel is whether a municipality is liable for the injury or death of an employee resulting from circumstances like those alleged, and therefore it is the only one discussed.

The law imposes upon the city the duty of taking measures for the preservation of the public health, through a board of health, whose powers and duties are statutory. Sections 376–381, Detroit Charter 1893. See, also, Comp. Laws 1897, §§ 4410–4467. Section 4448 makes it a duty of the board of health of the township to provide a hospital or place for reception wherever smallpox, or any other disease dangerous to public health, shall break out in any township, and section 4444 authorizes the establishment of permanent hospitals by the townships, while section 4419 makes the law applicable to cities; and it seems to be admitted that the city acted under these statutes.

It is the well-settled rule that the state is not liable to private persons who suffer injuries through the negligence of its officers,—and the rule extends to townships and cities,—while in the performance of state functions, imposed upon them by law. This subject is fully discussed in City of Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450. It was there held that "cities are governmental agencies, and that their officers are in no such sense municipal agents; that their negligence is the neglect of the municipality; nor will their misconduct be chargeable against them unless the act complained of be either authorized or ratified." And in a large number of cases it has been held that there is no such liability on the part of such governmental agency unless it has been imposed by statute, and in such case it is necessarily limited by the statute. Commissioners v. Martin, 4 Mich. 557, 69 Am. Dec. 333; Leoni Tp. v. Taylor, 20 Mich. 148; Larkin v. Saginaw Co., 11 Mich. 88, 82 Am. Dec. 63; Fowler v. Alexander Common Council, 3 Pet. 398, 7 L. Ed. 719; Black v. City of Columbia, 45 Am. Rep. 785; Gilboy v. City of Detroit, 115 Mich. 121, 73 N. W. 128; Maxmilian v. Mayor, etc., 62 N. Y. 160, 20 Am. Rep. 468; Webb v. Board, 116 Mich. 516, 74 N. W. 734, 72 Am. St. Rep. 541; Carrington v. City of St. Louis, 89 Mo. 209, 1 S. W. 240, 58 Am. Rep. 108; Eastman v. Meredith, 36 N. H. 298, 72 Am. Dec. 302.

Counsel for the plaintiff seem to admit the general rule that a municipality is not liable for injuries received through the negligence of its officers while acting in the capacity of governmental agents. They allege, however, that the city owned the premises, and contracted with the deceased, and owed the duty of warning him against hidden dangers; that the city is subject to the same responsibility to warn those upon its land against pitfalls that other landowners are subject

to; and that the obligation under its contract for constructing a house upon its land entitles its employees to a safe place to work, as a contract between private persons does. There is some plausibility in the suggestion, but we think it fallacious. In a moral sense, those acting for the state owe the same duty toward persons employed upon its behalf as that due from the citizen. They should also be as careful to provide safe appliances and a safe place for employees, as a private person should. But if they do not, the sufferer is remediless, as against the state, for the reason that it has provided no remedy, although the state itself own the land when the injury occurred, and make the contract of employment. It is an open question how far it is wise or just to subject citizens to taxation to pay for injuries caused by the negligence of public officers. Such officers are usually the representatives of the injured person as well as of other taxpayers. It is as much his duty to select careful and prudent officers as it is that of the taxpayer who is called upon to help pay for his hurt, who, perhaps, may be a woman or child, and has had no voice in the selection of the negligent officer, and therefore no duty in the premises. The rule of public liability in such cases offers such opportunities and inducements for abuse that there is some ground for doubting the expediency of relieving individuals at public expense in any such case; and as has been said, it is only in cases where the legislature has authorized it that the obligation can be enforced against the public, instead of the individual to whose misconduct the injury is due, and who should, in justice, be primarily liable in all cases. As said by Mr. Justice Campbell in O'Leary v. Board, 79 Mich. 286, 44 N. W. 610, 7 L. R. A. 172, 19 Am. St. Rep. 173: "It is for the legislature to determine how far, if at all, a body, whose negligence, if it is so called, is imputed, and in no sense actual, shall be made subject to suit for the misconduct of its employees. There are many cases where such liability does not exist, except against the immediate individual wrongdoer. The person injured is not harmed any more where there are several persons liable than where there is only one. Imputed negligence is purely a question of public policy, and subject to legislative regulation. No one can be bound by this record, except the immediate parties to it, and it would be improper to go beyond it." The action of the city in obtaining and owning the land and erecting the hospital is as much an act of a governmental agent as the transportation of a patient thereto and his treatment therein would be. It is land owned for governmental purposes, by governmental authority, by a governmental agency, it is true, but not for the private purposes of the municipality as such, and for purposes in which the state has no interest. The title to the land is in the city, but so it would be were the interest merely a leasehold for the shortest practicable period. It is inconceivable that changes made upon premises owned by the city

under this statute would stand upon any other footing than premises rented for a month by the city for a similar purpose. In either instance it might be necessary to adapt the premises to the purposes contemplated by law, and in both instances it might be necessary to employ men for the purpose. In either case, if done by the board of health, this would be done in the performance of an imposed duty, and the city would be acting solely in the capacity of governmental agent. Therefore the doctrine of respondeat superior would have no application. It was said by Chief Justice Montgomery in Murray v. Village of Grass Lake, 125 Mich. 2, 83 N. W. 995: "The next section authorizes the council to appoint a board of health. It would appear that that was done in this case. It also appears that the action taken by the council was taken on the recommendation of the board of health. The action of the council was doubtless taken under authority of the section quoted. The fact that the wrong was committed by the officers of the village does not fix the responsibility upon the municipality, if the wrongful act was done under authority of a general statute, in the attempt to perform a public service not distinctively local or corporate. 2 Dill. Mun. Corp. (4th Ed.) § 974. It is apparently the established rule that local health officers, acting under a general statute of the state conferring their powers, are not performing corporate functions, but are representatives of the state, and that the municipality is not liable for the acts of such boards, either of misfeasance or nonfeasance." Whether or not the city owned the land upon which the dam was built at the outlet of the lake, whereby the level of the lake was raised, does not appear. Presumably, it did, or acquired the right to use land for the purpose upon some terms. As in this case, something had to be done upon the land owned or controlled by the city or village, to accomplish the duty imposed. Had some one been injured in the construction of the dam, through negligence, the case would have been parallel to the present case. In such a case, would it be proper to hold that the city was not liable for injuries resulting to one from the raising of the lake, and liable to another for injuries arising from the act of obstructing the water whereby the lake was raised? Could it be said that either was not the act of a governmental agent in the performance of a public duty? In 2 Dill. Mun. Corp. § 977, the subject of the liability of municipal corporations for injuries resulting from maladministration of the health laws is discussed, and numerous cases cited. It has been held that a city was not liable to a nonpaying patient for injuries resulting from the neglect or misconduct of hospital officers or servants (Murtaugh v. City of St. Louis, 44 Mo. 479); or for the unskillful treatment of a resident physician (Sherbourne v. Yuba Co., 21 Cal. 113, 81 Am. Dec. 151); or for failure to take proper precautions to prevent the spread of the smallpox, or to notify the plaintiff, who was required to assist in the removal of the

corpse of a person who had died of this disease, of the dangerous nature of the service required (Ogg v. City of Lansing, 35 Iowa, 495, 14 Am. Rep. 499); or where a person caught the smallpox from a nurse who was permitted to leave the hospital without being properly disinfected (Brown v. Inhabitants of Vinalhaven, 65 Me. 402, 20 Am. Rep. 709); or for carrying a well person to the smallpox hospital, whereby he contracted the disease (Barbour v. City of Ellsworth, 67 Me. 294); or for illegally ordering a ship to leave the city (Rudolphe v. City of New Orleans, 11 La. Ann. 242); or for illegally taking possession of a vessel (Mitchell v. City of Rockland, 41 Me. 363, 66 Am. Dec. 252; Id. 45 Me. 496; Id. 52 Me. 18; Harrison v. Mayor, etc., 1 Gill, 264); or for negligence of a servant of the board of health in removing garbage (Condict v. Mayor, etc., 46 N. J. Law, 157). See, also, Tied. Mun. Corp. § 332.

We have been referred to a case which seems to go far toward sustaining the contention of plaintiff's counsel. It is Briegel v. City of Philadelphia (Pa.) 20 Am. St. Rep. 885, 19 Atl. 1038. The decision is not replete with adjudicated cases. The opinion states that the question was before the court for the first time, but that Mr. Justice Sharswood had expressly decided it in Shutter v. City of Philadelphia, 3 Phila. 228. But while the language used in that case was broad, the question arose over the contamination of a well by a leaky gas holder owned by the city, and used for furnishing gas to its inhabitants. Thus it is apparent that the question was not before that court.

Under the title of "Liability in the Capacity of Property Owner," Mr. Dillon discusses this question, and recognizes a liability when the property is owned and used for private corporate purposes. The language is somewhat broad, but the text and the cases cited in support of it seem to imply the importance of the nature of the uses for which the property is owned. See 2 Dill. Mun. Corp. § 985, and note 1. In the same connection attention is called to the fact that by the decisions the distinction between acts done by a city in discharge of a public duty, and acts done for what is called, by way of distinction, its "private advantage or emolument," is clearly made. Most of the cases cited turn on private ownership for corporate purposes.

Eastman v. Meredith, 36 N. H. 296, 72 Am. Dec. 302, was a case where a townhouse floor had given way, injuring one lawfully there for the purpose of voting. It was held that the town was not liable. In the discussion of this case there is general language relating to premises owned by municipalities for certain purposes. It is said that for private injuries caused by the improper management of their property, as such, they have been held to a general liability of private persons who own and manage the same kind of property. It is not to be presumed that the township did not own its town hall, or at least have a temporary title, if nothing more than a right of

possession. So in the case cited in support of the above language, viz., Bailey v. Mayor, etc., 3 Hill, 541, 38 Am. Dec. 669, there was no dispute but that the city of New York owned the dam; but in neither case did the question turn upon the ownership of the property, but, rather, upon the nature of tenure and duty. Why discuss whether the city was performing a public duty imposed by law, if the fact that it held title, alone could make it liable? And how justify the holding that a township was not liable for a defective floor, where it owned the building, if mere ownership in all cases creates liability? So we see that notwithstanding the use of broad language, the logic of these decisions supports the distinction indicated by the text of Dillon quoted, and the tests of municipal liability in such cases would seem to be two: (1) Is the act one in which the city has a private interest, instead of a public duty? (2) If not, then does the statute give redress against the municipality, either expressly or by necessary implication? This statute provides for a board of health, all of the members of which are chosen directly or indirectly by the city authorities; but as to the duties prescribed by law, they do not represent the city, but the state. The statute contemplates that a hospital may be provided in every township, and that when provided it will be practically under the control and regulation of the board of health. In one contingency the board of health is charged with the duty of providing it, and in doing that it would be acting for the state, not the city. But the statute provides that the town or city may establish such a hospital without waiting until an emergency arises. Whether that provision is mandatory, and requires the establishment of such hospital in every township or city, or is merely permissive, we need not inquire. In either case the city acts as a governmental agency in performing such duty, just as it acts in such capacity in selecting officers who are charged with such duties, and in providing and collecting from its inhabitants the necessary funds to pay the expenses, or in providing a police force for the preservation of the peace, or a fire department, and prescribing regulations for the same. It has been intimated that an officer, though a representative of the state instead of a city, is liable for his own misfeasance or nonfeasance. Many cases so hold, and we know of none to the contrary, except where judicial functions are involved. It may be claimed that if it be conceded that the city is made the agent of the state, it is liable for its misfeasance and that of its subagents. From the language of this statute it may be said that some duties are imposed directly upon the city, and not upon the board of health, and that the establishment of a hospital, when there is no emergency, is one of them. Cases can be found which suggest a distinction between a duty imposed on a city directly and one imposed on an officer of the city. It may possibly be urged that in such case the city is

responsible for the performance of such duty, and liable for a failure to perform it. And a few courts may so hold. It may also be urged that being an agent to build a hospital for the state, it is liable for its neglect or misconduct, as an agent ordinarily is, though the principal is usually the sufferer. It is manifest that one cannot be held liable under an application of the rule of respondeat superior where he would not be liable for the same act of negligence if done by himself, and notwithstanding his agent may be liable personally. Thus in Forbes v. Board (Fla.) 9 South. 862, 13 L. R. A. 549, the board was held not liable, although a corporation subject to being sued, for the reason that it was performing a public duty. In Iowa a statute gave to the city of Lansing power to establish a board of health, and to invest it with power and duties necessary to secure the people of the city against contagious and dangerous diseases. It was held that the city was not liable for negligence of its board of health. Ogg v. City of Lansing, 35 Iowa, 495, 14 Am. Rep. 499. City of Richmond v. Long's Adm'rs, 17 Grat. 375, 94 Am. Dec. 461, is a similar case. In Nebraska a statute provided that cities should have authority to provide protection from fires. A driver of the fire department injured a pedestrian, and it was held that the city was not liable, upon the ground that the city had no private interest in the service. Gillespie v. City of Lincoln (Neb.) 52 N. W. 811, 16 L. R. A. 352. See, also, Hayes v. City of Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Wilcox v. City of Chicago, 107 Ill. 334, 47 Am. Rep. 434; Fisher v. City of Boston, 104 Mass. 94, 6 Am. Rep. 196; Hafford v. City of New Bedford, 16 Gray, 297; Jewett v. City of New Haven, 38 Conn. 368, 9 Am. Rep. 382. See, also, many other cases cited in Gillespie v. City of Lincoln, supra. See, also, note to Barron v. City of Detroit (Mich.) 19 L. R. A. 452, note (s. c. 54 N. W. 273, 34 Am. St. Rep. 366); O'Rourk v. City of Sioux Falls (S. D.) 54 N. W. 1044, 19 L. R. A. 789, 46 Am. St. Rep. 760; Williamson v. Reform School (Ky.) 24 S. W. 1065, 23 L. R. A. 200, 44 Am. St. Rep. 243; Springfield Fire & Marine Ins. Co. v. Village of Keeseville (N. Y.) 42 N. E. 405, 30 L. R. A. 663, 51 Am. St. Rep. 667; Fuchs v. City of St. Louis (Mo.) 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 127; Hughes v. Monroe Co. (N. Y.) 41 N. E. 407, 39 L. R. A. 33; Webster v. Hillsdale Co., 99 Mich. 259, 260, 58 N. W. 317; Gilboy v. City of Detroit, 115 Mich. 121, 73 N. W. 128; Webb v. Board, 116 Mich. 516, 74 N. W. 734, 72 Am. St. Rep. 541. This distinction is hinted at in a note to Sheldon v. Village of Kalamazoo, 24 Mich. 383, though it is in the nature of a negative assertion of the proposition, through the medium of an implied exception. It is there said: "But such corporation is not liable for the negligence or malfeasance of officers or public boards acting in obedience to the mandates of the legislature, and for the public good rather than for the peculiar

benefit of the corporation, when in the performance of a duty imposed upon such officer or board instead of upon the corporation." Maxmilian v. Mayor, etc., 62 N. Y. 160, 20 Am. Rep. 468, is a leading case. The negligence complained of was that of a driver of an ambulance, who ran over a pedestrian. He was at the time in the service of the commissioners of public charities in New York, and it was held that the city was not liable. In the course of the opinion it was said: "If the act of the officer, or the subordinate of the officer, thus appointed, is done in the attempted performance of a duty laid by the law upon him, and not upon the municipality, then the municipality is not liable for his negligence therein." This language was descriptive of the case, rather than a limitation upon the city's immunity. It, however, furnishes a convenient peg to hang a limitation upon, and too many lawyers and courts accept such expressions as authority of greater or less weight. As the case shows, it turned on the general proposition that the act was in the performance of a public, not a private, duty, and that therefore there was no liability. In New York & B. Sawmill & Lumber Co. v. City of Brooklyn, 71 N. Y. 580 (a similar case in principle), it was said: "It is clear, therefore, that, unless the legislature has devolved the duty of rebuilding the docks upon the corporation, it is not liable for any neglect or omission to perform it." It is seen that this case is not a positive authority. There is a broad distinction between an agent (i. e. an officer) of the government, and a municipal corporation performing delegated functions pertaining to government. The latter becomes vested with a portion of the political power. As said by Mr. Justice Gray: "In such a case—and I speak, of course, of legislative acts which are general in their nature and scope—the assumption by the municipal corporation is of a further function of self or local government; and such a power is discretionary in its exercise, and carries with it no consequent liability for nonuser or misuser. In the legislature reside the power and force of government, confided to it by the people under constitutional restrictions. In the creation of municipal corporations, subordinate commonwealths are made, upon which certain limited and prescribed political powers are conferred, and which enjoy the benefits of local self-government. People v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202. When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality, they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers deposited with the various municipalities are exercised by them in a quasi sovereign capacity, so would any added powers designed for the general

public good, though optional with the corporation as to their assumption, and in their exercise and performance local, be exercised."

The true theory is that the township or city represents the state, in causing these things to be done, and, like the state, it enjoys immunity from responsibility in case of injury to individuals, leaving liability for such injuries to rest upon the persons whose misconduct or negligence is the immediate cause of the damage. The township and city must always act through officers. If it builds or repairs a road, constructs a bridge, collects a state or county tax, erects a town house, provides for the poor or the infirm, preserves the public peace, or provides a smallpox hospital, it must do it through persons selected for the purpose; and whether the law broadly directs that it shall do these things, or shall select officers whose duties are prescribed by law, its obligation is the same. The state relieves itself from the burden of multitudinous detail by delegating to and imposing upon aliquot parts of the body politic the power, and perhaps the duty, of doing for the state what it would otherwise have to supervise for itself. These powers are frequently legislative as well as ministerial. In this sense the township or city is a political agency, and the persons selected to perform the details whereby the result is accomplished are no more agents of the city or township, and no less the agents of the state, than as though the legislation had been more definite in prescribing the duties of the officers, and merely left their selection to the municipality. In imparting a portion of its powers, the state also imparts its own immunity. Cities are upon the same footing as quasi corporations, when acting in a purely governmental capacity. If this were not so, the township which should erect a town hall would be liable for injuries to persons using it who should be injured by falling through a defective floor, yet it was held otherwise in Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302, as already shown; and, were the plaintiff's action to be sustained, it would overturn the principle upon which nearly all of the cases cited rest.

It was a cruel thing to permit the decedent to enter the valley of the shadow of death unwarned, if those who sent him knew of the danger. A case involving a stronger appeal to the sympathy of a tribunal can hardly be imagined. But we feel constrained to say that, if there is culpable negligence here, the plaintiff's remedy is limited to the persons to whose negligence the deplorable event is due, if there be a remedy. It is not a case where the doctrines of imputed negligence and respondeat superior can be applied.

The judgment is affirmed. The other justices concurred.

QUAKER CITY NAT. BANK OF PHILADELPHIA *v.* CITY OF TACOMA *et al.*

(*Supreme Court of Washington, Jan. 10, 1902.*)

[67 Pac. Rep. 710.]

Warrants Drawn on Special Fund—Liability of City to Holders for Misappropriation of Such Fund.*

The misappropriation by a city of moneys belonging to a special fund of the city renders it generally liable to the holders of warrants drawn on such special fund to the amount of the moneys so misappropriated.

Same—Same—What Constitutes Misappropriation—Paying Subsequent Warrants in Preference to Those Issued Prior in Time.

Payment by a city of warrants drawn on a special fund, issued subsequent to other warrants on the same fund, is, if the effect of the payment is to exhaust the fund and leave prior warrants unpaid, a misappropriation of the fund, to the amount so paid.

Same—Same—Remedy.

Where a city misappropriates moneys belonging to a special fund, mandamus does not lie, on behalf of the holder of the warrants on such fund, to compel the city to pay the warrants out of its general fund; the remedy for such misappropriation being an action for damages.

Same—Same—Same—Statute of Limitations.

Where a city, June 30, 1893, misappropriated moneys belonging to a special fund, and the holder of a warrant drawn on such fund brought mandamus to compel its payment November 7, 1900, if the application be treated as an action for damages the same is barred by Ballinger's Ann. Codes & St. § 4800, subd. 2, limiting actions for injuries to the person or rights of another to three years from the accrual of the cause of action.

Same—Same—Validity of Ordinance Creating Fund to Replace Misappropriated Fund.

Where a city misappropriates moneys belonging to a special fund so as to exhaust the fund, an ordinance subsequently passed creating a fund for the payment of outstanding warrants drawn on the fund is not ineffectual as a promise which is a mere gratuity.

Same—Same—Remedy—Statute of Limitations.

Where, on June 30, 1893, a city misappropriated moneys belonging to a special fund so as to exhaust the same, and proceedings were commenced by mandamus, November 7, 1900, to compel the payment of an amount drawn on such special fund, an ordinance having been passed in September, 1900, creating a fund for the payment of all warrants drawn on such fund, the proceedings were not barred by limitation.

Appeal from superior court, Pierce county; J. A. Williamson, Judge.

Application by the Quaker City National Bank of Philadelphia for mandamus against the city of Tacoma and another to compel payment of a warrant issued by the city to the applicant. From a judgment sustaining a demurrer to the complaint, the applicant appeals. Reversed.

---

*See note appended to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 731, subhead j; City of New Orleans *v.* Fisher, 6 Mun. Corp. Cas. 403; City of New Orleans *v.* Warner, 6 Mun. Corp. Cas. 415.

E. R. York, for appellant.

William P. Reynolds and Emmett N. Parker, for respondents.

FULLERTON, J. The appellant is the holder of a warrant issued by the city of Tacoma dated October 10, 1892, and payable out of a special street-improvement fund. In this proceeding the appellant seeks a writ of mandate against the city and its treasurer to enforce the payment of the warrant. The application was made to the superior court of Pierce county on November 7, 1900. In its affidavit filed in support of the application, the appellant alleged, in effect, that the fund upon which its warrant was drawn was insufficient in amount to meet all of the warrants drawn against it; that the city collected the entire fund, and misappropriated a part of it by paying warrants drawn against it which were subsequent in time and in the order of their issuance to the appellant's warrant, thereby exhausting the fund, leaving the appellant's warrant unpaid in part. The date of the misappropriation is alleged to be June 30, 1893. It is further alleged that the city of Tacoma, by ordinance duly approved on September 21, 1900, created a fund designated as the "Street and Sewer Improvement Deficiency Fund," which ordinance contained, among others, the following provisions:

"Sec. 2. That out of said fund shall be paid any and all legal warrants heretofore issued by the city of Tacoma for the improvement of any street or alley, and for the construction of any sewer, which said warrants are now outstanding and unpaid, and for the payment of which no provision has heretofore been made; and all legal warrants heretofore issued by the city of Tacoma for the improvement of any street or alley, and for the construction of any sewer, which said warrants are in excess of the assessment rolls against which they were drawn, and which said assessment rolls have been collected in full, and for the payment of which said warrants no provision has heretofore been made.

"Sec. 3. That after the deficiency now existing in the interest fund to the amount of $3,562.94 shall have been paid into said fund, the balance of all moneys which may hereafter be received from George W. Boggs and his sureties, and from J. W. McCauley and his sureties, and from the banks and their sureties in which said Boggs and McCauley as city treasurers have heretofore deposited moneys belonging to the city of Tacoma, shall be paid by the city treasurer upon its receipt into said street and sewer improvement deficiency fund, and said money, or so much thereof as may be needed, shall be used for the payment of warrants designated in section 2 of this ordinance."

It is then alleged that the city has on hand, in the fund created by the ordinance, sufficient money to pay the balance due upon the appellant's warrant, which is applicable to its payment, and that it has in its general fund also moneys suffi-

cient to pay the warrant. To the application the respondents demurred on the grounds that sufficient facts were not stated to entitle the applicant to any relief, and that the proceeding had not been instituted within the time limited by law. The demurrer was sustained by the trial court, whereupon the appellant refused to plead further, and judgment of dismissal and for costs followed.

It is the settled doctrine of this court that misappropriation of moneys belonging to a special fund of a city by the city will render it generally liable to the holders of warrants drawn upon the special fund to the amount of the moneys so misappropriated, and that the payments of warrants drawn upon a special fund, issued subsequent in time to other warrants drawn upon the same fund, is such a misappropriation, if the effect of such payments is to exhaust the fund and leave prior warrants unpaid. Potter v. City of New Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135; Northwestern Lumber Co. v. City of Aberdeen, 22 Wash. 404, 60 Pac. 1115; Potter v. City of New Whatcom (Wash.) 65 Pac. 197; Paving Co. v. Sternberg (Wash.) 66 Pac. 121. But it is plain that a city, by misappropriating moneys belonging to a special fund, does not render itself liable to pay the warrants drawn upon that fund, as if they were warrants drawn upon its general fund. In other words, the act of misappropriation does not make such special-fund warrants general-fund warrants of the city. The city's liability arises from its wrongful act, and is measured by the amount of the fund misappropriated. The remedy of an injured party for a wrong of this kind would ordinarily be by an action sounding in damages for the injury suffered, judgment for which, when recovered, would be satisfied by the issuance to the judgment creditor of a general-fund warrant in the amount of the judgment, to be paid by the city's treasurer, in the order of its issuance, out of moneys coming into its general fund. Unless, therefore, some special fact is alleged, in addition to the fact of misappropriation, showing a liability to pay out of its general fund,—such, for example, as the appropriation of the money from the special to the general fund,—mandamus will not lie to compel the city or its treasurer to pay this class of warrants out of the city's general fund. In so far, then, as the application is treated as seeking a remedy against the general fund of the respondent city, the judgment of the trial court can rest upon the first ground stated in the demurrer. But if we were to treat the application as an ordinary action at law for damages, it is equally clear that the judgment must be sustained on the second ground stated. The wrong which gave rise to a cause of action against the city is alleged to have been committed in June, 1893. This action, as we have said, was commenced on November 7, 1900. Under the statutes of this state, an action for an injury to the person or rights of another, except in certain specially enumerated cases, of which this is not

one, must be commenced within three years after the cause of action accrues. Ballinger's Ann. Codes & St. § 4800, subd. 2. More than three years having elapsed between the time the cause of action arose and the time it was instituted, it was barred by this section of the statute.

The remaining question is, are the facts alleged sufficient to entitle the appellant to recover out of the special fund created by the ordinance of September 21, 1900? It is not to be doubted that the city had power in the first instance, provided, of course, it did not exceed its constitutional limitation of indebtedness, to provide for the payment of the cost of the improvement which gave rise to the issuance of the appellant's warrant out of its general fund, either in whole or in part. It could also have legally bound itself to pay any deficiency in the cost of the improvement remaining unpaid after the special fund created should be exhausted. This much is apparently conceded by the learned counsel for the city. If the city could do this prior to the making of the improvement, on what principle is its promise to pay the deficiency, after one is found to exist, invalid? The answers suggested are (1) that the city was under no legal obligation to pay the warrant, and its promise to do so is a mere gratuity; and (2) that the right of recovery on the warrant is barred by the statute of limitations. While it is true there was no legal obligation to pay the warrant on the part of the city which the law would enforce at the time the subsequent promise was made, yet it cannot be said there was no consideration for the subsequent promise, or that it was a mere gratuity. It is a general principle that whoever is capable of entering into a contract to compensate another for a service performed or an advancement made may, by a promise made subsequent to the performance of the service or the making of the advancement, bind himself to make such compensation. The power to make the contract is at the basis of the liability, and the performance of the act furnishes the consideration. This principle is applicable to municipalities, and unless some special reason, existing apart from its general power, prohibits the making of the promise, such a promise is binding upon the municipality, when accepted by the person coming within its terms. It is, of course, bound only to the extent and according to the terms of the promise as made; that is to say, it is bound to perform only in the manner it promises to perform. It assumes no general liability. In the case before us the ordinance is a promise to pay out of a particular fund a certain class of warrants arising in a particular manner. The promise is general in this respect, and applies to all warrants coming within its terms. The allegation contained in its affidavit clearly brings the appellant within its terms, and states a cause of action entitling him to recover out of this special fund. Whether the city could create this fund out of the money arising from the source out of which this money arises, or

whether it had power at that time to create a new obligation, are questions depending upon special circumstances not shown by the record before us, and questions which we here expressly refrain from deciding. If any such exist, they can be presented in the respondents' answer to the application for the writ. The warrant is not barred from payment out of this fund by the statute of limitation. It is a valid, existing warrant against the fund upon which it was drawn, and belongs to the very class the city intended should be paid out of the fund created by the ordinance.

The judgment is reversed, and the cause remanded, with permission to the respondents to answer to the merits of the application.

REAVIS, C. J., and WHITE, DUNBAR, MOUNT, and ANDERS, JJ., concur.

LE TOURNEAU *v.* CITY OF DULUTH *et al.*

(*Supreme Court of Minnesota, Jan. 13, 1902.*)

[88 N. W. Rep. 529.]

Municipal Indebtedness—Statutory Restriction*—Vote of Electors—Action by Taxpayer to Restrain Proposed Bond Issue.†

Action by a taxpayer to restrain a proposed bond issue by the city of Duluth: *held*, construing so much of Laws 1899, c. 351, § 10, as provides that "no city council * * * shall issue bonds for any purpose to the amount of one hundred thousand dollars or over, until the proposition to issue said bonds has been approved by a majority vote of the legal voters," that the city council may issue the bonds of the city to any amount less than $100,000 for any particular authorized public purpose without the approval of such voters, although the then aggregate bonded indebtedness of the city for all purposes equals or exceeds the amount named.

Collins and Brown, JJ., dissenting.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Wm. A. Cant, Judge.

Action by J. J. Le Tourneau against the city of Duluth and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

S. T. & Wm. Harrison, for appellant.

Oscar Mitchell, for respondents.

START, C. J. Action by a taxpayer to restrain a proposed issue of bonds to the amount of $60,000 by the common council of the city of Duluth for the purpose of extending its water plant without first submitting the proposition to issue such bonds to the voters of the city. The defendant interposed a

---

*See note appended to Thompson *v.* Town of Elton, 5 Mun. Corp. Cas. 725.

†See State, Orr *v.* City of New Orleans, 1 Mun. Corp. Cas. 122, and note; Reynolds *v.* City of Waterville, 1 Mun. Corp. Cas. 174, and note; Roberts *v.* City of Fargo, 6 Mun. Corp. Cas. 698; Middleton *v.* City of St. Augustine, 6 Mun. Corp. Cas. 896.

general demurrer to the complaint, and the trial court made its order sustaining the demurrer, from which the plaintiff appealed.

It appears from the allegations of the complaint that the city of Duluth adopted, pursuant to Laws 1899, c. 351, a special charter, which has been in effect since March, 1900; and, further, that the city, by its common council, in January, 1901, issued, without submitting the question of their issue to the voters of the city, and sold, permanent improvement revolving fund bonds to the amount of $99,000, which are now outstanding. The contention of the plaintiff is to the effect that, the council having already issued bonds to the amount of $99,000 without a vote of the electors, it cannot now issue the water bonds here in question until it is authorized to do so by a majority vote of the electors of the city. If this claim be correct, it follows that the proposed issue of bonds is illegal, and that the complaint states a cause of action. Whether the proposed issue of bonds is legal or not depends upon the construction to be given to Laws 1899, c. 351, § 10, hereafter referred to as the "enabling act," and to Duluth Charter, § 286, the here material provisions of which are substantially these: The city council shall control the property and finances of the city, and shall have power to borrow money on its credit for city purposes, and to issue bonds therefor; but "no city council of any city in this state shall issue bonds for any purpose, to the amount of $100,000 or over, until the proposition to issue said bonds has been approved by a majority of the legal voters of that city, voting at a general or special election." Id. § 10. The city of Duluth may issue bonds by ordinances as follows: (1) To pay floating indebtedness of the city existing at the time this charter goes into effect; (2) for the purpose of constructing, regulating, maintaining, extending, or improving suitable water or light plants; (3) such additional bonds as may be necessary to extend, enlarge, or improve such water and light plants. "No bonds excepting bonds for refunding indebtedness shall be issued for any purpose to an amount exceeding $100,000 until the proposition to issue said bonds has been approved by a majority of the legal voters of the city, voting at a general or special election. Whenever the common council passes any ordinance to issue bonds in pursuance of the provisions of this section, such ordinance shall provide for the submission to the legal voters of the city, at some general city election or at some special election to be called by the common council for that purpose, the proposition of issuing said bonds, to an amount deemed by said common council advisable." Id. § 286. Whether the exception of bonds for refunding indebtedness contained in the charter provisions quoted is repugnant to the prohibition contained in the enabling act, and therefore void, is not here material, for the subject under consideration is not refunding bonds, but water bonds. It is clear

from the charter provisions that no bonds to an amount exceeding $100,000 can be issued by the council until the proposition to issue such bonds has been approved by a majority of the legal voters of the city; and, further, that any proposed issue of bonds not falling within this prohibition may be issued without the approval of such voters. It is true that the general language which follows this prohibition, if construed without reference to the connection in which it is used, would require all proposed bond issues, without reference to the amount thereof, to be submitted to the voters of the city. But it cannot be so construed, for it would render the preceding sentence containing the prohibition meaningless and useless. When all of these charter provisions are construed together, as they must be, it is apparent that the construction we have adopted is not only the only reasonable one that can be given to the prohibition of the charter, but the only one which will give effect to all of the charter provisions in question. The charter, therefore, imposes no greater restrictions as to issuing bonds without submitting the question to the voters than the enabling act does. This narrows the question of the legality of the proposed bond issue to the sole question: What is the proper interpretation of the prohibition contained in the enabling act, "no city council * * * shall issue bonds for any purpose to the amount of one hundred thousand dollars or over until the proposition to issue said bonds has been approved by a majority of the legal voters"? It is urged on behalf of the plaintiff that the words, "for any purpose," as used in this prohibition, mean "for all purposes," and that the prohibition, read according to its true meaning, forbids, without the approval of a majority of the legal voters, the issue by any city of any bonds when the aggregate amount of bonds already issued for all purposes equals or exceeds $100,000. If such is the meaning of the prohibition, the legislature successfully concealed it by the words used to express it. If such was their intention, the simple and natural way of expressing it would have been in these words: "No city council of any city shall issue any bonds for any purpose when the aggregate bonded indebtedness of the city for all purposes equals or exceeds one hundred thousand dollars, until the proposition to issue such bonds has been approved by a majority of the legal voters of the city voting at a general or special election." But, if the intention of the prohibition was to forbid the issue of bonds in excess of the limitation named for any of the several specific purposes for which cities are authorized by law to issue bonds, the language used fairly expresses such intention. It is the proposition to issue bonds to the amount of $100,000 or over for any purpose which must be approved by the voters, and not a proposition to issue a less amount in case the then aggregate bonded indebtedness equals or exceeds the limitation. The language used is, "until the proposition to issue said bonds

has been approved." What bonds? "Bonds to the amount of one hundred thousand dollars or over." No other bonds are mentioned in the prohibition, which is directed against large issues of bonds for any specific purpose, unless the proposition is first approved by the voters. While the prohibition is not as aptly expressed as it might have been, it is reasonably clear that its purpose was to prevent any city from entering upon the work of constructing, extending, or repairing of any particular public improvement, or upon any other authorized municipal enterprise involving the necessity of a bond issue of $100,000 or more unless the proposition to issue the bonds for such purpose should be first approved by the voters of the city; or, in other words, this prohibition only forbids a bond issue for any specific purpose exceeding the amount limited without the approval of the legal voters of the city. We accordingly hold that the common council of the city may issue its bonds to any amount less than $100,000, for any particular authorized public purpose, without the approval of the electors, although the then aggregate bonded indebtedness of the city for all purposes equals or exceeds the amount named, but not the maximum limitation in excess of which no bonds can be issued for any purpose whatever. It is suggested that this construction would enable a city to enter upon any municipal enterprise it pleased without the approval of the voters, although it involved an ultimate bond issue of a million of dollars, more or less, by resorting to separate bond issues for installments of the entire work. Such an act would be a palpable evasion of the law,—a mere subterfuge,—to be dealt with by the court accordingly. But, were it otherwise, the suggestion affords no reason why we should not construe the enabling act as it reads, leaving the legislature to amend it if time and experience shall demonstrate the necessity for so doing. Again, it is suggested that, unless the prohibition be so construed as to forbid any bond issue whatever without the approval of the voters whenever the aggregate amount of bonds already issued equals or exceeds $100,000 the door will be opened for municipal extravagance in all cities that have adopted charters pursuant to this enabling act. If this be so, the remedy is by an appeal to the legislature, or by an appeal at the polls, and the election of members of the city council who will manage municipal affairs with the same fidelity and prudence as conservative and successful men manage their own business. But the construction contended for by the plaintiff, even if it were permissible, would lead to practical difficulties. Thus, if a city has once issued bonds for all purposes to the aggregate amount of $100,000, it cannot thereafter issue bonds for any purpose, nor in any amount, without submitting the proposition to the voters, even though the amount of the proposed issue was less than the expenses of holding an election. The proposed bond issue in this case is for a specific authorized public pur-

pose, and the amount of bonds necessary to be issued for its execution is less than $100,000. Therefore the city council is authorized to issue the bonds without submitting the proposition to the voters of the city.

Order affirmed.

LEWIS, J. I concur in the views expressed by the Chief Justice. The legislature has declared what it deems to be for the interests of the people, and we, in our interpretation, should be guided, not by what the voters on the adoption of the charter may have thought, nor by assuming that every man who holds a municipal office is a rascal, but by a consideration of all of the provisions of the act and charter in accordance with the usual canons of construction. The case turns largely upon the fact that the enabling act specifies certain purposes for which bonds may be issued within a certain limitation fixed by a percentage of value. In the city charter is contained an enactment which enumerates the purposes defined by the enabling act, and which prescribes the method of procedure. The words "for any purpose," as used in the enabling act, relate back to the several purposes before specified. If no limitation had been fixed, and no particular purposes had been stated, the illustration used in the dissenting opinion would be applicable. The proposition would then be similar to the case of an individual who should direct that disbursements for charity on his account by his cashier should not, for any purpose, exceed $10 a month. No one could reasonably claim, in such a case, that the limitation did not extend to all purposes. But, if a man authorizes disbursements to be made by his agent for several specific and independent charitable purposes, not exceeding in the aggregate a certain percentage of his monthly income, provided that no more than $10 a month shall be disbursed for any purpose until the proposition to make such disbursement has been approved by him, could it be reasonably claimed that the agent's authority was limited to the expenditure of $10 in the aggregate for all the specific authorized purposes? This illustration is strictly analogous to the provisions of the enabling act and city charter under consideration.

COLLINS, J. I dissent, and am authorized to say that Mr. Justice Brown concurs in my views. The charter of the city of Duluth, adopted in February, 1900, is based upon the enabling act (Gen. Laws 1899, c. 351), by which cities are authorized to frame their own charters. In that instrument (section 286), under the heading, "Power of the City to Borrow or Increase Debt," are provisions authorizing the issuance of bonds by ordinance for several different purposes; among others, for such additional bonds as may be necessary to extend, enlarge, or improve the existing water or light plants, or either. In also contains the following general provisions, the italics being my own: "No bonds excepting for

refunding indebtedness shall be issued *for any purpose*, to an amount exceeding one hundred thousand dollars ($100,000) until the proposition to issue such bonds has been approved by a majority of the legal voters of the city voting at a general or special election. Whenever the common council passes any ordinance to issue bonds in pursuance of the provisions of this section, such ordinance shall provide for the submission to the legal voters of the city at some general city election or at some special election to be called by the common council for that purpose, the proposition of issuing said bonds to an amount deemed by said council advisable." An examination of this section will show clearly that all bonds, without regard to the amount thereof, must be issued under ordinances, and under its express terms, before quoted, the propositions contained in such ordinances must be submitted to the legal voters under certain circumstances. The enabling act itself (section 10) provides that "no city council of any city in this state shall issue bonds *for any purpose* to the amount of one hundred thousand dollars ($100,000) or over, until the proposition to issue said bonds has been approved by a majority of the legal voters of that city voting at a general or special election." The express provisions of the city charter are construed and disposed of by the majority in a way which I do not regard as sustainable, and, instead of coinciding with the assertion in the opinion that, if the legislature had actually intended, when using the language found in section 10, and above italicized, to prohibit the issuance of bonds in an amount exceeding $100,000 without a vote on the proposition, it "successfully concealed" its meaning, I am of the opinion that it very clearly indicated its intention, and in a very plain and unambiguous manner conferred upon the legal voters of every city framing its own charter the right to vote on propositions to issue bonds in all cases where the bonds already issued amounted to or exceeded $100,000. The power of the council was expressly curtailed by the language found in section 10—First, by the words "for any purpose"; and, second, by the requirement that all bonds issued in pursuance of the provisions of that section must be under ordinances, and that whenever the council passed such an ordinance it should provide for a submission of the proposition therein contained to the legal voters of the municipality interested for approval or disapproval. It seems to me that the voters of the city of Duluth, to whom was submitted this charter for approval at the polls, must have understood that, where the bonded indebtedness of the city amounted to $100,000, the council was deprived of power to issue further bonds unless authorized by such voters. If a man directs that his household expenses shall not exceed $100 per month *for any purpose*, he would be somewhat surprised when told that his grocery bill was $50, his fuel and light bill $50, and his butcher's bill $50, an aggregate of $150, and also that his directions had not been disregarded because less than $100 had been expended for a single,

or for any one, purpose. If a man should direct that disbursements for charity to be made by his cashier should not *for any purpose* exceed $10 a month, he would certainly be astonished upon learning that his cashier had expended $10 each month for each of three or four different charitable purposes, and that, if he expected the amount authorized to include *all* purposes, he should have said so. I believe that the court should construe such provisions in the interest of the people, and not so as to confer unlimited power upon the governing body of a city to plunge it in debt at its own sweet will, except as restricted by the percentage clause. It is suggested in the main opinion that, if the intent had been as I contend, it was very easy for the legislature to have provided in this section that bonds should not be issued without a vote of the people where the aggregate bonded indebtedness of the city for all purposes equaled or exceeded $100,000. To this I reply that, while such language might better and more precisely express the intent, it would be simply multiplying words. Let me suggest that, if the intent had been to permit bonds to be issued by piecemeal for different purposes, as the majority hold, it would have been equally as easy for the legislature to have enacted that bonds should not be issued "for any one purpose" to an amount in excess of $100,000 without a vote of the people. A single word would have made the meaning perfectly plain to the taxpayers vitally interested. The result of this decision is that, without the vote provided for, bonds may be issued by city councils in installments of "ninety-nine thousand nine hundred and ninety-nine dollars, from time to time, until the five per cent. limit is reached in cities of over 8,000 inhabitants, and until ten per cent. of the assessed valuation is reached in cities of less than 8,000 inhabitants," provided different objects can be discovered for which such bonds may be issued day by day, and no matter how rapidly.

It is also suggested in the main opinion that the construction contended for by plaintiff, even if permissible, would lead to practical difficulties, because, if a city had already issued bonds for all purposes to the aggregate amount of $100,000, it could not thereafter issue in any amount, for any purpose, without the approval of the voters, although the amount of the proposed issue might be less than the expense of holding an election. If it be desirable to confer authority upon a city council to first ascertain the expense of holding an election upon a proposition to issue bonds, and then, if the amount of the issue is less than that expense, to allow the council to issue bonds without such election, the legislature should be called upon to so enact. I have not supposed that the rights of legal voters when before a legal tribunal to express their views at the polls upon any given proposition was to be determined, or even to be affected, by any consideration of expense.

I am of the opinion that the demurrer should have been sustained.

BOARD OF MAYOR, ETC., OF TOWN OF PONTOTOC *v.* FULTON *et al.*

(*Supreme Court of Mississippi, Jan. 13, 1902.*)

[31 So. Rep. 102.]

Municipal Indebtedness—Bonds—Partial Invalidity—Effect.

A provision in a municipal bond issued pursuant to Code, § 3017, which provides that no part of the principal shall be called in and paid by the board until maturity of the bonds, reserving the right after 10 years to pay off the bond, though void, will not affect the validity of the bond.

Appeal from circuit court, Pontotoc county; E. O. Sykes, Judge.

"To be officially reported."

Petition for mandamus by F. R. Fulton & Co. against the board of mayor and aldermen of the town of Pontotoc to compel the payment of municipal bonds. Judgment for plaintiffs, and defendant appeals. Affirmed.

In July, 1897, the board of mayor and aldermen of the town of Pontotoc, which town is operating under the code chapter on municipalities, and is a separate school district, issued bonds to the amount of $3,500 for the purpose of erecting a school house. Notice of the intention to issue the bonds was given as required by law, and, no petition for an election being filed with the board, the bonds were issued, and were sold to Noel Young Bond & Stock Company, of St. Louis. Noel Young Bond & Stock Company sold the bonds, before maturity, for a valuable consideration, to F. R. Fulton & Co., the appellees here. When the first bond became due, payment was refused by the municipality. Thereupon appellees, plaintiffs in the court below, filed their petition in the circuit court, praying for a writ of mandamus commanding the board to pay the bond if there was a sufficiency of funds for that purpose, and, if not, to levy a tax for the purpose of paying the bond. Defendant demurerd to the petition, setting up, among other grounds, that the town of Pontotoc has only the right reserved after ten years from the issuance thereof to pay off and cancel any of said bonds, whereas by law said bonds should have been payable after five years, at the option of the town. This demurrer was overruled, and defendants filed their pleas of the general issue and a special plea, alleging that the town was a separate school district, and that the debt contracted by the town greatly exceeded the amount of a three-mill levy on the taxable property. To the special plea plaintiffs demurred, the demurrer was sustained, and the cause was heard on the issue made by the plea of the general issue, and verdict and judgment were rendered for plaintiffs.

Fontaine & Fontaine, for appellant.

Geo. T. Mitchell and Anderson & Long, for appellees.

CALHOON, J. The town of Pontotoc issued $3,500 of bonds to build a school house, and got the money. These bonds are in the hands of bona fide holders without notice, unless, on the objections made, the statute gives to every one dealing in them notice of their invalidity. They were issued, and, we hold, pursuant to the power conferred by Code, § 3017. That section is as follows: "The mayor and board of aldermen, if it elect, may issue bonds, making a part of them mature annually, and running through a series of not more than 20 years from their issuance. All the interest in such case, and a part of the principal, to be fixed by the board at the time the bonds are issued, shall be payable annually, and the bonds shall be issued accordingly; in which case a part of the principal shall not be called in and paid by the board until maturity of the bonds." The only question, we think, we need refer to, arises out of the concluding sentence, viz.: "In which case a part of the principal shall not be called in and paid by the board until maturity of the bonds." Now, the bonds issued in the case before us have this provision, viz.: "The said town of Pontotoc reserves the right after ten years from the issuance thereof to pay off and cancel any of said bonds." It is contended that the bonds are void, because, while all matured in 15 years, the board reserves the right to pay them after 10 years. This reservation was, of course, void, and the board could never be compelled to exercise the option. Non constat that it ever would. If it ever attempts to exercise it, then will be the time for taxpayers to complain. It was expressly decided by the supreme court of the United States in Howell v. Railroad Co., 94 U. S. 463, 24 L. Ed. 254, opinion by Miller, J.,—a case practically identical with this in principle,—that, though such a provision is void, the bonds are valid. We follow that decision. We do not concur with learned counsel for appellant that there is anything in the other points made.

Affirmed.

STATE *ex rel.* COTONIO *v.* JUDGE OF CRIMINAL DISTRICT COURT, PARISH OF ORLEANS.

(*Supreme Court of Louisiana, April 2, 1900.*)

[30 So. Rep. 105.]

Ordinances—City Recorder Authorized to Take Judicial Notice of.*

Recorders in New Orleans are authorized to take judicial cognizance of the ordinances of the city, and, when they do so, such ordinances need not be offered in evidence for the purposes of prosecutions under them.

---

*In regard to judicial notice of ordinances, see State *v.* Cruickshank, 1 Mun. Corp. Cas. 399, and note; Moore *v.* Mayor, etc., of Jonesboro, 2 Mun. Corp. Cas. 276; Watt *v.* Jones, 1 Mun. Corp. Cas. 400; Incorporated Town of Scranton *v.* Danenbaum, 2 Mun. Corp. Cas. 767.

State *v.* Judge of Criminal District Court

Same—Same—Not Compulsory—Duty of Prosecution to Furnish Copy on Appeal.

But the recorders are not bound to take such notice, and, in any case which is to be appealed, they ought, if so requested by the defendant, to require the prosecution to furnish a copy of the ordinance, to be used for the purposes of the appeal, and should send the same up with the record, since it is a hardship, which ought not to be imposed on the defendant, to furnish such copy, and equally a hardship that his appeal should be dismissed for want of it.

Same—Appeal—Duty of Defendant to Request That Prosecution Be Required to Furnish Copy.

It is, however, incumbent upon the defendant to make his request that the recorder require the prosecution to furnish a copy of the ordinance under which the sentence is imposed, and that he send it up as part of the record of appeal; and if no such request is made, and the appeal goes up without such ordinance, it will be properly dismissed by the appellate court.

(Syllabus by the Court.)

Application by the state, on the relation of Theodore Cotonio, for writs of mandamus, certiorari, and prohibition against the judge of the criminal district court, parish of Orleans, section B. Denied.

Theodore Cotonio, pro se.

Richard Peete and Joseph E. Generelly, for respondent.

MONROE, J. Relator alleges that he was charged before the Sixth recorder's court of New Orleans with violating a city ordinance, referred to in the affidavit as "C. O. 3387, C. S., relative to the cleaning of privy vaults"; that he filed certain exceptions and demurrers, which were overruled, and that he was sentenced to pay a fine of $25, or, in default of payment, to imprisonment for 30 days; that he appealed to the criminal district court, and that said tribunal has dismissed his appeal, and refuses to hear and determine the case, "because of the failure of the recorder to attach to the transcript of appeal a copy of the city ordinance" that he is charged with having violated, which failure is attributed to him, although, under the law, as appellant, he has nothing to do with the preparation or filing of the transcript. He claims that this action amounts to a denial of justice and of his constitutional right of appeal, and he prays that the district court be ordered to send up the record and proceedings, that said court and the Sixth recorder's court be prohibited from enforcing the sentence imposed upon him, that the judgment of the district court dismissing the appeal be annulled, and that a mandamus issue, directing said court to reinstate the appeal, and to hear "and determine the issues as presented by the record and all proceedings had in said suit." The respondent, judge of the criminal district court, by way of return, and for cause why the writs prayed for should not issue, has forwarded the original record in the matter of City of New Orleans v. Theodore Cotonio, and has made answer in due form. From this record and answer, taken together, it appears that after the appeal had been lodged in the district court the defendant

and appellant, upon March 10, 1899, filed a motion to send the transcript back for correction, for the reason, as alleged, that prior to sentence he had moved for his discharge on the ground that the city of New Orleans had failed to offer in evidence the ordinance under which he was prosecuted, and on the further ground that the testimony did not show whether he was the occupant, owner, or agent of the premises mentioned in the affidavit, which motion and statement did not appear in the transcript, and had been inadvertently omitted. A motion was also filed on behalf of the city (whether before or after the motion to correct does not appear) to dismiss the appeal on the ground that the ordinance was not in the record; and both motions were disposed of at the same time, the opinion and decree reading as follows: "The city moves to dismiss this appeal on the ground that the ordinance is not in the record. The correction of the record as suggested by the defendant in his motion cannot avail him, since it would not make the ordinance a part of the record. The recorders take judicial cognizance of the municipal ordinances of the city. The motion to dismiss, in accordance with the former ruling of this court, must prevail," etc. Thereafter, upon application for rehearing, the court ordered the judgment thus rendered set aside, and the "cause remanded to the lower court, to be corrected in accordance with the motion to correct transcript of appeal filed herein March 10, 1899, if the allegation contained therein be true." But the recorder returned the transcript with an answer in which he denied the truth of the allegation contained in the motion to correct, and insisted that the record showed all that had taken place in the trial before him. Thereafter the matter was again remanded, in order that testimony might be taken upon the issue thus presented; and testimony was taken, and the respondent reached the conclusion that it failed to show that there was any error in the statement of the recorder, and he dismissed the appeal a second time. In addition to the facts which thus appear, the respondent alleges in his return that cases appealed to the criminal district court, under article 139 of the constitution, are required to be tried "on the record and evidence as made and offered in the lower court"; that the district court does not take judicial notice of the municipal ordinances, and hence that the ordinance in question should have been offered in evidence or annexed to the record; and that the dismissal of the appeal because of its nonappearance therein was in conformity to previous rulings of both divisions of said court, which rulings are well known to the profession. He further alleges that the recorders, upon the other hand, take judicial notice of the ordinances which they are called on to enforce, and that they are never filed in evidence in trials before them; that this practice has prevailed since time immemorial; and that, if relator had any objection to urge, he should have urged it before the recorder, and thus have secured a record, made

up in that court, upon which to predicate his claims upon the appeal. He further alleges: That the judgment of the recorder "is presumed to be correct. That the burden is on the appellant to show that it is incorrect, and the duty devolves upon him to bring up such a record, made up in the lower court, as will show its incorrectness," and that, "if he fails to do so, the fault is attributable to him." That, "if it was the duty of the city of New Orleans to file the ordinance in evidence, that point should have been first contested in the lower court. The recorder should have been given an opportunity of ruling on the point. Then the relator should have reserved his bill." In conclusion, respondent alleges that: "Although, as a matter of law, the criminal district court does not take judicial notice of the city ordinances, yet, as the recorders do, the judges of the former court simply require the ordinance to be in the records of appeal, whether offered in evidence or merely annexed by the parties. The practice now is for the appellant to produce a copy of the ordinance, and the recorder, on his request, annexes it. Any other system would require the judges of the criminal district court to seek for ordinances at the city hall, to determine appeals from the recorders' courts. This would not only impose difficulties and inconvenience on them, but would compel them to decide such cases on matters dehors the record. The ordinance, when annexed to the record, should be submitted to both the appellant and appellee or the recorder. This would give an injured party an opportunity of assailing it, and, if unassailed, the criminal district court presumes it to be authentic." It may be further stated that the defendant excepted or demurred before the recorder (1) to the jurisdiction of the court ratione personæ; (2) that the affidavit is informal and defective; (3) that, even though a statement of the offense embraced within the ordinance referred to in the affidavit had been made, the ordinance is unreasonable and ultra vires; (4) that it is not charged that the defendant is either owner, agent, or occupant of the premises; (5) that, if he is charged as agent, the ordinance is illegal and unconstitutional. The record, however, fails to establish the fact that he invoked any ruling of the recorder upon the question of the production of the ordinance, or its inclusion in the record to be sent up to the appellate court.

Opinion.

It appears from the foregoing statement of the case, as presented, that the question whether the ordinance under which the relator was prosecuted should be offered and filed on the trial before the recorder, or whether that official could properly take judicial cognizance of it, and the question as to the manner in which said ordinance should be presented to the appellate court in order to enable that tribunal to consider the relator's defenses, were not raised in the court of the first instance, and were therefore not brought up by the appeal.

It further appears that the question presented by relator's motion, filed in the appellate court, for the correction of the record, related to the failure of the city to offer the ordinance in evidence, and not to the failure of the recorder to include said ordinances, which had not been offered, in the record sent up by him. And finally it appears from the petition filed herein that the complaint upon this point is not that the relator asked that the ordinance should be annexed to the record for the purposes of the appeal, but that he had moved for his discharge because said ordinance had not been offered in evidence, and that his motion had been omitted from said record; and this averment has been negatived, as we have seen, by the evidence taken on the traverse of the recorder's denial thereof. It is well settled, however, that it is competent for a city court to take judicial notice of a city ordinance. And it is equally well settled that a court of general jurisdiction will not ordinarily take such notice. Dill. Mun. Corp. (4th Ed.) § 413; State v. Leiber, 11 Iowa, 407. It is also a well-recognized principle of jurisprudence that the presumption in the appellate court is in favor of the correctness of the judgment appealed from, and, while the plaintiff is bound to make out his case in the court of first instance, the appellant is bound on the appeal to show the error of which he complains. "Every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears." 1 Rice, Ev. p. 163. "The appellant must present a record showing error so clearly as to overthrow every presumption of regularity. He must exclude every presumption in favor of the judgment arising from omissions in the record by including all the trial court proceedings affecting the error alleged. No presumption or inference in favor of the appellant will be made." 11 Enc. Pl. & Prac. p. 294. "The transcript should contain every statement, paper, and document on which the opinion of the court is to be pronounced." State v. Dilley, 64 Md. 314, 1 Atl. 612; De Riesthal v. Walton, 66 Md. 470, 8 Atl. 462. "The general presumption obtains in all legal proceedings that judicial tribunals and officials act according to law. On appeal, accordingly, from an inferior district tribunal, an appellate court will presume, in review, that it has complied with all the requirements of law, and that its determination rested on facts sufficient to sustain it. * * * The burden rests upon the appellant to rebut this presumption. He must show clearly and affirmatively from the record itself facts constituting error in the proceedings below." 2 Enc. Pl. & Prac. pp. 421, 423. In view of these established propositions, it was to have been expected that the recorder would take judicial notice of the city ordinance under which the relator was prosecuted, and hence that it would not be offered in evidence, since one is not bound to prove that of which the court takes judicial notice. It was equally to have been expected that upon the appeal the appellate court, being

a state court of general jurisdiction, would not take judicial notice of said ordinance, but would, in its absence from the record, rather presume that the judgment appealed from, and predicated upon such ordinance, was correct.

Relator claims, however, that, while he was appellant, he was not responsible for the correctness of the record sent up by the recorder, but that by express provision of law the responsibility of preparing and filing such record devolved on that officer. The law applicable to the subject, we apprehend, is as follows: Const. art. 139, which confers upon the criminal district court appellate jurisdiction of all cases tried before the city criminal courts and recorders' courts, and provides that such cases shall be "appealable on the law and the facts, and shall be tried on the record, and the evidence as made and offered in the lower court." Act No. 123 of 1898, organizing the criminal district courts, which provides (section 13): "That in no case shall the appellant be responsible for any errors, omissions, or oversights, in the record of appeal. The chief clerk, or in his absence, the clerk designated by the judge, shall prepare the record, and shall be responsible for its errors, and omissions, or for any failure faithfully to discharge his duties in relation to it. Any dereliction in this respect shall be punishable as to [?] a contempt, by the appellate court." Act No. 84 of 1895, amending the city charter with regard to trials before the recorders, which provides that: "In all appealable cases, the testimony shall be taken down verbatim, but the stenographer's notes need not be written out unless an appeal is taken, in which case, the testimony shall be written out and signed by the recorder, and by him forwarded with the record of [to] the appellate court. No appeal shall be allowed, except when taken on the day of sentence; and in appeals, the procedure shall be, as nearly as possible, the same as in cases of appeals from the city criminal courts." It will be seen from this that the relator's case was to be tried in the appellate court upon "the record and evidence as made and offered in the lower court." And that it was the duty of the recorder, in case of appeal, to sign the testimony taken before him, and forward the same, with the record, to said appellate court. And it appears that the recorder discharged this duty. The relator's trouble arises from the fact that the ordinance under which he was prosecuted was never offered in evidence, and formed no part of the record, and hence was not sent up by the recorder. And, all that the recorder did having been within his authority, there seems to be nothing that the appellate court could require him to correct. The case was remanded to enable the relator to have it appear that he had raised the question that the city had not offered the ordinance in evidence. But it could have done him no good to have established that fact, because the recorder was authorized to take judicial notice of the ordinance, and the city was therefore under no obligation

to offer it. The relator, however, although afforded an opportunity to traverse the recorder's statement upon the subject, failed to show that he had raised even that question; and he made no attempt to show, nor does he claim now, that he requested the recorder to annex the ordinance to the record of appeal. The record therefore went up properly, so far as the recorder was concerned, without the ordinance, and the appellate court, declining to take judicial notice of it, dismissed the appeal. This ruling was in accord with the practice of said court, as we are informed by the return, in which it is said that the precedent was established in 1898, shortly after the adoption of the constitution, and has been adhered to since that time, and is well known to the profession. It may also be said to find support in the jurisprudence of this court, since appeals arising in cases under municipal ordinances have frequently been dismissed because of the absence of the ordinances from the transcripts. Hassard v. Municipality No. 2, 7 La. Ann. 496; City of New Orleans v. Boudro, 14 La. Ann. 303; Same v. Hill, 32 La. Ann. 1161; Same v. Labatt, 33 La. Ann. 107; State v. Tsni Ho, 37 La. Ann. 50; State v. Clesi, 44 La. Ann. 85, 10 South. 409; State v. Callac, 45 La. Ann. 30, 12 South. 119. It may be remarked, however, in regard to the cases thus cited, and others, perhaps, which might be cited, that it was not made to appear that the ordinances were missing from the transcripts because the recorders had taken judicial notice of them, or that the appellants had made any efforts in the trial courts to have them included in the transcripts of appeal. Otherwise, the rulings might possibly have been different, at least to the extent of giving the appellants the opportunity of correcting or supplementing such transcripts, and of being heard upon the merits of their cases. It is true, as we have stated, that the recorders may take judicial notice of municipal ordinances, but they are not obliged to do so; and when, in a given case, by so doing they subject the defendant, who is prosecuted before them, to the hardship of being compelled himself to furnish so important a factor in his conviction, in order that he may obtain a hearing upon his appeal, the custom of taking such judicial notice should be rather honored in the breach than in the observance, or followed with a certain moderation. In speaking of the latitude which courts allow themselves in matters of this kind, Mr. Stephens says: "No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereof, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces such document or book of reference." Steph. Dig. Ev. art. 59. *If, then, ignorance of* a fact of which he is authorized

to take judicial notice entitles a judge to refuse to take such notice unless and until the party calling on him to do so furnishes evidence of such fact, we think the circumstances of the case here presented would equally entitle him to pursue that course, since a defendant ought not to be obliged to furnish to the court the ordinance under which he is prosecuted, nor yet have his appeal dismissed because he has not furnished it, and because the appellate court refuses to take judicial cognizance of it. It has been held in some jurisdictions that "where a conviction is had for a violation of a city ordinance, and an appeal taken to the district court, the ordinance of the city need not be introduced in evidence. The district court should take judicial notice of it," etc. Downing v. City of Miltonville, 36 Kan. 740, 14 Pac. 281. We are of opinion, however, that the needed relief in this class of cases should be found in a change in the practice of the recorders, and that in a case which is to be appealed the recorder should, if so requested by the defendant, require those who are conducting the prosecution to furnish for the purposes of the appeal a copy of the ordinance relied on, and should send the same up as part of the record of appeal, though he need not allow the business of his court to be obstructed by requiring such copy for any other purpose, and may for all other purposes take judicial cognizance of such ordinance. Upon the other hand, when, as in this case, the appellant has made absolutely no effort in the trial court to have the ordinance under which he has been prosecuted produced in the trial court or sent up to the appellate court, and the proceedings of both courts are perfectly regular, we find ourselves unable to grant relief. The recorder committed no error, under the circumstances, in sending up the record without the ordinance in question, since he had taken judicial notice of it, as it was competent for him to do, and it had not, therefore, been offered in evidence, and the defendant in the case made no demand that it be produced for the purposes of an appeal. Nor was any error committed by the district court in dismissing the appeal, since it could not have proceeded to decide the case on the merits without the ordinance, which was not in the record, and of which it was not bound to take cognizance. It is therefore ordered, adjudged, and decreed that the preliminary order issued herein be rescinded, and that the demand of the relator be rejected, and this proceeding dismissed at his costs.

On Rehearing.

(June 27, 1901.)

NICHOLS, C. J. Relator, charged with having violated an ordinance of the city of New Orleans, was tried before one of the recorders, found guilty, and sentenced. He appealed to the criminal district court for the parish of Orleans. That court dismissed the appeal upon a motion to dismiss filed on

behalf of the city. The ground upon which the appeal was dismissed was that appellant had not offered in the recorder's court, and brought up in the record, a copy of the ordinance for whose violation he was sentenced. The present application was then made to this court for relief, relator alleging that the district court should not have dismissed his appeal. In the opinion rendered herein we declared that he was not entitled to relief under the circumstances of this case. Upon his application we granted a rehearing, not because we thought the district court would have erred in its ruling as it did had the case gone to trial before it, but to ascertain whether it had not erred in dismissing the appeal in limine, instead of waiting to do so (for want of proper evidence) until after submission. That course would have been the proper one to have been pursued. The record as brought up was an exact transcript of the proceedings below. There was therefore no fault to be found with the transcript, merely as such. The weakness of appellant's position before the district court was not in bringing up an imperfect transcript, but that he had failed to introduce in evidence a copy of the ordinance which he was alleged to have violated, in consequence of which the appellate court was not in a position to pass upon the various grounds for reversal which he had set up. That fact, however, was ascertainable only after the case should have been considered upon the merits. The city of New Orleans and the district court were therefore premature in dismissing the appeal in limine, but it is apparent to us that relator's appeal would ultimately have been dismissed, and properly dismissed after a trial. Had relator pressed before us on this rehearing the point of practice we have referred to, we probably would have sent the case back for trial on the merits, even though it was apparent that relator would practically have derived no benefit therefrom. Relator has, however, confined himself on this application to insisting that he would be entitled, upon a trial on the merits in the district court, to have the sentence of the recorder set aside. We see no reason to change our opinion considering relator's application for rehearing from that standpoint. For the reasons assigned, the judgment of this court heretofore pronounced must, and it is hereby declared to, remain unaltered.

In re KINSEL.

(*Supreme Court of Kansas, Division No. 1, Jan. 11, 1902.*)

[67 Pac. Rep. 634.]

Criminal Law—Violation of Ordinance—Right to Jury Trial.*

The constitutional guaranties of the right of a trial by jury apply only to the classes of cases in which the right existed when the con-

*See note on "Summary Proceedings in Municipal Courts" appended to Ogden *v.* City of Madison, ante, p. 161.

stitution was adopted; and juries were not then allowed, in local police courts in prosecutions for the infraction of ordinances and local regulations passed under the police power to preserve the health, peace, and good order of the people of towns and cities.

Same—Disorderly House—Summary Conviction—Appeal—Requirement of Bond Not a Denial of Constitutional Guaranty of Jury Trial.

The petitioner was tried and convicted in police court, without a jury, of keeping a bawdy house, in violation of a city ordinance; and when she attempted to appeal from the conviction a bond, with approved surety, in the sum of $80, to secure her appearance in the district court, was required. She declined to give such a bond, and tendered one signed by herself alone, which was refused: *held*, that the constitutional guaranty of the right to a jury trial was not denied to her.

(Syllabus by the Court.)

Application of Effie Kinsel for release on habeas corpus. Petitioner remanded.

Argued before DOSTER, C. J., and JOHNSTON, SMITH, and GREENE, JJ.

David Ritchie, for petitioner.

H. C. Tobey, for respondent.

JOHNSTON, J. Effie Kinsel was convicted in the police court of Salina upon a charge of keeping a bawdy house, and was adjudged to pay a fine of $25 and costs, and to stand committed to the city jail until payment was made. She gave notice of an appeal, and the police judge fixed the amount of her appeal bond at $80. She executed and tendered an appeal bond in that amount, signed by herself alone, but the police judge refused to accept or approve it unless security for her appearance in the district court was given. This she declined to give, and was therefore committed to the city jail, as the judgment provided. She applies here for a release from custody upon the ground that the conviction and custody are illegal and void because she was not afforded a jury trial. The conviction was had under an ordinance of the city of Salina which provides punishment for the keeping of a house of prostitution, and which the legislature authorizes a city council to enact. The power of the police court to convict the petitioner under the ordinance without a jury was raised at the trial, as well as when an appeal was demanded by her on an appeal bond signed by herself alone. This proceeding renews the question whether a person may be tried in a municipal court without a jury for a minor offense without violating the constitutional guaranty of the right to a jury trial. The power of a police court to try persons for infractions of city ordinances without the intervention of a jury was upheld in the early case of City of Emporia v. Volmer, 12 Kan. 622, and the same view has been taken in later cases. State v. City of Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; In re Jahn, 55 Kan. 694, 41 Pac. 956.

In behalf of the petitioner it is argued that the keeping of a

house of ill fame was an indictable offense at common law, triable by a jury, and that our constitution preserves the right to a jury trial as it existed when the constitution was adopted. The constitutional guaranties that the right of a jury trial shall be inviolate, and that the accused shall be allowed a speedy public trial by an impartial jury (Bill of Rights, pars. 5, 10), undoubtedly mean that the right to a jury trial remains and continues as it existed when the guaranties were incorporated into our constitution. State v. Simons, 61 Kan. 752, 60 Pac. 1052. At that time, however, persons prosecuted in inferior courts for violations of municipal regulations were not entitled to a jury trial. As was held in State v. City of Topeka, supra, the constitutional provisions do not apply to summary remedies given or exercised before such inferior courts. Prior to the adoption of our constitution such trials were conducted without juries, and it was said: "At the common law, juries are always composed of twelve men, and such juries have seldom been allowed in courts of special, inferior, or limited jurisdiction, such as police courts, justice of the peace or probate courts, or in courts of equity or in reviewing courts." It was further remarked in the same case: "In our opinion, the words 'all prosecutions,' as used in section 10 of the bill of rights, were intended to mean only all prosecutions for violations of the laws of the state, and were not intended to mean or to include prosecutions for the violation of ordinary city ordinances, which have relation only to the local affairs of the city." The same question was before the supreme court of Colorado in McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; and it was said: "The inquiry, therefore, is not, was the act complained of a public misdemeanor by statute or at the common law? but, does the offense charged belong to a class of offenses that were usually proceeded against summarily? A careful examination of the authorities has led us to the conclusion that both in this country and in England the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order, and otherwise promoting the general welfare, within cities and towns, had for more than a century prior to the adoption of our constitution been generally prosecuted without a jury." This authority makes a distinction between violations of a public law and violations of ordinances which provide for police or domestic regulation in the interest of order and decency. The latter is said to be devoid of the characteristics of general laws, and is not, in a constitutional sense, a crime for which the accused has a right to a trial by jury. These cases are not unanimous on the proposition, but we think it is settled by the great weight of authority that the enforcement of municipal ordinances without the intervention of a jury does not conflict with the constitutional guaranties securing the right of trial by jury. *State v.* Conlin, 27 Vt. 322; Byers v. Com.,

42 Pa. 89; State v. Glenn, 54 Md. 572; Ex parte Hollwedell, 74 Mo. 400; Williams v. City Council, 4 Ga. 509; State v. Lee, 29 Minn. 453, 13 N. W. 913; Howe v. Treasurer, 37 N. J. Law, 145; McGear v. Woodruff, 33 N. J. Law, 215; Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186; Wong v. Astoria, 13 Or. 538, 11 Pac. 295; State v. Fourcade, 45 La. Ann. 717, 13 South. 187, 40 Am. St. Rep. 249; Moore v. State, 22 Tex. App. 117, 2 S. W. 634; Hunt v. City of Jacksonville, 34 Fla. 504, 16 South. 398, 43 Am. St. Rep. 214; Brown v. Epps (Va.) 21 S. E. 119, 27 L. R. A. 676; Ex parte Kiburg, 10 Mo. App. 447; People v. McCarthy, 45 How. Prac. 97; Inwood v. State, 42 Ohio St. 186; Hill v. Mayor, etc., 72 Ga. 319; Floyd v. Commissioners, 58 Am. Dec. 559; Ward v. Farwell, 97 Ill. 593; Sedg. St. & Const. Law, 496; Pom. Const. Law, § 246; Proff. Jury, § 95; 24 Am. & Eng. Enc. Law, 504.

The constitutional provisions in question were not intended to confer the right of trial by jury in a class of cases where it had not previously existed, nor in summary proceedings wherein juries were not allowed at common law. These guaranties do apply to prosecutions in common-law courts; that is courts exercising common-law jurisdiction. In them the right to jury trial is enjoyed as it was when the constitution was adopted; but before that time, as the authorities cited show, juries were not allowed either in England or this country in local police courts for the summary trial of persons charged with violating municipal ordinances, or like trivial offenses.

Even if we regard the offense charged as of a criminal nature, and the violation of a public law, it cannot be said that the petitioner was in fact denied the right of trial by jury. An appeal was available to the district court, where a formal trial could have been had with a common-law jury. It has been held, as some of the cited cases show, that if an appeal may be had from a conviction at a summary trial, without unreasonable restrictions, to a court of general jurisdiction, where a jury trial may be had, the requirements of the constitution are satisfied. Whatever view may be taken, it cannot be said that the right of appeal of the petitioner was clogged by unreasonable restrictions. If the prosecution had been begun in the district court, her release from custody until the trial could only have been had by the giving of a bond, with approved surety, providing for her appearance in the district court. The appeal bond required for her appearance was no more difficult to give. It was only $80 in amount, and it appears that she gave a bond for a larger sum, signed by two sureties, to secure her release, while this proceeding was pending.

The petitioner will be remanded. All the justices concurring.

ROWLAND *v.* CITY OF GREENCASTLE.

(*Supreme Court of Indiana, Jan. 7, 1902.*)

[62 N. E. Rep. 474.]

Intoxicating Liquors—Power of City Council to Fix Boundary of Business Portion of City and Prohibit Sales Elsewhere*—Indiana Statute.

Under Acts 1895, p. 180 (Burns' Rev. St. 1901, § 3541), authorizing the common council of a city to regulate places where intoxicating liquors are sold, and to prohibit such sales in the suburban or resident portion of the city, the common council may fix the boundary of the business portion of the city in an ordinance prohibiting the sale of intoxicating liquors in the suburban or resident districts.

Same—Ordinance Prescribing Limits of Business Portion Not Conclusive That Place of Sale Was without Actual Limits of Business Portion.

Though the ordinance is prima facie evidence, in an action for a penalty for selling liquors in the resident or suburban portion of the city, that the place of such sale, when not within the prescribed boundaries fixed by the ordinance, is in the suburban or resident portion of the city, evidence may be admitted to show that the place of sale is in fact within the business portion of the city.

Same—Power of Council to Prohibit Sale in Suburban Portion of City When Portion of Suburbs Is Also Used for Business—Indiana Statute.

The statute authorizes the city to prohibit the sale of liquor in the suburban portion of the city, although such part of the city may be used for business purposes, as the word "suburban" as used in the statute means the outlying portion of the city.

Same—Statute Authorizing City to Regulate Place of Sale Does Not Authorize Ordinance Requiring License to Sell on Premises Not Owned by Him and Not Accessible to Him.

Acts 1895, c. 180 (Burns' Rev. St. 1901, § 3541), authorizing cities to license and restrain places where intoxicating liquors are sold, and providing that the city council can designate the room, building, or structure where such liquors may be sold, does not empower the council to fix conclusively the localities in which intoxicating liquors may be kept for sale, so as to authorize an ordinance requiring liquors to be sold on premises not owned by or accessible to the licensees.

Pleading—Pleading Ordinance by Number of Section and Date of Adoption—Sufficiency—Indiana Statute.

Where the number of a section of an ordinance and the date of its adoption is alleged in a complaint for a penalty for a violation thereof, the ordinance may be considered in determining the sufficiency of the answers, though not set out therein, under Burns' Rev. St. 1901, § 3501 (Horner's Rev. St. 1901, § 3066; Rev. St. 1881, § 3066), providing that such recital of the ordinance shall be a sufficient pleading thereof.

Same—Not Necessary to Allege Publication of Ordinance unless Same Be Denied under Oath—Indiana Statute.

Where the publication of an ordinance is not contradicted by an affidavit in proceedings by the city to collect a penalty for a violation thereof, it is not necessary to prove such fact, as Burns' Rev. St. 1901, § 3499, does not require a city to allege the publication of an ordinance in an action thereon instituted by it, unless the publication is denied by affidavit.

---

*See Rowland *v.* City of Greencastle, 6 Mun. Corp. Cas. 842. As to validity of ordinance prohibiting sale of intoxicating liquors in department stores, see City of Chicago *v.* Netcher, 4 Mun. Corp. Cas. 133.

Rowland *v.* City of Greencastle

Evidence—Proof of Publication of Ordinance—Printed Copy Accompanied by Affidavit—Sufficiency—Indiana Statute.

Under Burns' Rev. St. 1901, § 489 (Horner's Rev. St. 1901, § 481; Rev. St. 1881, § 481), providing that a printed copy of an ordinance, with the affidavit of the printer, his foreman, or any competent witness, shall be sufficient proof of publication, the introduction of a printed copy of a municipal ordinance with such an affidavit, stating the fact of its publication and the dates thereof, is sufficient, and proof of the filing of such affidavit of publication in the office of the city clerk is not required.

Appeal from circuit court, Putnam county; S. M. McGregor, Judge.

Action for a penalty by the city of Greencastle against Daniel B. Rowland. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendant appeals. Reversed. See 58 N. E. 1031.

Lewis & Corwin, Lamb & Beasley, and Woollen & Woollen, for appellant.

Moore Bros. and J. T. McClary, for appellee.

DOWLING, J. This action was commenced before the mayor of the city of Greencastle. The complaint charged the appellant with keeping and maintaining a room for the sale of spirituous and other intoxicating liquors, to be used upon the premises where sold, within the residence or suburban portion of the said city, and outside of the boundaries of the business district thereof, in violation of an ordinance of said city adopted February 8, 1898. From a judgment against him in the mayor's court the defendant appealed to the Putnam circuit court. A plea in abatement was held insufficient. A demurrer to the complaint and a motion to strike out parts of it were overruled. An answer in denial, together with four special answers, was filed by the defendant. Demurrers to the second, third, fourth, and fifth paragraphs of answer were sustained. A trial in the circuit court resulted in a finding and judgment against the defendant. Errors are assigned upon the rulings of the circuit court on the demurrers to the pleadings and on the motion for a new trial.

The proper construction of the act of 1895 (Acts 1895, p. 180; Burns' Rev. St. 1901, § 3541, subd. 13), by which the ordinance is supposed to be authorized, and the validity of the ordinance itself, are the principal questions to be determined on this appeal. The act referred to provides that the common council shall have power to enforce ordinances: "* * * Thirteenth. To license, regulate, and restrain all shops, inns, taverns, or other places where intoxicating liquors are kept for sale, to be used in and upon the premises, and in regulating, restraining, and licensing such inns, taverns, shops, or places aforesaid, they shall have the power to designate the room, building, or structure where such liquors may be sold, and may exclude such sales from the suburban or residence portion of such city, and confine the places where such sales may be made to the business portion of such city, and

may direct the arrangement and construction of the doors, windows, and openings of the particular room in such building where such sales may be had, or such intoxicating liquors be drunk, and may direct the location, arrangement, and construction of the bar kept therein, and the interior arrangement and construction of such room, and may direct what games may be carried on therein, and may forbid the keeping or use of wine rooms." In pursuance of the authority understood to be conferred upon it by the statute, the common council of the city of Greencastle, on February 8, 1898, enacted the following ordinance:

"Section 1. Be it ordained by the common council of the city of Greencastle, Indiana, that the business portions of the city of Greencastle are hereby defined to be, and declared to exist, only within the territory included within the following boundaries: All that part of said city of Greencastle which is bounded on the north by Columbia street of said city; on the west by Market street; on the south by Walnut street; and on the east by College avenue of said city; all the residue of the territory of said city is hereby declared to be the residence or suburban portions thereof, and the sale, or keeping of intoxicating liquors to be used in and upon the premises is hereby prohibited within said residence or suburban portion under the penalties hereinafter prescribed."

"Sec. 3. And be it further ordained by the common council of said city that it shall be, and is hereby made, unlawful for any person, or persons, or corporation to keep, or maintain any place, shop, room, or building for the sale, bartering, or giving away, or the keeping of any spirituous, vinous, malt, or other intoxicating liquors to be used in and upon the premises where sold, bartered, or given away, at any point or place within said suburban, or residence portion of said city, as defined in the first section of this ordinance; but the keeping or maintaining of all such places is hereby confined to the business portions of said city as herein defined in the first section of this ordinance; and any person violating any of the provisions of this section, or of any other section of this ordinance, shall, on conviction of such offense before the mayor of said city, be fined in any sum not less than ten nor more than one hundred dollars, for each such offense, and no license from Putnam county, Indiana, or said city of Greencastle, to sell intoxicating liquors shall constitute a defense to any action founded on this ordinance."

A fourth section of the ordinance declared it unlawful to keep or maintain any room, etc., for the keeping, etc., of intoxicating liquors to be used upon the premises where sold, within the suburban portion of the city of Greencastle, as described in the first section of the ordinance, and affixed a penalty for any violation of said section 4.

The trial court held the ordinance valid, and the complaint sufficient. It decided, also, upon the pleadings and proof,

that the defendant had no right to show, by way of defense, that his saloon was not in the residence or suburban portion of the city, but, in fact, in the business portion, although not within the boundaries of that district as declared by the ordinance.

In regulating, restraining, and licensing places where intoxicating liquors were kept for sale to be used upon the premises, the act of 1895 authorized the common council to exclude such sale from the suburban or residence district, and to confine the places where such sale might be made to the business portions of such city. The statute did not require the common council to fix the boundaries of the business portion of the city, neither did it prohibit them from doing so. It may have been thought by the legislature that in some cases it would be practicable to define such boundaries, and that in others it would not. Very good reasons may be given in support of each of these methods. It may be said that the question of the boundaries of the business district should be left to the determinations of the courts as a question of fact. Or, with equal force, it may be contended that greater certainty and uniformity in the enforcement of the ordinance can be secured where such boundaries are previously established and made known. Neither of these methods seems to be objectionable upon any legal ground, and the common council of the city of Greencastle, in the exercise of its discretion, had the right to adopt either. It saw fit to fix and declare the boundaries of the business portion of the city of Greencastle, and to confine the places where intoxicating liquors might be kept for sale to be used upon the premises within such boundaries, excluding them from both the suburban and the residence parts of the city.

But while the ordinance adopted by the common council of the city of Greencastle was valid, and, prima facie, rendered unlawful the maintenance of all shops, etc., kept for the sale of intoxicating liquors to be used upon the premises, outside of the business portions of the city, as defined by the ordinance, yet we think that such declaration of the boundaries of the business portion of the city was not conclusive. The statute authorized the common council to confine such places to the business portion of the city, and to exclude them from the suburban and residence portions. But that body could not, without exceeding its statutory authority, exclude such places from those portions of the city which were, in fact, neither suburban nor residence districts. Declaring them to be suburban or residence portions would not make them such. Proof of the passage of the ordinance, and that the appellant's room or saloon was within the prohibited district, was sufficient to make a prima facie case against him, but he had the right to show that his room or saloon was, in fact, in the business part of the city, and not in either the suburban or the residence portion.

It is proper to suggest in this connection that the words "residence" and "suburban," as used in the statute and ordinance, do not mean the same thing. The suburban portion of the city is the outlying part; that portion which is remote from the center of trade and population, where the houses are, generally, more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting. The suburban part of the city may be used for business, or it may be occupied by residences, or it may be used both for residence and business purposes. But in either case police surveillance and protection are usually less thorough and efficient than in the central parts of the city, and, however occupied, the same reasons exist for excluding from such portion of the city places of resort, and offensive occupations which may breed disorder, and threaten the quiet and safety of the neighborhood.

It is not necessary for us to decide whether the grant of the general power "to license, regulate, and restrain all shops, inns, taverns, or other places where intoxicating liquors are kept for sale to be used in and upon the premises," authorized the common council to fix the location of such shops, etc. It is sufficient to say that in adopting the ordinance before us the common council did not attempt to act under a general and unlimited power to fix the location of all such shops and places. They exercised only the more restricted authority expressly given by the statute to confine such sales to the business portion of the city, and to exclude them from the suburban and residence districts.

It is insisted that the power to fix, conclusively, the localities in which intoxicating liquors may be kept for sale to be used on the premises, is conferred by that clause of the statute which provides, that "in regulating, restraining, and licensing such inns, taverns, shops, or places aforesaid, they shall have the power to designate the room, building or structure where such liquors may be sold." In our opinion, the statute will not bear this construction. Under the laws of 1831, 1838, and 1853, regulating the traffic in intoxicating liquors, the place where the liquors were to be kept and sold was not required to be particularly described either in the petition of the applicant or in the license issued to him. Such petition and license usually designated certain premises known as a certain lot, or part of a lot, and the building situated thereon. The holder of the license was generally understood to have the privilege of keeping for sale and selling intoxicating liquors, in any and all rooms, in any part of such building, on any floor, and in any yard or garden upon the premises described in the license. It was, we think, to prevent abuses of this nature, and to restrict the business of the person to whom the license was issued to a single room, in a particular structure or building, that the law was changed so as to em-

power the common council to designate the room, building, or structure in which the person receiving the license might carry on his business. This designation is accomplished by requiring the applicant for license to describe in his petition the particular room, building, or structure, and by issuing the license to keep for sale and sell intoxicating liquors in such room, building, and structure only. The construction contended for by the appellee would authorize the adoption of an ordinance requiring all intoxicating liquors kept and sold for use on the premises by all persons engaged in the business, to be so kept and sold in one or more designated rooms, buildings, or structures in the city, not owned by, or accessible to, such persons. An ordinance of this character would operate, not to regulate or restrain the traffic, but to prohibit it, and this the common council, in this manner, cannot do. As a further answer to the contention of the appellee, it may be said that no effort is made by the ordinance on which this action is founded to designate any room, building, or structure in which intoxicating liquors must be kept and sold, but that the common council do describe a locality, under the authority given them by another different and distinct clause of the statute.

A few minor questions remain to be disposed of. The appellee makes the point that the ordinance alleged to have been violated was not properly set out in the answers, and that we cannot consider it in deciding the question of the sufficiency of those answers. The ordinance was the foundation of the action, and was brought into the case for all purposes by the complaint. It is true that, by reason of the express provision of the statute, no copy of the ordinance need be filed, and that a recital in the complaint of the number of the section charged to have been violated, with the date of the adoption of the ordinance, is sufficient. Section 3501, Burns' Rev. St. 1901 (section 3066, Horner's Rev. St. 1901; section 3066, Rev. St. 1881); Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138. But the effect of this provision is that the ordinance, by reference, is made a part of the complaint as fully as if a copy were filed.

The publication of the ordinance was not contradicted by affidavit; hence it was not necessary to prove the fact. Section 3499, Burns' Rev. St. 1901; Lake Erie & W. R. Co. v. City of Noblesville, 16 Ind. App. 20, 44 N. E. 652; Green v. City of Indianapolis, 25 Ind. 490. If the publication of the ordinance had been properly put in issue, the introduction by the appellee of the printed copy of the same, with the affidavit of the printer, his foreman or clerk, or any competent witness, stating the fact of its publication, and the dates thereof, was sufficient. Section 489, Burns' Rev. St. 1901 (section 481, Horner's Rev. St. 1901; section 481, Rev. St. 1881). We know of no rule requiring proof of the filing of such affidavit

of publication in the office of the city clerk, and we have been referred to none.

For the errors of the court in sustaining the demurrer to the fifth paragraph of an answer, and in excluding the evidence offered by the appellant that his place of business was not, in fact, within the residence or suburban portions of the city of Greencastle, and in overruling appellant's motion for a new trial on that ground, the judgment is reversed, with directions to overrule the demurrer to the fifth paragraph of the answer, and to sustain the motion for a new trial, and for further proceedings in conformity to this opinion.

GRAVES COUNTY WATER CO. *v.* LIGON *et al.*

(*Court of Appeals of Kentucky, Feb. 21, 1902.*)

[66 S. W. Rep. 725.]

Water Company—Failure to Supply Water to Extinguish Fires—Right of Property Owner to Maintain Action for Loss of Property.*

A city property owner may maintain an action against a water company for the destruction of his property by fire by reason of its failure to maintain a water supply pursuant to its contract with the city.

Same—Contract—Presumption That Parties Contracted with Reference to Existing Law.

It must be presumed that the parties to a contract contracted with reference to the law as it had then been declared by the highest court of the state.

Same—Same—Obligation of Ordinance Granting Franchise—Statute of Frauds.

Where a city, by ordinance, granted to a water company the franchise of supplying the city and its inhabitants with water for a period of 25 years, the water company holds the franchise so long as it enjoys it under the ordinance, and subject to the terms on which it was granted; and the company cannot escape the burdens imposed, at least as to past transactions, upon the ground that the contract is void under the statute of frauds, because it signed no memorial of the contract.

Appeal from circuit court, Graves county.

"To be officially reported."

Action by Ligon, Allen & Co. against the Graves County Water Company to recover damages for breach of contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

Robertson & Thomas, for appellant.

W. M. Smith and Crossland & Crossland, for appellees.

HOBSON, J. On July 30, 1891, the city of Mayfield made an ordinance providing for a supply of water and for electric lights for the city, by which it granted to appellant the franchise of supplying the city and its inhabitants with water and electric lights for a period of 25 years, appellant to keep a

*See note appended to Planters' Oil Mill *v.* Monroe Waterworks & Light Co., 3 Mun. Corp. Cas. 459.

sufficiency of engine and boiler power, so that, if one engine or pump should get out of fix, there would be others which might be used for pumping water; all mains to be of suitable size, and to furnish an abundant supply of water. A public test of the power and capacity of the waterworks was to be given when completed. At this test they were to throw from separate hydrants in the business part of the city not less than three simultaneous streams, with 50 feet of hose, to the height of 80 feet. The city agreed to rent 64 hydrants, and pay therefor $3,840 per annum, and for any additional hydrants $50 each per annum. These hydrants were to be used only for extinguishing fires, and it was stipulated that they should furnish effective streams without the aid of portable engines. Appellant undertook to keep all these hydrants supplied with water, and to maintain them in effective working order, except during the time of repairing or removing any hydrant which had become ineffective by accident or other cause than willful negligence of appellant. Appellant was also to build a water tower not less than 12½ feet in diameter, and not less than 130 feet in height, which should be for a constant supply of water. Appellant accepted the grant, and built the plant, and put the works in operation. After this the means theretofore provided by the city and its inhabitants for fire protection were abandoned. On June 26, 1901, a fire began in a house in the city, which spread to and burned appellees' house from the want of water in the hydrants, there not being sufficient pressure to throw a stream of any size more than from two to five feet. There was no water in the tower, and the firemen were unable to get water to check the fire. By reason of this the fire spread to appellees' property and destroyed it. They then sued the appellant, alleging these facts. It demurred to the petition. Its demurrer was overruled. It then filed an answer, which it subsequently withdrew, and, the case having been submitted to a jury, a verdict was rendered in favor of appellees for $12,000. The court entered judgment on the verdict, and appellant prosecutes this appeal without a bill of exceptions showing the evidence heard in the trial court. It insists that its demurrer to the petition should have been sustained on the ground that, as there was no privity of contract between it and the property owners, appellees have no right of action against it on the contract made by it with the city; and that, this contract being evidenced only by the ordinance of the city, and not signed by it, no action can be maintained against it under the statute of frauds.

In Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, this court, after very mature consideration, held that the property owner might maintain an action against the water company for the destruction of his property by reason of its failure to maintain a water supply pursuant to its

contract with the city. This decision is rested by the court on the ground that such a contract is made by the city as the corporate representative of its citizens, and for their benefit; and that they may, therefore, maintain an action under the rule allowing one to maintain an action on a contract made with a third person for his benefit. This decision was followed in Duncan v. Water Co. (Ky.) 12 S. W. 557, and in Duncan's Ex'rs v. Water Co. (Ky.) 15 S. W. 523. The learned counsel for appellant earnestly insists that these cases should be overruled, as contrary to the weight of authority and unsound in principle. We are referred to a large number of cases in other states holding otherwise, but upon a careful reconsideration of the subject we adhere to the rule heretofore laid down. This rule has since been followed in a well-considered opinion in Gorrell v. Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. The court, after referring to the numerical weight of authority against the rule announced by this court, said that authorities are to be weighed, not counted, and that line should be adopted which is most consonant with justice and the reason of the thing. It then added: "Did the people of Greensboro have just cause to believe that by virtue of that contract they, as well as the corporation, were guarantied a sufficient quantity of water to protect their property from fire, and did the water company understand it was agreeing for the valuable considerations named to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when, by a breach of that contract, private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he and he alone can maintain an action for his loss." It is universally held that the city is not liable to the property owner for the loss of his property. It is equally clear that the city cannot sue the water company and recover damages for the loss of private property. The result is that, if the owner cannot himself sue for the loss of his property, he is without redress, although his property has been destroyed by the breach of a contract made for his benefit by the city. We are not prepared to so hold. The cases above referred to were decided by this court in the year 1889, or two years before the contract now before us was made. The rule thus three times announced by this court was recognized as the law of the state at the time the contract before us was made, and we must presume that the parties to the contract contracted with reference to the law as it had then been declared by this court. To give a different effect now to the words which they used from that which they at the time understood was the legal operation of the contract would be to make for

them a contract different from that which they themselves made; for when they used words which, under the law as it had then been declared, created a certain obligation, it must be presumed that they intended to create this obligation.

The other objection to the petition may be more briefly disposed of. The franchise was granted to appellant by ordinance, and it signed no memorial of the contract. Since the contract was to run for twenty-five years, it is insisted that, as the contract was not to be performed in one year, it is within the statute of frauds, and appellant is not liable in this action. Appellant was granted a valuable franchise by the city. The grant was regularly made. The franchise was accepted by appellant, and has been enjoyed by it over 10 years. During this time it has received from the city annually the prescribed compensation for supplying the hydrants with water. After accepting the grant, and while in possession of the franchise and enjoying the compensation attached to it, appellant cannot be heard to say that it is not liable in damages for its negligent failure to furnish a supply of water. The city carried out its part of the contract by making the grant. Appellant, after accepting and enjoying the grant, and while in possession and still holding on to it, cannot escape the burdens it imposed, at least as to past transactions. Roberts v. Tennell, 3 T. B. Mon. 247; Dant v. Head, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369. It constructed its works, laid its mains in the streets, and exercised its powers under the ordinance. Whatever its rights as to the future may be, it holds the franchise, so long as it enjoys it, under the ordinance, and subject to the terms on which it was granted.

Judgment affirmed.

THOENI *v.* CITY OF DUBUQUE.

(*Supreme Court of Iowa, Jan. 31, 1902.*)

[88 N. W. Rep. 967.]

Statute of Limitations—Retroactive Operation—Existing Right to Sue Cannot Be Summarily Destroyed.*

Though statute of limitations may be given a retroactive operation by the legislature, it is incompetent for the legislature to cut off all remedy, and the right to sue within an existing statute of limitations cannot be summarily destroyed.

Same—Not to Be Construed Retrospectively in Absence of Express Words or Necessary Implication.

A statute of limitations will not be given a retroactive operation unless it appears by express provision or necessary implication that such was the legislative intent.

Same—Same—Not to Be Construed as Destroying Existing Right of Action.

Code, § 1050, taking effect October 1, 1897, provided that no suit should be brought against cities acting under special charters "for any unliquidated claim or demand unless within three months from

*See City of Louisville *v.* Seibert, 3 Mun. Corp. Cas. 118; Oshkosh Waterworks Co. *v.* City of Oshkosh, ante, p. 263.

the time the same became due or cause of action accrued thereon." Plaintiff's demand against the city of Dubuque for damages from a change of grade accrued in August, 1896, and, prior to the Code of 1897, was enforceable at any time within two years: *held*, that the section quoted could not be construed as applying to plaintiff's case, as such construction would take away from him all remedy.

Same—Same.

Such section cannot be construed as requiring plaintiff to sue the city within three months from its taking effect, such a meaning being neither expressed nor necessarily implied by its language.

Same—Same.

Code, § 1050, providing that no suit shall be brought against a city acting under a special charter for any unliquidated demand "unless a written verified statement of the general nature, cause and amount of same is filed * * * thirty days before the commencement of suit," will not be given a retroactive operation; it not appearing by express provision or necessary implication that such was the legislative intent.

Appeal from district court, Dubuque county; M. C. Matthews, Judge.

Action at law begun July 13, 1898, to recover damages alleged to have been occasioned to plaintiff's property by change in grade of street made in August, 1896. Demurrer to petition having been overruled, defendant appeals. Affirmed.

Duffy & McGuire, for appellant.

Jess & Kitzinger, for appellee.

WEAVER, J. The grounds of the demurrer to petition are stated as follows: (1) That plaintiff's cause of action is based on an unliquidated claim which accrued in the year 1896, and this action, being brought thereon more than three months after the Code of 1897 went into effect, is barred by the statute limiting such actions as provided in such Code; (2) that there is no showing that any written, verified statement of the general nature, cause, and amount of plaintiff's claim was filed with the recorder of the city 30 days before the commencement of the suit.

Prior to the Code of 1897, actions upon claims of this nature could be brought at any time within two years after the cause thereof accrued. In adopting the Code the legislature materially modified this rule in favor of cities acting under special charters, and it is there provided: "Sec. 1050. No suit shall be brought against any such city for any unliquidated claim or demand unless within three months from the time the same became due or cause of action accrued thereon, nor unless a written, verified statement of the general nature, cause and amount of same is filed with the clerk or recorder thirty days before the commencement of such suit." Does this change in the statute of limitations affect plaintiff's right of action, which had accrued before such change was enacted? It will be conceded that statutes of limitation, pertaining, as they do, *to the remedy, may be* extended or abbreviated by

act of the legislature, and that, generally speaking, such changes may be made retroactive and applicable to existing rights. It is well settled, however, that, with but few exceptions, it is not competent for the legislature to cut off all remedy, and that the right to sue within the existing statute of limitations is property, which cannot be thus summarily destroyed. Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; Kennedy v. City of Des Moines, 84 Iowa, 187, 50 N. W. 880. Nor will a statute of this kind be given retroactive effect, unless it appears by express provision or necessary implication that such was the legislative intent. Murray v. Gibson, 15 How. 421, 14 L. Ed. 755; Railroad Co. v. Van Horn, 57 N. Y. 477. Under both of these propositions, we think defendant's demurrer was properly overruled.

Code, § 1050, went into effect October 1, 1897. Plaintiff's cause of action having accrued in August, 1896, it was manifestly impossible to comply with the provisions of said section; and to hold that plaintiff is bound by the amendment is to take away from him at once all remedy. Appellant seeks to avoid the force of this objection by the suggestion that although more than three months had already elapsed after the cause of action accrued, and before the Code became effective, yet, for the purposes of this case, the time must be considered as beginning to run with the advent of the Code (October 1, 1897), and, having failed to begin his action within three months thereafter, his right is barred. It is sufficient answer to this argument to say that such is not the language of section 1050, upon which counsel relies, and to give it any such interpretation requires us to read into the act of the legislature a meaning which is neither expressed nor necessarily implied.

It is further contended that, even if the time limit of three months is not applicable to plaintiff's right of action, yet the filing of the verified statement is made a condition precedent to his right to bring an action. The rule we have already invoked against giving a statute retroactive effect when a fair interpretation of the language employed does not require it is applicable here also, and the point made is not well taken.

There was no error in the ruling upon the demurrer, and the judgment below is affirmed.

YANCY *et al. v.* TOWN OF FAIRVIEW *et al.*

(*Court of Appeals of Kentucky, Feb. 12, 1902.*)

[66 S. W. Rep. 636.]

Extension of Boundary—Applicability of Statute Forbidding Same.

Ky. St. § 3713, restricting the boundary of towns when created, does not apply to a sixth-class town organized by special charter and then in existence, the boundary of which may be extended any reasonable distance.

Yancy *v.* Town of Fairview

Same—Town Lying in Two Counties—Jurisdiction to Appoint Trustees.

Where a town lies in two counties, the county judge of either may appoint trustees; the jurisdiction continuing in the one first exercising the authority.

Validity of Acts of De Facto Officers.

The acts of persons acting and recognized as town trustees are valid, they being de facto officers.

Extension of Boundary—Necessity—Case at Bar.

Where every lot in a town, save three, had been built upon at the time an ordinance annexing territory was passed, and much of the annexed territory was used by citizens of the town as pasture lots, the court was justified in concluding that the proposed territory was necessary for the growth of the town, and that the annexation of the territory would cause no serious injury to the persons owning real estate therein.

Appeal from circuit court, Todd county.

"Not to be officially reported."

Proceeding by John W. Yancy and others against the town of Fairview and others to prevent the annexation of territory to the town. Judgment for defendants, and plaintiffs appeal. Affirmed.

Perkins & Trimble, for appellants.

W. L. Reeves, for appellees.

WHITE, J. This was a proceeding begun by appellants in the circuit court of Todd county to prevent the annexation of certain territory to the town of Fairview, and to prevent cutting off a part of the boundary as it existed. It appears that Fairview was established by special charter in 1846, and that its boundary was in both Christian and Todd counties, and was originally divided into 20 lots; 10 being on either side of the turnpike; the major portion being in Christian county. In June, 1898, the town trustees, who, it seems, had been appointed by the county judge or county court of Todd county, passed an ordinance at a regular meeting changing the boundary of the town by cutting off a small strip on the west or Christian county side, and by annexing other territory so as to make the town a rectangle, 142 by 192 poles in dimensions. The appellants filed their petition in equity under the statute, objecting to the proposed change, in the proposed annexation of the territory. There seems to be no objection to that part of the ordinance cutting off territory. The objections presented are (1) that the proposed boundary exceeds one-fourth of a mile in each direction, necessary to form a square; (2) that the board of trustees acting when the ordinance was enacted was illegal, as it is contended the county judge or county court of Todd county had no authority to appoint trustees for the town, as it lay partly in Christian county; (3) the right of the petitioners, citizens and freeholders in the territory, to object to being annexed to the town. It is insisted that the opponents compose 75 per cent. of the resident freeholders of the territory sought to be

annexed. The court sustained a demurrer to the first and second grounds, and issue was made by pleadings as to the third, and on this proof was heard. On final hearing the court refused relief and dismissed the petition, and hence this appeal is prosecuted.

We are of opinion that the demurrer to the petition, or the part pleading that the boundary lines are more than one-fourth of a mile, was properly sustained. We know of no statute restricting the boundaries of sixth-class towns to one-fourth of a mile each way, forming a square, except section 3713, Ky. St., which is a part of the act of July 3, 1893, for the creation and organization of towns. That section applies only to the creation and organization of towns in the first instance. Both the minimum population and the maximum territory are prescribed for the first organization of towns under that act. That act has no application to such towns as Fairview, organized by special charter, and then in existence. By section 3663, Ky. St.,—a part of the charter of the sixth-class towns,—it is provided, "The boundaries of the several towns of this class shall, until changed as herein provided, remain as now established by law." The charter of the sixth-class towns was passed July 1, 1893; and the act of July 3, 1893, providing for the creation and organization of towns, is no part of, nor amendatory to, the charter of sixth-class towns. So far as boundary is concerned, the sixth-class towns in existence July 1, 1893, might have been of any size, which they retained, or they might, under the provisions of the charter, be extended any reasonable distance.

The second objection—that the county court or county judge of Todd county had no power or authority to appoint trustees of the town, because the town lay partly in Christian county—is also unsound. If the county judge of Todd county could not act, for the identical same reason the county judge of Christian could not act; and then, by the position of appellants, there is no authority in either to act. The power to appoint could not be joint. If it exists at all, it must exist in one or the other. It cannot exist as a joint power. We hold that the power and jurisdiction to appoint, in proper cases, is concurrent in the two authorities. The first exercising has authority. This is like the concurrent jurisdiction of two courts. Either may act, but not both. Nor is it a joint power. That court first taking jurisdiction holds to the final determination of the case. The appointments had been made by the Todd county judge, and as he exercised the right, concurrent in him, his appointment was legal, and the trustees so appointed had authority to enact the ordinance in question. Besides this question, the acts of the trustees, acting and recognized as such, are valid and binding. They were de facto officers, as was expressly held in the case of Pence v. City of Frankfort (Ky.) 41 S. W. 1011.

Upon the issue presented, we are of the opinion from the

proof that less than 75 per cent. of the freeholders of the territory to be annexed have remonstrated against the annexation. The proof very clearly establishes the fact that every lot in the town, save three, had been built upon and was occupied when the ordinance was enacted. It would seem, therefore, necessary, if the town was to grow at all, that there must be territory added. It is also shown that much of the annexed territory was owned by citizens of the town, and used as pasture lots for their horses and milch cows. We conclude from the proof (1) that less than 75 per cent. have remonstrated; (2) that the proposed territory is necessary for the growth of the town; and (3) that the annexation will cause no serious injury to the persons owning real estate therein. True, the annexation of this territory will subject this property to taxation for municipal purposes; but this fact must always be. The outlying territory brought in is owned largely by residents, who must pay the expenses of the town corporation anyway; and in others they receive the benefit of the town organization, and it cannot be said that they are materially injured by being compelled to contribute to pay for the benefits received.

Upon the whole case, we decline to disturb the judgment of the court below. Judgment affirmed.

CITY OF PHILADELPHIA *v.* BRABENDER.

(*Supreme Court of Pennsylvania, Feb. 24, 1902.*)

[51 Atl. Rep. 374.]

Scattering Paper—Validity of Ordinance Prohibiting.

An ordinance prohibiting the casting of advertisements, circulars, handbills, and waste paper in the vestibules or yards or on the porches of dwellings is within the legislative power of the city as to streets, as naturally, and without any further act, the paper is liable to be, and probably will be, blown into the streets.

Same—Same—Discrimination.

Advertising by circulars is not prohibited by an ordinance forbidding the casting thereof in vestibules of dwellings; addressed envelopes being expressly excepted, and delivery to individuals not being forbidden.

Same—Same—Same.

There is no discrimination impairing equal rights in an ordinance prohibiting the casting of advertisements in vestibules of dwellings, though newspapers and addressed envelopes are excepted.

Appeal from superior court.

Action by the city of Philadelphia against Edward Brabender to recover a penalty for violation of an ordinance. From judgment of the superior court affirming a judgment of the court of common pleas for plaintiff, defendant appeals. Affirmed.

The following is the opinion of the superior court (Rice, P. J.): "*By express legislative* enactment the city of Phila-

delphia has 'full power and authority to make, ordain, constitute and establish such and so many laws, ordinances, regulations and constitutions (provided the same shall not be repugnant to the laws and constitution of this commonwealth) as shall be necessary or convenient for the government and welfare of said city' (Act March 11, 1789; 2 Smith, Laws pp. 462, 467), and is 'vested with all the power, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same' (Act Feb. 2, 1854; P. L. 21, 25). It cannot be questioned that under this comprehensive grant the city has power to enact reasonable ordinances for the protection of the public in their right to the free and safe use of the highways of the city. Nor, so far as it relates to the casting of any paper, advertisement, or handbills, circulars, or waste paper upon the streets, can it be questioned that the ordinance under consideration tends to, and is reasonably necessary for, the accomplishment of that purpose. It tends not only to the cleanliness of the streets,—a matter which deservedly is receiving much attention in the smaller as well as in the larger towns and cities, and which unquestionably is a proper object of municipal legislation,—but also to safety, as every one familiar with the action of horses knows. But it is claimed that, so far as the ordinance relates to the casting of advertisements, circulars, handbills, and waste paper into the vestibules of dwellings, it is invalid, because, to adopt the language of counsel, it relates to that which at most is a private nuisance; an act done within the house line, and to which only the owners or occupiers can object. We do not understand it to be claimed, and we do not think it could be declared as an unvarying rule, that because an act, not a common nuisance per se, is done within the house line of private premises, it may not lawfully be prohibited by municipal ordinance. We may, however, concede the general principle—although we think it could be shown that this also has its exceptions—that private property must usually seek protection against trespassers from the general laws of the land and the public tribunals, and not from the city by-laws. Horn v. People, 26 Mich. 221. But we do not regard this ordinance as intended for the protection of private property. Incidentally it may have the effect of relieving such owners, to some extent, from what, in common parlance, is a nuisance; but that is not its primary purpose. Waste paper, circulars, handbills, and the like lying upon the porch, in the vestibule, or in the front yard of a private residence are not sightly things; but so long as they lie there they cannot be considered a public nuisance, and, for the purposes of this case, it may be conceded that a city ordinance cannot make them such. It is obvious, however, that the reason upon which the ordinance rests is not merely that the casting of these fugitive papers in the places described is an annoyance to the owners

of the premises, but that the wind catches them up and casts them into the streets, where they lie or are blown about, to the annoyance and inconvenience of the general public. This is liable to happen not only to papers cast into the yards and upon the porches, but also, although perhaps in a less degree, to those cast into the vestibules of city dwellings, as is well shown in Judge Biddle's opinion. It is a fact which did not require proof, but is a matter of common knowledge, which the municipal authorities in enacting the ordinance, and the court in passing upon its reasonableness, were justified in taking into consideration. See Commissioners, etc., of Northern Liberties v. Northern Liberties Gas Co., 12 Pa. 318, at page 322. There is a manifest difference between the ordinance discussed in People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578, and the ordinance now under consideration. In the former the offense was made complete in itself by the mere act of distributing or giving away the enumerated articles upon the public streets. In the latter the thing prohibited in the casting of these papers in places whence naturally, and without any further act of the wrongdoer or of any one else, they are liable to be, and probably will be, blown into the streets. 'It admits of no controversy that the city is armed with ample authority to remove from its streets and thoroughfares every obstruction or impediment to their free use as such by the public, unless authorized by law.' City of Philadelphia v. Philadelphia & R. R. Co., 58 Pa. 253. The power to remove includes the power to prevent by reasonable regulations which do not conflict with any provision of the federal or state constitutions. So far as we can see, the purpose of this ordinance is to prevent the littering up of the streets and the frightening of horses, and we cannot say that the means chosen are not adapted to, and reasonably necessary for, the full accomplishment of that purpose. It is argued further, again adopting the language of counsel, that the ordinance 'utterly destroys the well-known business of distributing circuits, and partially destroys the business of merchants by preventing them from advertising their wares in a cheap and expeditious manner, thereby violating the section of the bill of rights which gives to the citizens the inherent and inalienable right to acquire, possess, and protect property and reputation, and of pursuing their own happiness.' This argument is based on wrong premises. The ordinance does not prohibit the business referred to, nor does it prohibit merchants or others from advertising their wares by means of circulars. It does not prohibit the delivery of them to individuals, and it excepts from its operation circulars inclosed in addressed envelopes. Thus, whilst regulating the mode of distributing this form of advertisement, it does not absolutely prohibit it. Surely, it cannot be contended that any man has an inalienable right

to advertise his goods or business by circulars scattered broadcast, trusting to chance to bring them to the hands of willing readers, but knowing also that quite as likely the unfavoring winds will sweep them into the traveled ways and gutters of the streets. But the power of the legislature or the delegated power of a municipal corporation—which we think every one will concede—to prohibit that mode of distributing advertising circulars and handbills is no clearer and rests upon no more sure foundation than the power to prohibit the distribution of these papers in the modes described in this ordinance. Nor can we see that an invidious discrimination is made against any one by the ordinance. All persons are treated alike and subject to the same restrictions. True, the ordinance exempts from its operation newspapers and addressed envelopes, but evidently not for the purpose of favoring those who advertise in that way, but because, in the judgment of the municipal authorities, there was not the same necessity for prohibiting the delivery of newspapers and addressed envelopes to the persons for whom they are intended in that way. This discriminates against no persons or class of persons, and surely it is not for the defendant to say that the ordinance is void because it does not prohibit other acts equally as mischievous as the acts prohibited. 'The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.' Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. The limitations of the powers conferred upon municipal corporations are that they must be exercised in a reasonable, lawful, and constitutional manner. 'If these limitations are not transgressed, courts cannot interfere with the ordinances of the municipality, for to the mayor and council must be left a reasonable discretion, and for the proper and wholesome exercise thereof they are accountable not to the courts, but to the people.' O'Maley v. Borough of Freeport, 96 Pa. 24, 42 Am. Rep. 527. 'Where the municipal legislature has authority to act, it must be governed, not by our, but by its own, discretion; and we shall not be hasty in convincing them of being unreasonable in the exercise of it.' Fisher v. Borough of Harrisburg, 2 Grant, Cas. 291; City of Wilkesbarre v. Garabed, 11 Pa. Super. Ct. 355. Judgment affirmed."

Isaac S. Sharp and Geo. S. Graham, for appellant.

Samuel Chew, Howard A. Davis, and John L. Kinsey, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of Judge Rice of the superior court.

WILLS *v.* CITY OF FT. SMITH.

(Supreme Court of Arkansas, Feb. 15, 1902.)

[66 S. W. Rep. 922.]

Police Power—Weighing Coal on City Scales*—Ordinance Not Applicable to Sale of Small Quantity.

A city ordinance making it unlawful to sell coal without weighing it on the city scales, and paying the weighman 10 cents for the weighing of any load or part of a load, applies only to wagon loads, and not to sales of very small quantities, such as a bucket or wheelbarrow of coal.

Same—Same—Validity of Ordinance Imposing Fee for Weighing.*

Since under Sand. & H. Dig. § 5132, providing that a city may require parties selling coal in the city to weigh the same on city scales, and pay a reasonable fee for the weighing, the city may impose a fee sufficient to cover expenses incident to enforcing the requirement, including extra police superintendence necessary for that purpose, which, if not plainly unreasonable and excessive, will not be interfered with, an ordinance imposing a fee for such service, the revenue from which is only a trifle more than the expense of furnishing and keeping the scales in repair, hiring an assistant weighmaster, and furnishing necessary police superintendence, cannot be held to have been passed for the purpose of raising revenue, so as to be outside the scope of the statute and invalid.

Same—Same—Unreasonable and Oppressive Character of Ordinance—Validity.

Where a city from November 1st to April 1st of each year, which was the season when coal was most in demand, maintained public scales near a coal yard, while the city scales in continuous operation were about 10 blocks therefrom, an ordinance, requiring all coal to be weighed on the city scales, and the payment of 10 cents for the weighing of each load or part of a load, is not so unreasonable and oppressive as to be invalid, though it is an inconvenience and annoyance to the owner of the coal yard during the part of the year when not much coal is sold.

Hughes and Battle, JJ., dissenting.

Appeal from circuit court, Sebastian county; Styles T. Rowe, Judge.

Action by E. C. Wills against the city of Ft. Smith to enjoin the enforcement of a city ordinance. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

The city council of Ft. Smith on 5th of February, 1900, passed an ordinance, the first section of which provides as follows: "It shall be unlawful for any person hereafter to sell, barter or exchange coal in any quantity in the corporate limits of this city until they have first weighed the same upon the city scales of the city of Ft. Smith and paying the weighman the sum of ten cents for the weighing of any load or part of a load of coal." The second section of the act provides that any person violating the ordinance shall be fined not less than $5 nor more than $25. E. C. Wills, a coal dealer in Ft. Smith, brought this action to enjoin the city from enforcing, or attempting to enforce, said ordinance on the ground that the ordinance was void. The city appeared by counsel, and

*See notes at end of case.

filed an answer denying the material allegations in the complaint. The evidence showed that the total revenue to the city from the sales was over $1,400, while the expenses in operating the scales was above $1,300. On the hearing the circuit court found in favor of the defendant that the ordinance was valid, and dismissed the complaint. Plaintiff appealed.

Read & McDonough, for appellant.
F. M. Jamison, for appellee.

RIDDICK, J. (after stating the facts). The questions presented by this appeal relate to the validity of an ordinance of the city of Ft. Smith in reference to the weighing of coal sold in that city. Plaintiff, a coal dealer in that city, contends that the ordinance is void on the ground that it was unreasonable and oppressive, and operated to deprive plaintiff of his property without due process of law, and for the further reason that it was passed for the purpose of raising a revenue for the city. The ordinance in question, after providing that all coal sold in the city shall be weighed upon the city scales, directs that the sum of 10 cents shall be paid to the weighmaster for the weighing "of any load or part of a load of coal." The word "load" used in the ordinance is rather indefinite, and might be said to include a car load or wheelbarrow load of coal as well as a wagon load. But as the evident intention of this ordinance was to protect the residents of the city who were purchasers and consumers of coal against fraud, imposition, or mistake in the weighing of the same, and as coal is usually delivered to consumers by wagons either in full loads or in parts of a load, we think it is evident that the word "load" in the ordinance refers to wagon loads, and that it has no application to sales of very small quantities, such as a bucket or wheelbarrow load of coal. In fact, the mayor of the city testified that the ordinnce was construed by the city authorities to apply only to cases when the delivery was by wagon in loads or parts of loads, and we are willing to adopt that construction of it.

Now, our statute expressly grants to cities "to provide for the measuring or weighing of hay, wood or any other article for sale." Sand. & H. Dig. § 5132. Under this statute the city had the power to require parties selling coal in the city to weigh the same on scales provided by the city, and to pay a reasonable fee for the weighing. Taylor v. City of Pine Bluff, 34 Ark. 603. While under our statute an ordinance of this kind cannot be passed for the purpose of taxation and raising a revenue, yet fees can be imposed sufficient to cover the necessary expenses incident to the enforcement of the ordinance. The city council is required to determine what fees will be necessary for that purpose. And in arriving at their conclusion on that question they may take into consideration all legitimate expenses required for the enforce-

ment of the ordinance, including, as we think, any extra police superintendence necessary for that purpose. City of Fayetteville v. Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509. As the exact size of the fee required cannot always be ascertained in advance, the courts will not interfere with the action of the council when the fees imposed are not plainly unreasonable and excessive. Taylor v. City of Pine Bluff, 34 Ark. 603; City of Fayetteville v. Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509; City of Hot Springs v. Curry, 64 Ark. 152, 41 S. W. 55.

After considering the facts proved in this case, we think the evidence does not show that this ordinance was passed for the purpose of raising revenue. On the contrary, there is evidence to justify a finding that the annual expenses of the city in furnishing and keeping in repair scales, in hiring assistant weighmaster required, and in furnishing necessary police superintendence, very nearly equal the revenue arising from the fees imposed for weighing.

As to the contention that the ordinance is unreasonable and oppressive, the evidence shows that the coal yards and place of business of plaintiff are situated about 10 blocks distant from the public scales, which are operated by the city continuously during the year. On this account the ordinance does impose some hardship on plaintiff, especially in cases where the coal is sold in small quantities to persons who wish the same delivered at or near the coal yard of plaintiff. In such a case it is no doubt very inconvenient to be compelled to carry the coal over half a mile to the scales for weighing, and then return with it to the yards or near them for delivery. But it was shown from 1st of November to 1st of April, during the season when coal was most in demand, the city maintained and operated two public scales, one of which was near plaintiff's yards. From the 1st of April to 1st of November the scales located near the coal yards were not operated, for the reason that during that time of the year the demand for coal was small, and the expense of operating the scales was greater than the income from the fees charged. While, as before stated, the requirement that even small quantities of coal must be, when sold, weighed on the city scales, imposes during the summer, when only one pair of scales is operated by the city, some unnecessary inconvenience and expense on plaintiff, still, taking into consideration that this is during a season when not much coal is sold, a majority of us are of the opinion that the ordinance is not so clearly unreasonable and oppressive as to justify a court in holding it invalid. It is often that city ordinances occasion individual inconvenience and even hardship. The powers which are vested by law in municipal legislatures are at times exercised unwisely; for these, like other human tribunals, are not infallible. But it does not follow because an ordinance operates to the annoyance and inconvenience of a citizen, instead of to his benefit, that it

Notes

is invalid, or that the courts can for that reason interfere with the local concerns of the city, and declare the ordinance invalid. On the whole case, a majority of the judges are of the opinion that the judgment of the circuit court is right, and it is therefore affirmed.

HUGHES and BATTLE, JJ., dissent, on the ground that the ordinance in question is unreasonable and oppressive, and therefore void.

NOTES.

Weighing of Coal, Hay, Grain, etc.—Power of City to Require.

An ordinance requiring all coal sold by retail within city limits to be weighed by a public weigh master is within the corporate powers of a city. Such an ordinance, if reasonable, is not in restraint of trade, but is a regulation thereof. Stokes *v.* City of New York, 14 Wend. (N. Y.) 87.

But where a system of inspecting hay has been abolished by statute, and in place thereof the seller is required under the statute to pack and mark in a prescribed manner all hay intended for sale, which done, he is authorized to sell the same, without deduction for tare, either by the weights and marks thereon or by any other standard weight that may be agreed upon between buyer and seller, an ordinance requiring all hay offered for sale within the city to be inspected and weighed, under a penalty in case of failure to do, is invalid as being opposed to the policy of the statute. Mayor *v.* Nichols, 4 Hill (N. Y. 1843) 209.

Same—Reasonableness of Ordinance.

Ordinances requiring vendors of coal, hay, grain and similar commodities to have the same weighed on public scales or by public weighmasters must, like all other ordinances, be reasonable. The accommodations for weighing must be adequate. An ordinance providing only one scale or place of weighing would be entirely reasonable in a town of five hundred inhabitants, but wholly unreasonable in a populous city. Davis *v.* Town of Anita, 73 Iowa 325, 35 N. W. Rep. 244. In this case, under a statute authorizing the town to provide for the weighing of coal, hay, or any other article offered for sale within the town, an ordinance requiring all articles sold by weight and weighing over one thousand pounds to be weighed on the town scales was held not to be unreasonable. And in Stokes *v.* City of New York, 14 Wend. (N. Y. 1835) 87, where it was contended that the number of weighers were insufficient for the needs of the city, it was said that the plaintiffs should have applied to the city for the appointment of additional weighers.

Same—Same—Exempting Merchants—Constitutional Law.

An ordinance relating to the weighing of coal, hay, and grain which permits merchants having established places of business to sell coal and grain in quantities not exceeding fifteen bushels, and hay in quantities not exceeding five hundred pounds, without having the same weighed, but which compels all other persons selling the commodities named to have the same weighed regardless of the quantity sold, for which weighing a fee is exacted, is not unreasonable as making an unjust and unwarranted discrimination; nor is it in violation of the constitutional provision requiring taxation to be equal and uniform, since it is uniform upon all within the same class. City of St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. Rep. 291.

Same—Power to Exact Fee for Same.

The power to license or regulate a business or employment does not confer power to charge a fee with a view to revenue. Such a charge must be limited to an amount necessary to cover the expense of issuing the license and the extra labor and trouble imposed upon the officers in carrying out the ordinance. City of St. Charles *v.* Elsner,

155 Mo. 671, 56 S. W. Rep. 291; City of St. Louis *v.* Boatmen's Ins. & Trust Co., 47 Mo. 150. But where the charter or statute authorizing the city to provide for the weighing of coal, hay, or grain also confers the power to fix the fees therefor, the fact that such fees are in excess of what is needed to cover the expense and trouble of weighing, and constitute a source of revenue, is insufficient to invalidate the ordinance so long as the corporate authorities have not exceeded the discretion reposed in them by law. Stokes *v.* New York, 14 Wend. (N. Y. 1835) 87; City of St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. Rep. 291. In the case last cited a fee of twenty-five cents for each load of fifty bushels of coal or corn, or five hundred pounds of hay, was held not to be unreasonable.

In Sylvester Coal Co. *v.* City of St. Louis, 130 Mo. 323, 32 S. W. Rep. 649, the charter conferred power "to license, tax, and regulate retailers, to regulate and establish the standard weights and measures to be used in the city of St. Louis, and to provide for the inspection of the same, and for the inspection and weighing, or measuring, of hay, and stone coal, charcoal, firewood, and all other kinds of fuel to be used in the city of St. Louis." Under this provision an ordinance requiring all coal sold within the city to be weighed either on public scales or by bonded weighers on approved private scales, and all dealers to furnish a weigher's certificate to the purchaser of each load of coal, for which certificates the dealers were compelled to pay ten dollars per hundred, was held to be reasonable and valid.

Same—Power to Erect and Maintain Public Scales.

A statutory authority to provide for the weighing of coal, hay, grain, etc., carries implied authority to erect and maintain public scales. City of St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. Rep. 291; Davis *v.* Town of Anita, 73 Iowa 325, 35 N. W. Rep. 244.

Generally.

See generally, upon this subject, Mayor *v.* Hyatt, 3 E. D. Smith (N. Y.) 156; Hoffman *v.* Jersey City, 34 N. J. L. 172 (1870); Raleigh *v.* Sorrell, 1 Jones (N. Car.) Law 49 (1853); Nightingale's Case, 11 Pick. (Mass.) 168; Gass *v.* Greenville, 4 Sneed (Tenn.) 62; Yates *v.* Milwaukee, 12 Wis. 752; Frazier *v.* Warfield, 13 Md. 279; Briggs *v.* Boat, 7 Allen (Mass.) 287; Snell and Belleville, In re, 30 Upper Can. Q. B. 81.

REEVES *v.* CITY OF ATLANTA.

(*Supreme Court of Georgia, March 11, 1902.*)

[40 S. E. Rep. 1003.]

Recorder's Court—Jurisdiction to Try Municipal Offense Which Is Also a Violation of the State Law.*

The recorder's court of the city of Atlanta has jurisdiction to try the keeper of a pool or billiard room for the municipal offense of admitting a minor into such room without the written consent of his parent or guardian, notwithstanding the same is also an offense under the state law.

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

J. M. Reeves was convicted of violating an ordinance of the city of Atlanta, and brings error. Affirmed.

W. I. Heyward, for plaintiff in error.

Jas. L. Mayson and W. P. Hill, for defendant in error.

---

*See notes appended to Town of Whiting *v.* Doob, 1 Mun. Corp. Cas. 393; Ogden *v.* City of Madison, ante, p. 161.

LUMPKIN, P. J. An ordinance of the city of Atlanta declares that "it shall not be lawful for any person or persons having charge or control of any pool or billiard room and tables kept for hire, to admit into any such room any minor, or to allow any minor to play at such billiard or pool table, without the written consent of the parent or guardian of such minor." The plaintiff in error was tried before the recorder of Atlanta upon a charge of violating this ordinance. Having been adjudged guilty, he sued out a certiorari, and by his bill of exceptions assigns error upon the overruling thereof. The answer of the recorder to the petition for certiorari discloses that the evidence in his court was sufficient to establish the fact that the accused permitted certain minors to enter his pool or billiard room without the consent of their parents or guardians. According to the evidence, some of the minors played upon the tables, and others did not. It is evident that the judgment of conviction rendered by the recorder was based upon so much of the ordinance as prohibited the accused from allowing minors to enter the room in question. The main point made by the petition for certiorari is that inasmuch as section 413 of the Penal Code, as amended by the act of 1897 (see Van Epps' Code Supp. § 6748), makes it a state offense for the owner of a billiard or pool table to "permit any minor to play or roll on the same, without the consent of the parent or guardian," the recorder's court of the city of Atlanta had no jurisdiction of an offense of this nature. Granting that this position is correct, the reply to it is obvious, namely, that the court just referred to did have jurisdiction of the municipal offense of permitting a minor to enter a pool or billiard room without the written consent of his parent or guardian. We therefore have no difficulty in reaching the conclusion that there was no error in refusing to set aside the decision of the recorder.

Judgment affirmed. All the justices concurring, except LITTLE, J., absent on account of sickness.

Ex parte OGDEN.

(*Court of Criminal Appeals of Texas, March 5, 1902.*)

[66 S. W. Rep. 1100.]

Criminal Law—Pool Selling—Validity of Ordinance Conflicting with State Law.*

A municipal ordinance prohibiting pool selling on horse races, and providing for a punishment against any saloon keeper permitting pool selling on his premises, is void, being in conflict with a state law licensing the selling of pools on horse races.

Habeas corpus proceedings by E. C. Ogden to obtain his discharge for violation of a municipal ordinance. Relator discharged.

---

*See notes appended to Town of Whiting *v.* Doob, 1 Mun. Corp. Cas. 393; Ogden *v.* City of Madison, ante, p. 161.

Watts, Chester & Ellison, for applicant.

Smith, Crawford & Sonfield and Robt. A. John, Asst. Atty. Gen., for respondent.

DAVIDSON, P. J. This is an original application for the writ of habeas corpus. Briefly stated, the record shows that relator was charged by complaint with violating a city ordinance of the city of Beaumont; the offense stated being that he permitted the operation of a turf exchange, or selling pools on horse races, in his place of business. The ordinance under which the case arose provided, in the first section, the punishment against parties who pursued the occupation of turf exchange or selling pools on horse races. The second section denounced a punishment against any saloon keeper, owner, lessee, proprietor, manager, or person in charge of any saloon, or any owner, tenant, or lessee of any house where spirituous, vinous, or malt liquors are kept or sold, who shall permit any turf exchange, place for selling race pools, or place for exhibiting, reporting, publishing, or announcing such horses, or the progress and results of races, or place for staking money or other thing of value on the purported results of any horse race, etc. The first section of this ordinance was held invalid in the recent case of Ex parte Powell (decided at the present term) 66 S. W. 298, because the charter of the city of Beaumont did not authorize such ordinance. The legislature has licensed turf exchanges or the selling of pools on horse races. It therefore cannot delegate authority to a municipal corporation to create or pass ordinances violative of that law, either by repealing or suspending it. State v. Arrington, 13 Tex. App. 613; Flood v. State, 19 Tex. App. 584; Bohmy v. State, 21 Tex. App. 597, 2 S. W. 886; Ex parte Sundstrom, 25 Tex. App. 153, 8 S. W. 207; Ex parte Coombs, 38 Tex. Cr. R. 648, 44 S. W. 854; Const. Bills of Rights, art. 1, § 28. The second section of the ordinance is dependent upon the first, and, the first being invalid, there is no foundation for the second. The inhibition against the owners, lessees, etc., of saloons is based upon the theory that it is a violation of a valid city ordinance prohibiting turf exchanges; that is, it is a criminal offense against the city ordinance to be engaged in turf exchange or selling pools on horse races. The second section of the ordinance, as created by the city council, would be equally violative of our statute. This ordinance simply makes it a violation of law to carry on a turf exchange or sell pools on horse races in the places mentioned. It being a legitimate business,—one legalized by the state,—the city could not, even in this indirect manner, inhibit it. It will be noted that the ordinance in question was not one of regulation, but is one of inhibition. The relator is discharged.

HENDERSON, J. I agree to the reversal of the case, because the charter does not authorize the inhibition of pool selling on horse races, and no power is given in the charter to regulate the place of such sale by location.

AUDITOR GENERAL *v.* HOFFMAN.

(*Supreme Court of Michigan, March 4, 1902.*)

[89 N. W. Rep. 348.]

Sidewalks—Ordinance Requiring Abutter to Construct Walk within Five Days, Void for Unreasonableness.

An ordinance requiring a lot owner to build a sidewalk within five days from notice, and on his failing to do so authorizing others to build it, and imposing a tax on him for the cost, is void for unreasonableness.

Appeal from circuit court, St. Clair county, in chancery; Frank Whipple, Judge.

Proceeding by the auditor general against John M. Hoffman to enforce a tax for a sidewalk. From an adverse decree, petitioner appeals. Affirmed.

Joseph Walsh, Pros. Atty., for appellant.
William T. Mitchell, for appellee.

GRANT, J. The tax which the circuit judge set aside in this case was imposed under the same charter and ordinance that were before the court in City of Port Huron v. Jenkinson, 77 Mich. 414, 43 N. W. 923, 6 L. R. A. 54, 18 Am. St. Rep. 409, in which the penal provisions of both the charter and the ordinance are held to be absolutely void. In that case a notice was given under section 1 of the ordinance to construct the sidewalk within 10 days. It was there said: "No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his nonperformance of such duty a crime." For the same reason the legislature cannot impose a duty upon the citizen, give him an insufficient time to perform it, and then authorize some one else to perform the duty for him, and impose a tax upon him for the cost. The duty to construct a sidewalk is purely statutory, and when such duty is imposed upon a citizen he is entitled to reasonable time within which to perform it. From the language above quoted it is obvious that the court held a 10-day notice unreasonable. In this case section 7 of the ordinance is in direct conflict with section 1, in that it requires the lot owner to build the sidewalk "within five days from the date of the notice," while section 1 provides for a notice of 10 days. The notice in this case was served under section 7, and was a notice to build a stone or cement sidewalk not less than 4 feet wide within 5 days. Such a provision is unreasonable and void under the decision above cited.

Decree is affirmed.

LONG, J., did not sit. The other justices concurred.

CITY OF ATLANTIC CITY *v.* TURNER.

(Supreme Court of New Jersey, March 12, 1902.)

[51 Atl. Rep. 691.]

Summary Proceedings*—Failure of Omnibus Driver to Wear Number —Evidence Necessary to Sustain Conviction.

Where a city ordinance provided that the driver of every omnibus or other public conveyance "that may be required to be licensed" should wear in a prominent position on his clothing the number corresponding to the number assigned to the owner of such conveyance by the officer granting the license, it was *held*, on review of a summary proceeding to enforce a penalty for violation of the provision, that the conviction, among other things, must show proof that the omnibus in question was one of a class "required to be licensed" under the ordinances of the city.

Same—Validity.

In summary proceedings to recover a penalty for the violation of a city ordinance, the conviction must show a case clearly and distinctly within the provisions of the ordinance.

(Syllabus by the Court.)

William H. Turner was convicted of violating a city ordinance, and brings certiorari. Reversed.

Argued November term, 1901, before DIXON and HENDRICKSON, JJ.

William I. Garrison, for plaintiff.

Godfrey & Godfrey, for defendant.

HENDRICKSON, J. The plaintiff in certiorari was convicted before the recorder of Atlantic City of violating section 6 of an ordinance of said city entitled "An ordinance to regulate the business of driving omnibuses, automobiles or locomobiles, and fixing the fares to be charged," approved April 12, 1901. The particular offense charged in the complaint, as recited in the conviction, is "that on or about the 3d day of June, A. D. 1901, at Atlantic City aforesaid, William Turner, being then and there the driver of a certain omnibus, neglected and refused to wear in a prominent position on his clothing any number which was the same as the license number assigned and issued by the mercantile appraiser for the said conveyance which he was driving, all of which is contrary to the provisions of section 6," etc., of the ordinance above described. After hearing the evidence the recorder found the defendant below guilty of the offense charged, and adjudged that he pay the fine of $20 prescribed by the ordinance. A reversal of the conviction is sought on the ground, among others, that the record fails to set forth all the facts necessary to constitute a legal conviction.

The provisions of section 6 of the ordinance require that all persons owning omnibuses, etc., "or vehicles of whatever character that may be required to be licensed, shall by the

*Upon the general subject of summary proceedings in municipal courts, see note appended to Ogden *v.* City of Madison, ante, p. 161.

mercantile appraiser be assigned a number for each vehicle so licensed; * * * that no person under the age of sixteen years shall be licensed to drive any omnibus, hack, carriage or other public conveyance, and that the driver of every omnibus, hack, carriage or other public conveyance shall wear, in a prominent position on his clothing, a number which shall be the same as the number issued for the conveyance he drives." The conviction shows that the only evidence produced was the ordinance above described and the testimony of a police officer. The latter testified that he saw the defendant on Tennessee avenue, in Atlantic City, coming out, driving his bus, and that he was without his badge; that witness meant by "badge" the license number issued by the mercantile appraiser; that witness spoke to defendant about not having his license badge on, and his reply was that he had no badge; that, upon being asked if he had his license, he said "Yes." The point is made that the evidence does not show that the defendant was the driver of a vehicle "required to be licensed," and in that respect comes short of proving one of the essential elements of the offense described in the ordinance. It is only necessary to compare the evidence with the terms of the ordinance above set forth to see that the conviction is defective in this particular, and, as we think, fatally so. No ordinance fixing the license fees, and defining the character of the vehicles required to be licensed, was offered in evidence. Their mere admission, testified to by the officer, that the defendant had his license, is not sufficient proof of this essential element of the offense charged. The offense is a penal one and must therefore be strictly proved. In summary proceedings to recover a penalty, the prosecutor must show a case clearly and distinctly within its provisions. Allaire v. Howell Works Co., 14 N. J. Law, 21; Hoeberg v. Newton, 49 N. J. Law, 617, 9 Atl. 751.

The result is that the judgment of the recorder's court is reversed, with costs.

CITY OF GALVESTON *v.* BROWN.

(*Court of Civil Appeals of Texas, Feb. 26, 1902.*)

[67 S. W. Rep. 156.]

Ultra Vires Acts of Officers—Impressing Horses—Liability of City.

The chief of police of the city of Galveston, acting under the instructions of the mayor to impress any horses he could find to be used in removing the dead and caring for the sick after the flood in that city, September 8, 1900, directed a policeman to get a team anywhere he could, and the policeman took defendant's horses without his knowledge and consent: *held* that, in the absence of anything to show that the city had any charter power to impress personal property of any kind, it was not liable for the trespass, since a municipal corporation is not liable for torts of its officers unless within scope of their authority.

City of Galveston *v.* Brown

Same—Same—Power to Impress Must Be Expressly Conferred and Exercised Only in Manner Prescribed.

Although personal property is subject to the state's power of eminent domain, and the state may delegate such power to a municipal corporation, when so delegated it must be exercised by the formal vote of the governing body; and the city of Galveston was not liable for the acts of its police acting under instructions of its mayor in impressing horses to be used in removing the dead and caring for the sick after the flood in that city, September 8, 1900, where the council had never in any way authorized such taking and use, the acts of the officers being beyond the scope of their authority.

Appeal from Galveston county court; Jno. W. Campbell, Judge.

Action by A. A. Brown against the city of Galveston. From a judgment in favor of plaintiff, defendant appeals. Reversed.

P. A. Drouilhet, for appellant.
Marsene Johnson, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover $200, the value of a horse, alleged to have been taken on the 11th of September, 1900, by the officers, servants, agents, and employees of the city without Brown's (the owner) consent, and worked to death. The trial resulted in a verdict and judgment for plaintiff. The facts are undisputed that under instructions of the chief of police of the city of Galveston to secure a team any way possible, a policeman of the city, without the knowledge and consent of appellee, on the 11th day of September, 1900, took two horses belonging to him from where he had staked them out on the Ball School Square, and turned them over to the driver of the city's patrol wagon; and he worked them to wagon in hauling off the sick, wounded, and dead, who were suffering or had perished from the storm and flood which swept over the city on the 8th day of September, 1900. Brown demanded the horses from the driver who refused to give him possession of them until he had worked them night and day for six days, when he turned them over to him, completely worked down. One of them died from overwork, and was worth, when taken from the appellee, $200. On account of conditions rendered by the storm, which completely paralyzed and prostrated business for nearly a month, there was no meeting of the city council during that time. But the mayor, without authority from the council, instructed the chief of police to impress horses for the purpose of using them in removing the dead and caring for the sick and wounded. This he considered necessary for the protection of the lives and health of the inhabitants of the city. All kinds of personal property are subject to the state's power of eminent domain (Lewis, Em. Dom. § 263), and this power may be delegated by the state to a municipal corporation. In cases of pressing and immediate necessity—as in the event of an invasion by the public enemy, or some great calamity—this power has been exercised. But when the power is given to a municipal cor-

poration the taking by it must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. Lewis, Em. Dom. (2d Ed.) § 308, and authorities cited in note 85, pp. 761, 762. To establish a municipal corporation's liability for the acts of its officers or agents, it is necessary to show that the acts were either expressly or impliedly authorized by it, or some branch of government having jurisdiction of the subject to which the acts relate, or that they were done bona fide in pursuance of a general authority to act for the corporation in the matter. A common council's powers are limited and defined by law, and it can no more transcend them than an agent in any other case can, and bind his principal beyond the scope of the authority conferred upon him. It is not liable, therefore, for acts of agents outside the scope of its powers. Except where certain functions are conferred upon it in the interest of the public at large (White v. City of San Antonio [Tex. Sup.] 60 S. W. 426), a municipal corporation is liable for every tortious act of its agents committed by its express command or direct authorization, however unlawful the act may be, provided the act complained of was in or about a subject-matter of which it had jurisdiction. Shear. & R. Neg. (5th Ed.) § 299, and authorities cited. But its liability for tortious acts of its agents extends no further. We have been cited to no authority conferred upon the city of Galveston by its charter empowering it or its officers to impress or take under any circumstances the horses or personal property of another into its service or use without the owner's consent. If, however, it were shown that such power had been given it, still no authorization by the common council, the governing body of the city, of the taking and use of appellee's property, has been pleaded or proven. On the contrary, the undisputed evidence shows that the council never in any way authorized such taking or use. The acts complained of were done by a policeman and patrol wagon driver under orders and instructions of the mayor and chief of police of the city, neither of whom was authorized by it to make such orders or give such instructions. We do not wish to be understood as disapproving or censuring the acts of any of the parties. With them we have nothing to do except to determine whether the appellant can be held liable in damages for them. In the absence of any testimony connecting the city with the acts complained of, there is, in our opinion, no basis for any claim of liability against it. City of San Antonio v. Mackey (Tex. Civ. App.) 36 S. W. 760; City of Dallas v. Allen (Tex. Civ. App.) 40 S. W. 324; Dooley v. City of Kansas, 82 Mo. 444, 52 Am. Rep. 380. It appearing that the evidence was fully developed upon the trial in the court below, and it being wholly insufficient to support the verdict, the judgment of the county court is reversed, and judgment is here rendered for the appellant.

CITY OF LOUISVILLE *v.* LOUISVILLE RY. CO.

(Court of Appeals of Kentucky, May 28, 1901.)

[63 S. W. Rep. 14.]

Taxation—Power to Compromise Claims for Taxes.

Under Const. § 52, providing that "the general assembly shall have no power to release, extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness or liability of any corporation or individual to this commonwealth, or to any county or municipality thereof," the general council of a city has no power to compromise a claim for taxes after the assessment has been regularly made and the claim has come into the hands of the collecting officer; and especially has the general council of a city of the first class no such power after the city attorney has brought suit on the unpaid tax bill, as provided by Ky. St. § 3005.

Same—Same—Power of City Attorney.

The city attorney of a city of the first class has no power to compromise claims for taxes either before or after suit is brought.

Du Relle, J., dissenting.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by the city of Louisville against the Louisville Railway Company to recover taxes. Judgment for defendant, and plaintiff appeals. Reversed.

Henry Lane Stone, for appellant.

Humphrey, Burnett & Humphrey and St. John Boyle, for appellee.

WHITE, J. In these two cases the city of Louisville, by and through its city attorney, brought actions against the appellee, Louisville Railway Company, for taxes for the years 1893, 1894, 1895, 1896, 1897, and 1898, alleged to be due and unpaid. These taxes were alleged to be due on franchise, as assessed by the state board of valuation and assessment for the years 1893, 1894, 1895, 1896, and 1897, and upon assessments by the county assessor for 1894, 1895, 1897, and 1898. The amount of tax sought to be recovered is about $311,188. To these actions appellee filed answers containing some 15 paragraphs, in which there are specific denials of all allegations as to the assessment of the property and levy of the taxes; the denials being made in lack of knowledge or information sufficient to form a belief, although all these matters must be of record at the proper office. Other paragraphs presented matters of defense, pleading a contract with the appellant city to pay a license tax in lieu of all taxes; pleading the repeal of the statute authorizing the assessment by the state board of valuation and assessment of the franchise for the purpose of the city taxation by the enactment of the charter of appellant; pleading that the valuation of the franchise as fixed by the board was too great and excessive, because a part of its track and plant extended beyond the limits of the city. These

are among the defenses presented by the answer of appellee. A demurrer to several of these paragraphs was sustained by the court, and as to others overruled. While the two cases were pending an agreement of compromise was entered into by and between the appellee company and D. F. Murphy, city assessor, and J. B. Camp, tax receiver on behalf of the city, by which it was agreed that on payment of $177,093.48 in full compromise and satisfaction of all taxes, except on real estate, and in addition to license tax theretofore paid of $122,312.68, making a total sum of $299,406.16 for those years, the two suits for taxes would be dismissed, settled, at the cost of the defendant. This agreement was approved by the mayor, Charles P. Weaver, and subsequently by resolution of the general council of the city. This compromise agreement was made under a resolution of the general council approved January 11, 1896, as follows: "Be it resolved by the general council of the city of Louisville that the city attorney, the tax receiver, and the assessor are hereby appointed and constituted a board having power and authority to compromise any and all claims for back taxes by the city of Louisville against individuals where said claims, in the opinion of said board, are in any wise doubtful, or where, in the opinion of said board, said compromise will redound to the substantial benefit of the city." In this compromise agreement the city attorney did not participate, and did not agree thereto. On the approval of the compromise agreement by the general council, the amount of $177,093.48 was paid by appellee, as stipulated. The resolution approving the compromise agreement provided: "Sec. 2. That the city attorney be instructed to dismiss all suits pending between the city of Louisville and the Louisville Railway Company involving taxes claimed by the city against the said railway company." After these matters of compromise had been completed, the appellee filed an affidavit showing the compromise, payment, and order to the city attorney to dismiss suits, and asked the court to order dismissal. The court took the matter of dismissal under advisement, pending which the city attorney took proof on the controverted facts. The court, after having considered the motion, ordered the two actions dismissed, settled, over the protest and objection of the city attorney. There was no trial on the merits,—only the order of dismissal, from which these appeals are prosecuted.

Appellee has entered motions in this court to dismiss the appeals, the same reasons being given as are presented why the judgment and order of dismissal in the court below should be affirmed. It is contended by counsel for appellee that as appellant is a municipal corporation, and governed by the act of July 1, 1893, relating to cities of the first class, it has full power, by and through its general council, to manage the affairs of the city in such way and manner as they may deem best, and, while it is not contended that the general council

could accept less than the sum due on a fixed liability, it may, on all doubtful or unliquidated matters, compromise with the party, and accept less than the full sum claimed, or may pay by way of compromise in excess of what they deem justly due. The contention of counsel, as we understand it, is that in all matters where the sum due the city is not finally fixed and certain, and where there is any controversy as to the right to collect or as to the sum due, the general council may agree with the party on any basis they deem proper, and finally adjust the matter, and thus bind the municipality the same as a natural person might bind himself by compromise agreement; that this power exists to compromise tax claims by the city, as well as any other that might arise. On the other hand, the city attorney contends that, because of section 52 of the constitution, the compromise is ultra vires and void, as beyond the power of the general council. Upon this question the whole case depends; for, if the compromise agreement is binding on appellee, the order of dismissal was proper, as there could have been no final recovery by appellant.

Section 52 of our constitution reads: "The general assembly shall have no power to release, extinguish or authorize the releasing or extinguishing, in whole or in part, of the indebtedness or liability of any corporation or individual to this commonwealth or to any county or municipality thereof." This provision was not contained in any previous constitution of this state, and this section has never been construed by this court, so far as we are advised. Similar constitutional provisions are found in the constitutions of the states of California, Colorado, Illinois, Louisiana, Montana, Missouri, Nebraska, Texas, and Wyoming, and possibly others that we have overlooked. The charter of appellant, at section 2742, Ky. St., sets forth the powers granted to it by the legislature. It reads: "That the inhabitants of cities of the first class are hereby continued corporate by the name and style which they now bear, with power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the constitution and laws of the state, nor of the United States; with power to contract and be contracted with; to sue and be sued; to defend and be defended in all courts; to acquire property for municipal purposes or otherwise; to hold the same and all property and effects now belonging to them in their own names or in the names of others, to the use of the city for the purposes and intents for which the same were granted or dedicated; to use, manage, improve, sell and convey, rent or lease the said property, and have the like powers over property hereafter acquired; to have a common seal, and change it at pleasure, and act with or without a seal." Section 2783 provides: "The general council shall have the power to pass, for the government of the city, any ordinance not in conflict with the constitution of the United States, the

constitution of Kentucky and the statutes thereof." The question is presented, is the compromise agreement and the resolution approving the same contrary to the state constitution (section 52, supra)?

In the state of Louisiana, where the constitutional provision is almost identical with ours, a case arose questioning the validity of a compromise made by the city of New Orleans with the Crescent City Railroad Company for municipal taxes; the action being by an individual taxpayer. The court said: "We pass to the question of the power of the municipal council to compromise with a delinquent taxpayer, and release him from payment of part or all of his taxes, while a suit for reduction of his assessment is pending before the courts. It is well settled that corporations have such powers as are given to them. There are special laws applying in matters of taxation. The constitution specially prohibits the general assembly, and, it follows, subordinate municipal corporations, from releasing or extinguishing any tax indebtedness to the state, or due to any of its municipalities. It devolves upon us to determine in the case before us for decision whether the tax indebtedness here of the Crescent City Railway was within the scope of the prohibition. There had been a final assessment made. While the assessing authorities have the rolls in their possession in an incomplete state, they may reduce the assessment, but not after the assessment has passed from their hands. All taxpayers have the right to appear before the board of assessors of the parish of Orleans until the 20th of March, and in other parishes until the first day in November, and should be heard regarding overvaluation of property, but not after those dates. The question of value of property assessed after the filing of the taxpayer's suit passes from the assessor and revising committees to the courts. The defendants urged that the assessment, as relates to those who appeal to the courts, is not complete; that, not being complete, a compromise may be made, as was made in the pending case. We have not found it possible to give our assent to that view. The suit brought does not have the effect of suspending the assessment. It is legal to the amount the court finds in the value of the property. Every person is taxed for the year, and the assessment dates from the day it was made, and not from the date of the final decision of the court pronouncing it legal as to value [for a part or the whole] as carried on the roll." City Item Co-operative Printing Co. v. City of New Orleans, 51 La. Ann. 713, 25 South. 313. Counsel for the city and the railway company in the case supra did not contend that the city might legally compromise a tax claim after the amount was finally fixed by the assessing authorities, but that the right of compromise did exist until the final valuation was made by the courts, as it seems was a method of procedure allowed there, and that, as the question of value was undecided by the court, the compromise must be upheld. The supreme

court, however, held that, after the assessment had been made by the proper authorities, the city could not compromise the tax claim; the final conclusion of the court being, "It follows that no compromise can be made on the basis of property being of less value when the municipality is concerned than when the state is concerned." The same court, in the case of City of New Orleans v. Sugar-Shed Co., 35 La. Ann. 550, said, "It takes no argument or authority to establish that the city had no power to exempt the property of the defendant, or to commute the taxes upon it, as is claimed was done."

In the state of Illinois, where the constitutional provision (article 5, § 23) is almost identical with that of our constitution (section 96), the supreme court, in the case of Board v. Smith, 95 Ill. 335, said: "Again, we are not aware of any power in the county board to make any abatement of taxes legally assessed, extended, and placed in due course of collection. If a party is aggrieved by an overassessment, he should apply to the board of review to have it corrected, or to the July session of the board, under the ninety-seventh section of the revenue law. But when property has been assessed, and the tax extended, and the books placed in the hands of the collector, we are aware of no law authorizing the board to make any abatement. Or even after its session on the second Monday in July the general assembly has conferred no power on the board to abate state or other than county taxes, and we are not informed of any express authority for that body to abate county taxes. If the county board may abate state and other municipal taxes in one case, they may in all cases. If they may do so for one reason, they may for any reason or without reason, and thus defeat the collection of all revenue." The same court, in Mix v. People, 116 Ill. 273, 4 N. E. 786, said: "The law has designated a certain person to assess and fix a value upon property for purposes of taxation, and given a remedy to parties aggrieved by his action to have the same reviewed. If the parties neglect this opportunity, they at least cannot contest the matter in a suit like this, brought to enforce the lien given by the statute against the lands for the nonpayment of the taxes. The action of the board of supervisors in appointing a committee to reassess these lands for the purposes of taxation, and their compromise with plaintiffs in error regarding the state and county taxes, was clearly unauthorized." The supreme court of Illinois recognizes the right and power of the city council to compromise ordinary claims due to or by the city. In the case of Agnew v. Brall, 124 Ill. 314, 16 N. E 231, the court said: "They [city council] have no power to squander or give away the funds or property of the incorporation, but all property within their control belonging to the incorporation must be honestly applied to the uses and purposes specified in the act of incorporation. The city council have no power to sell or in any manner dispose of the property of the corporation

without consideration, and, in our opinion, they have no right to discharge a debt without payment which may be held against parties who are solvent and responsible, where no controversy exists in regard to the validity and binding effect of the indebtedness. But a municipal corporation has power to settle disputed claims against it. Dill. Mun. Corp. § 398. It may prosecute suits in favor of the corporation, and defend actions brought against it. It may sue and be sued, and the right to settle matters in litigation follows logically from the right to maintain or defend actions. This doctrine is well stated in President, etc., v. Mappin, 14 Ill. 195, where it is said the power to prosecute suits in behalf of the corporation includes the power to settle same. So the power to defend suits brought against the corporation gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant." The court there says that the power to compromise suits had long been recognized in that state, yet in tax cases had held a compromise unauthorized and void.

Section 4 of article 9 of the constitution of Nebraska is very similar to section 52 of our constitution. In the case of State v. Graham, 17 Neb. 43, 22 N. W. 114, the supreme court of that state, after quoting section 4, said: "Revenue is to be provided by levying a tax by valuation, so that every person and corporation shall pay tax in proportion to his, her, or its property and franchises; and the legislature shall have no power to release any county, city, etc., or the inhabitants thereof, from their proportionate share, nor shall commutation be authorized in any form. Stronger language could scarcely be used. In effect, the constitution guaranties to every property owner in the state that his property shall be liable for the just proportion of taxes due thereon according to the valuation as ascertained by law, and for no more. It deprives the legislature of the power to add to this amount, or to discriminate between taxpayers in any manner or form. Now, what the legislature cannot do directly it cannot do indirectly. If it cannot say to A., 'You must pay the entire taxes levied upon your property,' and to B., 'You need pay but fifty per cent. of the amount thus levied,' it cannot accomplish by indirection what it is prohibited expressly from doing." The force and effect of the constitutional provision again came before the court in the case of Lancaster Co. v. Trimble, 33 Neb. 125, 49 N. W. 939. The court said: "The legislature is without power to release any inhabitant or corporation from his or its proportionate share of taxes, nor can it confer such authority upon county commissioners. It has authorized them to purchase real estate at tax sale, but has provided for the foreclosure of tax certificates in their hands only when the amount due thereon exceeds a specified sum. The proviso clause of the section of the statute quoted expressly prohibits county commissioners from foreclosing tax

liens when the amount of the lien is $200 or less. It, in effect, places it in the power of county commissioners to release the taxes upon lots and lands where the amount of the delinquent taxes thereon is not over $200. All they would have to do to accomplish it is to purchase that kind of property for the county at tax sale. The legislature is powerless to confer such authority. It cannot do indirectly what the constitution prohibits it from doing directly. That is clear. Wood v. Helmer, 10 Neb. 68, 4 N. W. 968."

The supreme court of Missouri, in State v. Hannibal & St. J. R. Co., 75 Mo. 210, held that a municipal corporation had no power to grant exemption from or commutation of taxes, and a contract undertaking to do so was void. In City of Kansas City v. Hannibal & St. J. R. Co., 81 Mo. 290, the court said: "Nor did the court err in the exclusion of the evidence of a compromise effected by the defendant with the county court by which a less sum than that demanded by the city was accepted in full of that demanded. The county court had no authority to compromise the city taxes. * * * The city council of Kansas City is forbidden to compromise city taxes, by the charter of the city, and therefore could not ratify a compromise made by the county court."

Section 55, art. 3, of the constitution of Texas is to the same effect as section 52 of our constitution. An action was begun by the city of Houston in January, 1899, for taxes due for the years 1892 and 1893 from certain persons. In May, 1899, an amendment to the charter of Houston became effective which provided that suits for taxes should be barred by limitation of four years, and that such plea might be interposed to actions already instituted. The question of the validity of this act as to the actions begun in January prior to its enactment was before the court of civil appeals in Olivier v. City of Houston, 54 S. W. 940, and its opinion was approved by the supreme court, at page 943, 54 S. W. The court of civil appeals said: "The inevitable effect of the law under consideration is to extinguish the liability of appellant for the taxes alleged to be due by them, and this, as to pending suits for taxes coming within its provisions, was its manifest purpose. By that provision of the constitution (section 55, art. 3) the legislature is forbidden to pass any law which would 'extinguish any liability, indebtedness, or obligation to the state or any county or city,' and thereby power to extinguish liability for taxes was denied. The constitution of itself furnishes many evidences of the earnest purpose of the framers to render impossible every form of governmental favoritism. The granting of special privileges, the bestowal of favors, the lightening of the public burdens as to one citizen at the expense of others, are contrary both to its spirit and its letter. So it is declared that taxation shall be equal and uniform. But the force of this provision would be defeated if the power remained to *relinquish at will* the liability thus justly and fairly

fixed. For the prevention of these evils this provision was inserted. Its terms are broad enough to cover every conceivable obligation or liability, the remission of which would diminish the public revenue, and thereby either directly or indirectly impose a heavier tax upon those not affected by the exemption. * * * For these reasons, the contention of appellant that the power rests in the legislature to extinguish the liability of a citizen of a municipal corporation for taxes levied and assessed in a case where the vast majority of his fellow citizens have paid their part of the taxes thus levied seems inconsistent with the spirit of our institutions, and utterly untenable from any point of view. But it is urged that the law in question, while it may operate to extinguish the liability of the citizen, is, after all, but a law fixing the limitation of actions, and that its incidental effect upon such cases as the one before us does not affect its validity. That a power cannot be exercised incidentally or by indirection which could not be directly exercised is elementary. The effect of the act is to relinquish liability. The purpose to accomplish that end is manifest. The ordinary effect of changes in the law of limitation is not to extinguish any right or liability, but to limit the time within which it may be enforced. The right may be lost or the liability extinguished by delay or negligence, but such result is not chargeable to the law. So, in this instance, if the city were required to sue hereafter within a prescribed time, the validity of the act would be beyond question. But, as the matter is presented, the city had already undertaken, within a time permitted by the then existing law, to enforce the collection of these taxes. The liability was existent, and the rights thereunder unimpaired, when the act took effect. No opportunity was given to the city to proceed with its remedy. The result was the effectual exemption of the property of appellants from taxation for the years named. * * * The act has been discussed from the standpoint of its effect upon this class of cases alone, and, in so far as it would have the effect of defeating actions pending at the time it became effective, it is held to be unconstitutional."

In the state of Nevada the question arose as to the power of county commissioners to compromise taxes, a suit for which was pending. The county commissioners of that state had power very similar to our fiscal court. In deciding this question the supreme court, in the case of State v. Central Pac. R. Co., 9 Nev. 79, at page 88, said: "Did the board of county commissioners have any authority to make the compromise with defendant? It is not claimed that there is any law expressly giving to the commissioners power to compromise and settle suits instituted by the state for the collection of delinquent taxes. But it is argued by defendant's counsel that section 8, subd. 12, of the statutes of 1864–65 (page 259), giving to the commissioners power to 'control the prosecu-

tion or defense of all suits to which the county is a party,' and section 29 of the statutes of 1871 (page 94), providing that 'no suit for the collection of delinquent taxes shall be commenced except by the direction of said board,' imply that it was the intention of the legislature to invest the commissioners with full power to control the collection of taxes, and 'that, when the process of collection has taken the form * * * of an action at law, the county commissioners have control of such action.' This position is wholly untenable. The board of county commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law and void." This position was reaffirmed in a case of the same title. 10 Nev. 48, at page 84.

In Massachusetts, where the county commissioners were permitted to abate taxes upon proper showing, they were denied the right to allow interest on the taxes refunded, in the case of City of Lowell v. Middlesex County Com'rs, 3 Allen, 550. To the same effect are the cases of Wilson v. Supervisors, 47 Cal. 91; City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56.

We think it clear from these authorities, under constitutional provisions like our own, even if the provision of section 52 were not plain, that there is no authority given, or could be given, to the general council of appellant to release in whole or part the taxes due from any individual or corporation. If the general council could compromise at less than the amount due, at the fixed rate and assessed value, the liability of any person or corporation, even after suit had been instituted, it could then by indirection do what the constitution forbids; that is, release a part of a liability. If it was desired by the general council to release taxes, the officers would delay and return delinquent, and suit be brought and compromise effected at the reduced amount. To prohibit the possibility of such a procedure, the section of the constitution was enacted. The further provision for uniformity of taxation on all property is a further safeguard against discrimination in taxation or a reduction or release of part of the taxes. We do not mean to hold that an unliquidated demand by or against the city cannot be compromised, but we think that, when the liability to the city is fixed, it cannot be relinquished in whole or in part. When the property has been regularly assessed, and the assessment passes from the officer making it, and the claim comes into the hands of the collecting officer, we are clearly of opinion that the liability is fixed, so that less cannot be accepted in satisfaction thereof. When the actions for these taxes were brought, more than a year had elapsed after the assessment became final, and all statutory right to question the *amount of the* assessed valuation had long since

passed. Moreover, the tax bills were prima facie correct as to amount, and appellee's liability therefor was fixed, so far as legal procedure before the board of assessment, valuation, and equalization was concerned. The compromise agreement was beyond the power of the general council, and was ultra vires and void.

There is yet another reason why the general council could not make the compromise agreement. By section 2909, Ky. St., it is provided: "There shall be elected by the general council immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all the officers and boards of the city in the discharge of their official duties. If requested he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council. His salary and term shall be fixed by the general council, not to exceed four years." By section 3005, Ky. St., it is provided: "On the first day of May of the second year after the assessment of city taxes the receiver shall make out a list of the bills still wholly or partly unpaid, on lands or improvements, and furnish the list to the city attorney, whose duty it shall be to bring, without delay, suits for the recovery thereof in the circuit court," etc. This section of the charter of appellant places in the hands of the city attorney for suit the unpaid tax bills at a certain date, and directs suit to be instituted thereon by the city attorney. This places the duty of collecting delinquent taxes, after a certain time, in the hands of an officer provided by the charter, and also especially provides his duty in the premises. After the matter comes to the city attorney as provided by the charter, the general council cannot control the matter, and cannot direct or order the dismissal of suits begun by the city attorney under the mandate of the charter. If it be made to appear to the court wherein the action is pending that the delinquent has paid the taxes due, of course a satisfaction would be entered and the action dismissed, settled. But, as we have said, the general council cannot accept less than is due, and has no power or authority to compromise for any sum less than the liability fixed by the assessed value at the rate of tax for that year. Likewise, we are of opinion that the city attorney could not effect a compromise and take less than is shown to be due from the taxpayer, neither before nor after suit brought. City of Louisville v. Bank of Kentucky, 174 U. S. 412, 19 Sup. Ct. 881, 43 L. Ed. 1027. His powers and duties are fixed by the charter provision, and when the delinquent taxes come to him for collection the matter must be adjusted by a judgment, unless the full amount be paid.

The merits of the case as presented by the pleadings are not before us, as there has been no trial in the lower court.

Having reached this conclusion, it is unnecessary to decide whether the city should refund to appellee the amount paid on the compromise, or to pass on any question raised by the pleadings, as the same are not before us. Wherefore the motion to dismiss the appeal is overruled, and the judgment of dismissal by the court below is reversed, and the cause remanded, with directions to set aside the order of dismissal, and for further proceedings consistent herewith.

DU RELLE, J., dissenting.

WEST *v.* CITY OF MT. STERLING *et al.*

(Court of Appeals of Kentucky, Nov. 20, 1901.)

[65 S. W. Rep. 120.]

Constitutional Law—Peddlers—License Tax.*

A city ordinance imposing a license tax on "peddlers or itinerant retailers of goods" is not in violation of the federal constitution or of the interstate commerce law.

Same—Same—Same.

Under Ky. St. § 3490, subd. 12, a city of the fourth class has authority to pass such an ordinance.

Same—Same—Same—Residents and Nonresidents.

Such an ordinance applies to the residents of the city as well as to nonresidents, and is therefore not void as discriminating against nonresidents.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by G. W. West against the city of Mt. Sterling and another to recover damages for false arrest and imprisonment. Judgment for defendants, and plaintiff appeals. Affirmed.

A. T. Wood and Hathaway & Hodgkin, for appellant.
W. B. White, for appellees.

GUFFY, J. It appears from the petition in this action that the board of council of the city of Mt. Sterling enacted the following ordinance: Section 124 reads: "The tax on license shall be as follows: Peddlers, or itinerant retailers of goods, wares or merchandise of any description, per year $100; same per day, $10." That afterwards said ordinance was amended by striking out the words, "Peddlers or itinerant retailers of goods, wares or merchandise of any description, per year $100, per day, $10," and inserting in lieu thereof the words, "Peddlers or itinerant retailers of goods, wares or merchandise of any description per day, $15." Section 120 of the by-laws of said city reads as follows: "It shall be unlawful for any person to conduct any business or pursue any occupation hereinafter mentioned in the city of Mt. Sterling, without having previously obtained a license therefor, as pre-

*See note appended to City of St. Paul *v.* Briggs, ante, p. 501.

scribed by this section, under a penalty of double the amoun of the license required, not exceeding $100 in any one case.' It is further alleged in the petition that all of the money aris ing from license, fines, and prosecutions under said section o said pretended and unconstitutional by-laws aforesaid inure to the exclusive use and benefit of the defendant city of Mt. Sterling, Ky., and that said ordinance is not in pursuance no in aid of any law of the commonwealth of Kentucky, nor is the same by authority of any law of this commonwealth or in defendant city vested by virtue of the law creating the municipality of the defendant. It is further alleged, in substance, that said ordinance discriminates as between residents of the city of Mt. Sterling and those in other parts of the state. It is further alleged that said ordinance is in violation of section 2 of article 4 of the federal constitution and that of the state of Kentucky, and in violation of the interstate commerce law. It is further alleged: That on the 15th of May, 1899, the plaintiff was in the city of Mt. Sterling as salesman for a medicine known as "Perkins American Herbs," which was manufactured by the National Herb Company in Washington City, D. C. That said company was at the said time doing business and resident in the city of Washington, and that said medicine was on the 15th of May the property of the said National Herb Company, and did not belong to any citizen or resident of this state, nor had it ever been the property of such citizen, nor mixed with or become in any way confounded with or incorporated with any of the property of any citizen of Kentucky. That prior to the shipment to this state to plaintiff said herb company had paid the tax on same in Washington, D. C., and that the medicine was packed in separate and original packages, and stamped with an internal revenue stamp, as required by law; and that plaintiff was on the 15th of May, 1899, a citizen of the state of Kentucky, but only the agent of said National Herb Company, and was only selling said medicine as the agent of the said company. That on said day the plaintiff did sell in the city of Mt. Sterling a package of said medicine; and charges that the defendant Frank Duerson gave to Fult Green the money to purchase same for the malicious purpose of having the plaintiff arrested upon the charge of peddling without license; and that Duerson reported the fact of the sale to W. B. White, city attorney, and the said Duerson, in pursuance of said pretended ordinance, wrongfully had the plaintiff arrested upon the charge aforesaid, to wit, peddling medicine without having obtained a license therefor. That the warrant was issued by the police judge at the instance of the said city attorney and the defendant Duerson, and plaintiff was taken before the police judge, where, over his objection, he was put upon trial under said pretended law, and wrongfully fined by the said court in the sum of $30, and costs amounting to $4, and for nonpayment he was wrongfully and without authority of law,

upon a mittimus or capias profine issued upon said judgment, incarcerated in the jail of defendant until he was released by an appeal to the Montgomery circuit court from said police court. That before he appealed he sued out a writ of habeas corpus before the judge of the Montgomery county court, and, the said judge refusing to liberate him, he was compelled to and did take said appeal; and upon the trial of said case or appeal in the Montgomery circuit court he was dismissed, but he had to incur $200 attorney's fees to defend himself. That defendants had notice of the unconstitutionality of said pretended ordinance. That plaintiff was greatly damaged in his business, mind, and feelings, and character, and expense, in the sum of $10,000, for which he prayed judgment against the city of Mt. Sterling and Frank Duerson. The circuit court sustained a demurrer to the petition and to the petition as amended, and, plaintiff failing to plead further, the same was dismissed, and from that judgment he prosecutes this appeal.

It is insisted for appellant that the ordinance in question is in violation of the constitution and laws of the United States, and especially the interstate commerce law. We do not concur in this contention. While this ordinance may, in one sense, be considered a tax upon the goods sold, yet it seems to us that the doctrine is well settled that a license or tax required of peddlers and itinerant venders of goods by retail is essentially a police regulation, and we are not aware of any decision of the supreme court of the United States which has ever held an ordinance of a city similar to the one under consideration to be invalid. We do not think that the decisions of the supreme court referred to by appellant have any application to the ordinance under discussion. Section 181 of the constitution clearly authorizes the legislature to confer or delegate to towns and cities the power to impose and collect license fees on franchises, stock used for breeding purposes, trades, occupations, and professions. Subdivision 12 of section 3490, Ky. St., confers upon the city of Mt. Sterling authority to impose the license mentioned in the ordinance in question.

We are further of opinion that the ordinance applies to the citizens of Mt. Sterling to the same extent that it implies to any other citizen. The term "peddler," or "itinerant" person, includes any one who goes from place to place to peddle or retail goods, wares, or other things, without regard to the distance between the different places visited in so selling. In Crosdale v. City of Cynthiana, 50 S. W. 977, this court passed upon the validity of an ordinance quite similar to the one under consideration. We quote from the syllabus as follows: "The appellant seeks to hold the city responsible for wrongful arrest, alleging that he was arrested on a warrant charging him with the violation of an ordinance prohibiting persons from offering for sale any merchandise, or anything

pertaining thereto, by opening up a stand upon the streets, or to carry around for sale or to solicit orders for future delivery of any goods or merchandise; that said ordinance was illegal. Held, that said ordinance is fully authorized by section 3490, Ky. St., and appellant's arrest for a violation of it was legal." A similar question was before this court in City of Carlisle v. Hechinger, 45 S. W. 358. The city of Carlisle is a city of the fifth class, and by the provisions of subsection 4, § 3637, Ky. St., it was authorized to impose and collect license fees on stock used for breeding purposes, and on all franchises, trades, occupations, and professions. This court expressly held that the statute supra authorized such cities to impose and collect license fees upon peddlers and itinerant retailers of goods, wares, and merchandise who exercise their occupation within the limits of the cities in competition with resident taxpayers. Our conclusion is that the city council of Mt. Sterling had authority to enact the law in question, and that the appellant could be legally arrested and fined for violating the same.

Judgment affirmed.

L. S. CLARK, Plff. in Err., *v.* CITY OF TITUSVILLE.

(*Argued and Submitted January 14, 1902. Decided March 3, 1902.*)

[22 Sup. Ct. Rep. 382.]

License Tax—Classification of Merchants*—Constitutional Law.

An ordinance imposing a license tax upon the merchants of a city, by which they are divided into classes according to the amount of their sales, each class including all whose sales range between a certain minimum and maximum amount, does not violate the equality clause of U. S. Const. 14th Amend., although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amounts of their sales differ.

In Error to the Supreme Court of the State of Pennsylvania to review a decision affirming a judgment sustaining the constitutionality of an ordinance imposing a license tax. Affirmed.

The facts are stated in the opinion.

Mr. Eugene Mackey for plaintiff in error.

Mr. George Frank Brown submitted the case for defendant in error.

MR. JUSTICE McKENNA delivered the opinion of the court:

---

*See Goldsmith *v.* Mayor of Huntsville, 1 Mun. Corp. Cas. 89, and note; Saks *v.* Mayor of Birmingham, 1 Mun. Corp. Cas. 96, and note; Silver *v.* Mayor of Sparta, 2 Mun. Corp. Cas. 239, and note; City of Kansas City *v.* Grush, 2 Mun. Corp. Cas. 448, and note; Fleetwood *v.* Read, 3 Mun. Corp. Cas. 336; McKenna, Ex parte, 4 Mun. Corp. Cas. 168, and note; State *v.* Willingham, 6 Mun. Corp. Cas. 287; Board of Council of Harrodsburg *v.* Renfro, 6 Mun. Corp. Cas. 841; Hill *v.* City Council of Abbeville, ante, p. 475.

Clark *v.* City of Titusville

This case is here on error to the supreme court of the state of Pennsylvania. It involves the constitutionality of an ordinance of the city of Titusville imposing a license tax upon the merchants of the city. The particular contention is that the ordinance violates the equality prescribed by the 14th Amendment of the Constitution of the United States, in that it divides the merchants into arbitrary classes.

The trial court sustained the ordinance, and its judgment was affirmed by the supreme court upon the opinion delivered by the trial court.

The case was submitted upon a case stated in the nature of a special verdict, from which it appeared that the city was duly incorporated, and passed on June 25, 1888, the ordinance complained of. The provisions of the ordinance were set out, and it was stipulated that if the court should be of the opinion that the ordinance was valid a fine should be entered against the defendant (plaintiff in error) for the total of the taxes prescribed.

The ordinance imposes a license tax upon persons who carry on certain occupations in the city. Persons in different occupations pay different amounts, and persons in the same occupation are classified by maximum and minimum amount of sales. For instance, persons dealing in merchandise are classified as follows, and we quote from the opinion of the trial court:

Class.	Business.			Tax.
1	Over	$60,000		$100.00
2	$50,000	to	60,000	80.00
3	40,000	to	50,000	70.00
4	30,000	to	40,000	60.00
5	20,000	to	30,000	50.00
6	10,000	to	20,000	35.00
7	5,000	to	10,000	25.00
8	2,500	to	5,000	15.00
9	1,000	to	2,500	10.00
10			1,000	5.00
	Wholesale.			
1	$100,000	and	upwards	$60.00
2	60,000	to	100,000	50.00
3	50,000	to	60,000	40.00
4	40,000	to	50,000	35.00
5	30,000	to	40,000	30.00
6	20,000	to	30,000	25.00
7	10,000	to	20,000	20.00
8	5,000	to	10,000	15.00
9	2,500	to	5,000	10.00
10			2,500	5.00

It is with this classification that we have immediate concern, because the plaintiff is a retail grocer. He was assessed in the sixth class in 1895, and in the seventh class in 1896.

The objection that plaintiff makes to the ordinance is that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class "is required to pay the same amount of taxes with the highest amount or value of property therein;" (2) that the differences are not in

kind, but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.

Classification by amount came up for consideration and decision in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention, and attempts to limit its decision to the power of a state over inheritances, and to explain by that power, not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the state could be exerted to the extent of making the state the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law of Illinois. We said: "Our inquiry must be, not what will satisfy the provisions of the state Constitutions, but what will satisfy the rule of the Federal Constitution. The power of the states over successions may be as plenary in the abstract as appellee contends for; nevertheless it must be exerted within the limitations of that Constitution. If the power of the devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

"On each and every $100 of the clear market value of all property and at the same rate for any less amount on all estates of $10,000 and less, $3; on all estates over $10,000 and not exceeding $20,000, $4; on all estates over $20,000 and not exceeding $50,000, $5; and on all estates over $50,000, $6. Provided, that an estate in the above case, which may be valued at a less sum than $500, shall not be subject to any duty or tax."

Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as

manifestly there was equality between the members of each class, and that equality was held to satisfy the 14th Amendment of the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent., and that one over $10,000 pays, not 3 per cent. on $10,000 and an increased percentage on the excess over $10,000, but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,001 by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the 14th Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their legality has never been questioned."

Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well-recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business, regulated by the amount of sales, and is not repugnant to the constitution of the United States.

Judgment affirmed.

MR. JUSTICE HARLAN did not hear the argument, and took no part in the decision.

CITY OF INDEPENDENCE *v.* CLEVELAND.

(*Supreme Court of Missouri, Division No. 2, March 11, 1902.*)

[67 S. W. Rep. 216.]

License Tax—Who Subject to—Agent of Steam Laundry—Ejusdem Generis*—Expressio Unius.†

A city has no authority to require payment of a license by an agent of a local steam laundry, its only authority to levy license tax on agents and occupations being in Acts 1893, p. 89, § 107, which, after enumerating certain businesses, not including laundries, adds "and all other businesses"; and which, while stating that agents may be charged a license fee, enumerates agents, not including those for laundries.

Appeal from criminal court, Jackson county; Samuel Davis, Special Judge.

M. J. Cleveland was convicted of violation of an ordinance, and appeals. Reversed.

Wollman, Solomon & Copper, and Flournoy & Flournoy, for appellant.

Sam W. Hilt, for respondent.

BURGESS, J. Defendant was convicted in the police court of Independence, Jackson county, Mo., a city of the third class, and fined in the sum of $50, for unlawfully conducting in said city an agency for a steam laundry without first having a license therefor, as required by the ordinance of said city. He appealed to the criminal court of said county, where upon a trial de novo before the court, a jury being waived, he was again convicted, and a fine assessed against him in the sum of $30. After unsuccessful motion for new trial, he appeals to this court. The ordinance upon which this prosecution is based is as follows: "Ordinance No. 27. License Required for Sundry Occupations. An ordinance to license, tax and regulate the different classes of business, employments, occupations, agencies, public halls and amusements in the city of Independence, Missouri. Section 1. No person, firm, company, corporation or association, without first having obtained a license therefor, shall, in the city of Independence, engage, carry on or exercise any of the following classes of business, occupations, employments, agencies or amusements, and the charges for such license shall be as follows: * * * Agents of steam laundries, fifteen dollars per year. * * *" "Sec. 7. Any person in this city who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than five dollars, nor more than one hundred dollars." It was admitted that M. J. Cleveland, the appellant, was the agent of Woolf Bros. Steam Laundry, located in Kansas City,

*See Detroit Citizens' St. Ry. Co. *v.* Common Council of Detroit, 5 Mun. Corp. Cas. 426.

†See City of Kansas City *v.* Grush, 2 Mun. Corp. Cas. 448, and note.

Mo., and had been such agent since the date of the ordinance in question, and that there were and had been during said time two steam laundries located in said city of Independence. The evidence showed that defendant had never taken out a license to act as the agent for a steam laundry; that the ordinance introduced by respondent was the only ordinance of the city relative to laundries, and that there was no ordinance of the city putting a license tax on laundries located at Independence; that there was no attempt on the part of the city to levy any tax on the agents of laundries located at Independence.

There are but two points presented by this appeal, both of which are raised by the motion for a new trial, and in no other way. The first challenges the power of the city of Independence by its charter to impose a license tax on agents of steam laundries. The argument of defendant is, as we understand it, that the city has no power to levy a license tax upon steam laundries themselves, and is therefore without authority to impose such a tax upon their agents. The only authority which the city of Independence has to levy and collect a license tax upon agents, trades, and occupations is to be found in section 107, p. 89, Acts 1893. It reads as follows: "The council shall have power and authority to levy and collect a license tax on beer depots or store rooms, auctioneers, druggists, hawkers, peddlers, banks, brokers, pawn-brokers, merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, hotels, public boarding houses, dram shops, saloons, liquor sellers, billiard and pool tables and other gaming tables, bowling alleys, hay scales, lumber dealers, livery stable keepers, real estate agents, loan companies, loan agents, public buildings, public halls, opera houses, public grounds, concerts, photographists, bill posters, artists, agents, porters, runners, drummers, public lecturers, public meeting, circuses and shows, for parades and exhibitions or both, horse and cattle dealers, patent-right dealers, stock yards, wagon yards, inspectors, gaugers, mercantile agents, insurance companies, insurance agents, manufacturing and other corporations or institutions, street railroad cars, hackney carriages, omnibuses, carts, drays, transfer and job wagons, ice wagons and all other vehicles, travelling and auction stores and all other businesses, trades and avocations whatever, and fix the rate of carriage of persons and wagonage, drayage and cartage of property and to license, tax, regulate or suppress ordinaries, money brokers, money changers, intelligence and employment offices and agencies, public masquerades, balls, street exhibitions, dance houses, fortune tellers, pistol galleries, corn doctors, private venereal hospitals, museums, menageries, equestrian performances, horoscopic views, telescopic views, lung testers, muscle developers, magnifying glasses, ten pin alleys, ball alleys, billiard tables, pool or other tables, theatrical or other exhibition, boxing or sparring exhibitions, shows and

amusements, tippling houses, gift enterprises and sale of unclaimed goods by express companies or common carriers; to license, tax and regulate, hackmen, draymen, omnibus drivers, porters and all other pursuing like occupations, with or without vehicles and to prescribe their compensation; and to regulate, license and restrain runners for steamboats, cars, stages and public houses and to license ferries and to regulate the same and the landing thereof within the limits of the city." Section 1506, Rev. St. 1889. And we have looked in vain for any authority in that section which authorizes cities of the third class to levy a license tax on steam laundries. It is clearly not so expressed, nor do we think any such authority can be implied from the language employed. In 1 Dill. Mun. Corp. (4th Ed.) § 89, it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Williams v. Davidson, 43 Tex. 33, and authorities cited. But if there were any fairly reasonable doubt as to the existence of any such power it must be resolved against the city. Town of Trenton v. Clayton, 50 Mo. App. 535; City of Kansas City v. Lorber, 64 Mo. App. 605; City of Joplin v. Leekie, 78 Mo. App. 8; City of Brenham v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143; Kirkham v. Russell, 76 Va. 956.

We do not, however, think there is any doubt as to the want of authority in the city under its charter to license steam laundries doing business in said city. Could, then, the defendant be required by ordinance to take out a license as agent for a business which the city had no authority to tax, before engaging in such business? We think not. To require him to do so would be imposing upon his principal indirectly a burden which the city could not impose directly, and this would be a clear evasion of the law. If the city had no authority to require steam laundries doing business within its limits to pay a license tax, it is somewhat difficult to see by what authority it could compel their agents to do so. Defendant, as agent, was simply the representative of the principal; and if no authority existed upon the part of the city to require a license or occupation tax of his principal before engaging in the laundry business in the city, it must logically follow that none could be required of the agent.

The next question is as to the constitutionality of the ordinance, which defendant claims is in conflict with the provisions of section 3 of article 10 of the constitution of this state; but from what we have said, that question is eliminated

from the case on this appeal, if, in fact, it was ever in it. Speaking for myself, I do not think this question is properly presented by this record, so as to give the supreme court jurisdiction of this appeal, and that the cause should be transferred to the Kansas City court of appeals, but I defer to the opinion of my associates on that question.

For these intimations the judgment is reversed, and the defendant discharged. All concur.

WOODALL *v* CITY OF LYNCHBURG.

(*Supreme Court of Appeals of Virginia, March 13, 1902.*)

[40 S. E. Rep. 915.]

Taxation—Scope of Charter Provision Conferring General Power of Taxation.

Where the legislature confers upon a city by its charter the general power of taxation, it grants all the power possessed by itself in that regard, and the city can tax all subjects within its jurisdiction not withheld from taxation by the laws of the state, whether they are taxed by the state or not.

License Tax—Reasonableness of Amount—Review of Municipal Discretion by the Courts.*

Where it was conceded that a city had authority under its charter to impose a license tax upon the privilege of conducting a labor agency, the court had no jurisdiction to consider the reasonableness of such tax as regards the amount thereof, this question being exclusively within the discretion of the taxing power.

Error to circuit court of city of Lynchburg.

Action by one Woodall against city of Lynchburg. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Beasley & Moon, for plaintiff in error.

N. C. Mauson, Jr., for defendant in error.

HARRISON, J. This is an action of assumpsit, brought by plaintiff in error against the city of Lynchburg to recover $500 alleged to have been illegally exacted of him by way of license tax for the privilege of conducting business as a labor agent. There are three counts in the declaration. The important allegations are that the plaintiff in error was duly licensed by the state to carry on the business of labor agent, and that for this privilege the state license fee was $25; that for the same year he applied to the city of Lynchburg for the privilege of conducting the business within its jurisdiction, and was required to pay $500 for such license, the city having theretofore only charged $30 for such privilege. It is further alleged that the ordinance of February 23, 1900, under which

*See City of Walla Walla *v.* Ferdon, 2 Mun. Corp. Cas. 434, and note; Mayfield Woolen Mills *v.* City of Mayfield, 5 Mun. Corp. Cas. 750; note appended to Macon Consol. St. R. Co. *v.* Mayor of Macon, 5 Mun. Corp. Cas. 457.

the license tax of $500 was collected, is illegal, and of no effect, because it imposes a tax on a legitimate and useful occupation, already licensed by the state, so high as to be a restraint upon trade, unreasonable, excessive, oppressive, and unfair, and was and is without authority of law; a palpable attempt on the part of the city council to prohibit the plaintiff from engaging in a useful and legitimate business and occupation licensed by the state, under the guise of an ordinance purporting to impose a license tax for the purpose of raising revenue, but having for its real object the prohibition and suppression of such business, and having been enacted by said council for that very purpose, and not for the purpose of raising revenue for said city, without authority of law; accomplishing such object and purpose, for the plaintiff avers that he cannot pay said tax and prosecute such business in the city of Lynchburg at a profit.

It is further alleged that the tax was paid under protest and under threats of the penalties imposed by the ordinance (a fine of not less than $5 nor more than $20 per day for each day that plaintiff might conduct the business of labor agent without license).

The defendant in error demurred generally to the declaration, and the demurrer was sustained. This judgment of the circuit court we are asked to review.

The ordinance complained of was passed in pursuance of the authority vested in the city by chapter 8, § 5, of the Revised Charter of Lynchburg (Acts 1895–96, pp. 213, 214). This language has been repeatedly construed and held to confer upon the city the general power of taxation, except only as it may be limited by the laws of the state or of the United States, and to include all powers and subjects of taxation. Newport News & O. P. Ry. & Electric Co. v. City of Newport News (decided Jan. term, 1902) 40 S. E. 645. This legislative grant of power to the city council of Lynchburg is without limitation as to the amount of tax to be imposed. That matter is left solely to the discretion of the council.

It is settled law that, where the legislature confers upon a municipality the general power of taxation, it grants all the power possessed by itself in respect to the imposition of taxes, and the city can then impose taxes, in its discretion, upon all subjects within its jurisdiction not withheld from taxation by the legislature, whether they be taxed by the state or not. City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959; Newport News & O. P. Ry. & Electric Co. v. City of Newport News, supra.

The power of the council of the city of Lynchburg to impose the tax complained of must, therefore, be regarded in the same light as if an act of the legislature imposing such tax was called in question.

The power of taxation is a most important and delicate trust and under our system of government rests with the legislative,

and not with the judicial, department, and its province cannot be invaded by the courts. As was said by Chief Justice Marshall: "It is unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

Mr. Justice Cooley, in his admirable work on Constitutional Limitations, says: "The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. * * * No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life, than through the exactions made under it. * * * Chief Justice Marshall has said of this power: 'The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.'" After quoting the foregoing observations from Judge Marshall, the learned author adds, "The like general views have been frequently expressed in other cases." Cooley, Const. Lim. (6th Ed.) pp. 587, 588.

Again, in Weston v. City Council of Charleston, 2 Pet. 449, 466, 7 L. Ed. 481, Chief Justice Marshall says: "If the right to impose a tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it which the will of such state or corporation may prescribe."

These principles have been repeatedly approved and applied by this court. Ould v. City of Richmond, 23 Grat. 464, 14 Am. Rep. 139; Com. v. Moore, 25 Grat. 951; Com. v. Maury, 82 Va. 888, 1 S. E. 185; City of Norfolk v. Norfolk Landmark Pub. Co., supra, and other cases.

In the case of Com. v. Moore, supra, involving the constitutionality of a license tax imposed by the state upon merchants, the court says: "If the legislation complained of is unjust and unequal, unwise and oppressive, to any particular class (about which we express no opinion), the remedy for unwise and oppressive legislation, within constitutional bounds, is by an appeal, not to the courts, but to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity may correct the evil. But the courts cannot assume their rights. In the language of Chief Justice Marshall: 'The wisdom and justice of the representative body and its relations with its constituents,

form the only security, when there is no express limitation against excessive taxation and unwise legislation generally.'"

It will be observed that the declaration in the case at bar concedes the authority of the city council under its charter to assess the plaintiff in error with a license tax for the privilege of conducting his occupation of labor agent. The complaint is that the amount of the tax imposed is so excessive and burdensome that the plaintiff in error cannot prosecute his business of labor agent at a profit. If it be true that the tax complained of is excessive and oppressive,—as to which we express no opinion,—the relief sought would compel the court to determine what degree of tax was reasonable. This would be for the court to assume legislative functions, which it has no authority to exercise.

For these reasons the judgment of the circuit court must be affirmed.

Affirmed.

WHITTLE, J., absent.

BARTO *v.* BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO *et al.*

(*Supreme Court of California, Feb. 14, 1902.*)

[67 Pac. Rep. 758.]

Municipal Contracts—Restraining Illegal Contract.*

Injunction will not issue to restrain the board of supervisors of San Francisco from letting a contract in direct contravention of the charter, the court being bound to presume that the board will do its duty, and there being no irreparable injury in any event, since a contract let in violation of the charter would be void.

In banc. Appeal from superior court, city and county of San Francisco; Frank J. Murasky, Judge.

Injunction by Harrison Barto against the board of supervisors of the city and county of San Francisco and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. B. Kollmyer, for appellant.

Franklin K. Lane, for respondents.

PER CURIAM. The court below sustained a demurrer to the complaint, and judgment for the defendants. This appeal is from the judgment for the purpose of reviewing the order sustaining the demurrer. It appears by the complaint that the plaintiff is a resident and taxpayer in the city and county of San Francisco, and that the defendants other than defendant Phelan were at all times stated the duly qualified and acting members of the board of supervisors of said city and county; that defendant Phelan is, and was at all said times, the mayor of said city and county, and president of said board; that, in pursuance of an order duly made by the said board,

*See notes at end of case.

an advertisement was published, as required by law, calling for sealed proposals for furnishing certain printed forms and blanks for the use of said city and county; that after said advertisement, and as required therein, there were certain sealed proposals for furnishing the said printed forms and blanks filed with said board, among which was that of the Stanley-Taylor Company, a corporation; that the proposal and bid of the Stanley-Taylor Company complied with the law and the rules and regulations of said board, was accompanied with a proper certified check, and was the lowest bid for the stationery called for in said advertisement; that the charter of said city and county requires all such contracts for supplies to be let to the lowest responsible bidder; that the defendants, as members of the said board of supervisors, and in their official capacity, had, before advertising for said bids, passed an order or resolution that no printing should be let except to printing establishments entitled to use the label of the Allied Printing Trades Council of the City and County of San Francisco, as registered with the secretary of state of California, and that said Stanley-Taylor Company was a non-union office, and not entitled to use said label, and was not a member of said alleged printing trades council; that plaintiff "has been informed and believes, and on such information and belief alleges, that, notwithstanding the premises, said defendant board of supervisors intends to, and that it will, in pursuance of the recommendation of said committee, unless restrained and enjoined from so doing by this honorable court, refuse to consider the said proposal of said the Stanley-Taylor Company, and will refuse to award to said company the contract for the furnishing of the articles of printed forms and blanks mentioned in paragraph 9 of this complaint, and specifically set out in said 'Exhibit B,' and at the price set opposite each article in said Exhibit B, respectively, and that it will, on this 25th day of June, 1900, pass an order awarding contracts for the furnishing of said articles to others of said persons, firms, and corporations who put in proposals as aforesaid that said the Stanley-Taylor Company, thereby causing great and irreparable loss to said city and county, and to the taxpayers thereof, and to this plaintiff." Judgment is prayed that defendants be enjoined from awarding the contract for printed forms and blanks to any other person than the Stanley-Taylor Company.

We think the demurrer was properly sustained. The board of supervisors are a quasi judicial body, whose duties are prescribed by statute. If they should let a contract in direct contravention of the charter, and in conflict with the power therein given, such contract would be void, and the plaintiff could not suffer any irreparable injury therefrom. The board has not yet acted. We must presume that it will do its duty, and let the contract in the method prescribed in the charter. In any event, we do not think that it is the policy of the law

that the machinery of the courts should be put in motion and the writ of injunction invoked upon evidence as to the intention of a judicial body in regard to some act which has not been attempted to be performed. If the board should not proceed in accordance with law, and should let a contract contrary thereto, the taxpayer is not without remedy. But he cannot come into court upon the supposition or belief that a public official elected by the people and sworn to perform his duty faithfully to the best of his ability is going to disregard his oath, and willfully violate the law. The above views are fully sustained by the recent case of McBride v. Newlin, 129 Cal. 36, 61 Pac. 577.

The judgment is affirmed.

NOTES.

RESTRAINING CORPORATE AUTHORITIES FROM ENTERING INTO CONTRACT.

I. In General.
II. Injunction by Taxpayer.
  1. Grounds of Suit.
    a. Public Property and Money a Trust Fund for Benefit of Taxpayer.
    b. Taxpayers as a Special Class or as Sustaining Special and Individual Injury.
    c. Inadequacy of Remedy at Law—Imminent and Irreparable Injury.
    d. Exceptions—Massachusetts, Ohio, and New York Doctrine.
  2. Bona Fides.
III. Injunction by Attorney General or Other Officer.
IV. Injunction by Person Claiming Special or Exclusive Privilege.
  1. Generally.
  2. Privilege Claimed under Ultra Vires Contract.
  3. Refusal of Person Claiming Special Privilege to Perform Contract Thereunder.
  4. Legal Interest—What Is Not.
V. Injunction by Rejected Bidder.
VI. Specific Instances in Which Injunction Will Be Granted or Refused.
  1. Where Contract Is Sought to Be Entered into by Ordinance.
  2. Fraud.
  3. Contract Wholly Ultra Vires.
  4. Same—Illegal Disposition of Public Funds or Property.
  5. Statutory Restrictions.
    a. Contracting Indebtedness beyond Limit.
    b. Contracting for Longer Term Than Charter Permits.
    c. Contracts Let on Bids.
      (1) Failure or Refusal to Let to Lowest Bidder.
      (2) Conditions Which Tend to Prevent or Stifle Competition.
        (a) Requiring Contractor to Employ Union Labor.
        (b) Use of Patented or Monopolized Materials.
      (3) Where Proposals Differ from Specifications or No Specifications Are Furnished.
      (4) Letting to Lowest Responsible Bidder.
    d. Failure to Perform Statutory Prerequisites.

I. IN GENERAL.

It is well settled that where the corporate authorities have entered into an illegal or fraudulent contract a taxpayer whose pecuniary or

Notes

property interests are affected thereby may maintain a suit for an injunction to restrain proceedings thereunder. Spilman *v.* City of Parkersburg, 35 W. Va. 605, 14 S. E. Rep. 279; Peck *v.* School Dist., 21 Wis. 516; Newmeyer *v.* Mo., etc., R. Co., 52 Mo. 81, 14 Am. Rep. 394; Sackett *v.* City of New Albany, 88 Ind. 473, 45 Am. Rep. 467; Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. Ed. 1070. But as concerning the right of a taxpayer or other interested person to restrain the corporate authorities from entering into such contract in the first instance, the principles applicable thereto are not so well defined. In some jurisdictions the existence of any such remedy is denied broadly, while in others it is recognized with more or less qualification. Opposed to the doctrine that a taxpayer may maintain such a suit whenever he brings his case within a well-defined head of equity jurisdiction, stands the principle that the legislative and judicial discretion of municipal bodies is analogous to that of the legislative body of the state, and that the one is no more susceptible of judicial control than the other. But on principle, and according to the weight of authority, it cannot be said that this is wholly true even as to those matters with which municipal bodies have to do in their public and governmental capacity. The tendency of such bodies to abuse their corporate power or to use it fraudulently, either in their own favor or for the benefit of political favorites, renders it imperative that there should reside somewhere a supervisory power to keep them within the spirit as well as the letter of the law; and in our system such a power can exist no where but in the courts. Moreover, it is not necessarily true that the making of a contract by municipal authorities involves the exercise of any legislative or judicial discretion, for the reason that under its charter, or under some statute, it may be required to enter into certain contracts in a prescribed manner, or it may be prohibited from making certain others at all; in short, the discretion may be circumscribed or taken away altogether, and when such is the case, acts done without the limits of such discretion as defined by charter or statute are wholly wanting in authority. It may be said, then, that in a proper case, equity will interfere to restrain municipal authorities from entering into contracts. As to who may maintain such a suit and in what cases we will now proceed to consider.

II. INJUNCTION BY TAXPAYER.

I. Grounds of Suit.

a. Public Property and Money a Trust Fund for Benefit of the Taxpayer.

In the first place, it is fundamental that no person can seek relief through the courts until some legal right is threatened or denied. Courts of justice sit to try questions of law, and not matters social, moral, or political. Therefore, before a person seeking to enjoin a municipality from entering into a contract can obtain the relief prayed, or question the rights of others in respect to the subject-matter of such contract, he must show a legal interest therein himself. Fleitas *v.* City of New Orleans, 51 La. Ann. 1, 24 So. Rep. 623. That a taxpayer has such a legal interest to restrain a contract calling for the illegal expenditure of public funds or property, is in many cases predicated upon the theory that, as regards public moneys and public property, the corporate authorities sustain toward the taxpayer a trust relation analogous to that which exists between the directors and stockholders of a private corporation, and that such being the case, a taxpayer is entitled, in the absence of other remedy, to the assistance of the strong arm of a court of equity to protect his interests from the indiscretion or unfaithfulness of the trustee. Thus, in Winston *v.* Tennessee & Pac. R. Co., 1 Baxt. (Tenn.) 60, 75, it was said: "The corporation, as such, so far as it uses the funds or means gathered from the taxpayer, is a trustee, to a certain extent at least, using these funds and collecting them for purposes authorized by law, and having only authority to use or collect them for such use."

Notes

And in Christopher *v.* The Mayor, 13 Barb. (N. Y.) 567, it was said that where the necessary effect of the act complained of was to place a burden upon the real estate of the plaintiffs, they had an interest as certain and direct as that of a stockholder in a moneyed or other corporation. Again: "The officers of the city are trustees in the management and application of the funds and property of the people of the city: 2 Dillon on Municipal Corporations, 915. The application of municipal funds to illegal purposes by them is a breach of trust: 2 Dillon on Municipal Corporations, 919, and notes. Equity has jurisdiction to prevent the misapplication or waste of trust property: 2 Story's Eq. Jr. 1252, and note."—Sandels, J., in Russell *v.* Tate, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. Rep. 130. See, also, Jacksonport *v.* Watson, 33 Ark. 704; Blakie *v.* Staples, 13 Grant (U. C.) 67. "The agents of municipal corporations must maintain themselves within the law in the matter of awarding contracts, and if through fraud or manifest error not within the discretion confided to them, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction to the effect of restricting their action to proper bounds." Times Pub. Co. *v.* City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, citing Mayor *v.* Keyser, 72 Md. 107; People *v.* Dwyer, 90 N. Y. 402; Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. Ed. 1070, in which last case it is said: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may safely be trusted to prevent the abuse of process in such cases." See also, The Liberty Bell, 23 Fed. Rep. 843; Willard *v.* Comstock, 58 Wis. 571, 17 N. W. 401; People of New York *v.* Canal Bd. of New York, 55 N. Y. 390, 393; Wood *v.* Draper, 24 Barb. (N. Y.) 187; New London *v.* Brainard, 22 Conn. 552, 556.

Certainly money raised for a special purpose, and in the hands of the municipal authorities is a trust fund and can be appropriated to no purpose other than that for which it was intended. Town of Aurora *v.* Chicago, etc., R. Co., 119 Ill. 246, 10 N. E. Rep. 27; Webster *v.* Town of Harwinton, 32 Conn. 131; Coulson *v.* City of Portland, Deady 494, Fed. Cas. 3,275; Willard *v.* Comstock, 58 Wis. 571, 572, 17 N. W. Rep. 401; Pullman *v.* Mayor, etc., of New York, 49 Barb. 61; People *v.* Canal Bd. of New York, 55 N. Y. 390, 393; Milan *v.* Sharp, 15 Barb. 212; Sherlock *v.* Village of Winnetka, 59 Ill. 389, 398.

And in a case where the specifications of a contract, as advertised, contained provisions inimical to the statute requiring it to be let to the lowest bidder, it was said, upon a bill filed by a taxpayer to enjoin the city officials from entering into the contract, that the bill came clearly within the category of bills quia timet—a well-settled branch of equity jurisdiction—and that the standing of a citizen and taxpayer, when money is to be raised by taxation, or expended by the municipal treasury, to proceed in equity to test the validity of the proposed action claimed by him to be illegal, was not to be questioned. Frame *v.* Felix, 167 Pa. 47, 27 L. R. A. 802, 31 Atl. Rep. 375. See also, Wheeler *v.* Philadelphia, 77 Pa. St. 338, 348; Sharpless *v.*

Notes

Mayor, etc., 21 Pa. St. 147, 59 Am. Dec. 759; Moers *v.* City of Reading, 21 Pa. St. 188; Mott *v.* Railroad Co., 30 Pa. St. 9; Page *v.* Allen, 58 Pa. St. 338; Mazet *v.* City of Pittsburgh, 137 Pa. St. 548, 20 Atl. Rep. 693; Phillips *v.* Town of Albany, 28 Wis. 340; City of Cincinnati *v.* Dexter, 55 Ohio 93, 44 N. E. Rep. 520; Tackett *v.* Stevenson, 155 Ind. 407, 58 N. E. Rep. 534; Lawson *v.* Schneller, 33 Wis. 288; Mauldin *v.* Greenville, 33 S. Car. 1, 8 L. R. A. 291, 11 S. E. Rep. 434; Moore *v.* City of Walla Walla, 60 Fed. Rep. 961.

b. Taxpayers as a Special Class or as Sustaining Special and Individual Injury.

In a number of jurisdictions the right of a taxpayer to enjoin the making of an unauthorized or illegal contract has been upheld on the theory that only a portion of the inhabitants of the city, less than a majority in most cases, are taxpayers, and that since they alone are to bear the burden and brunt of any waste or misuse of public money, they constitute a class sustaining special and peculiar injury, and are for that reason entitled, in the absence of other remedy, to the assistance of a court of equity to aid them in protecting their interests. Thus, in the oft-cited case of Mayor and Council of Baltimore *v.* Gill, 31 Md. 374, 394, in which the plaintiffs sought to restrain the city officers from acting under an ordinance authorizing them to contract a loan for the purpose of building a railroad, which ordinance was claimed to be unconstitutional, it was held that the interests of the plaintiffs as taxpayers was sufficient to enable them to maintain the action, the court saying, per Bartol, C. J.: "The case is to be distinguished from cases of public wrongs, in which the general public are alike concerned, in that the complainants, as taxpayers of the city, and others similarly situated, constitute a class specially damaged by the alleged unlawful act in the increase of the burden of taxation upon their property situated within the city. They have, therefore, a special interest in the subject-matter of the suit distinct from that of the general public."

In a few jurisdictions the case has been held to be analogous to that of a public nuisance, and relief has been denied unless the plaintiff could show that not only was he a taxpayer, but that he would suffer special and individual injury, different in kind as well as degree from that which threatened others of his class. Thus, in Pierce et al., County Com'rs, *v.* Smith, 48 Kan. 331, 29 Pac. Rep. 565, it was held that taxpayers, merely as such, had no standing to enjoin the board of county commissioners from purchasing certain bridges, which purchase was alleged to be illegal, but that to maintain such an action they must show that they were threatened with some special and peculiar injury, different in kind and not merely in degree from that which threatened other taxpayers or the public at large. Such seems to be the Canada rule also, Taylor *v.* Montreal Harbor Com'rs, 17 Rap. Jud. Que. C. S. 275. The holding of these cases is not believed to be sound except to this extent, namely, that where it is shown that the contract will inevitably result in the creation of a public nuisance, and the plaintiff seeks to enjoin it on that ground, then he must, of course, show such injury to himself as would enable him to sue in any other case of public nuisance. Daly *v.* Ga. Southern, etc., R. Co., 80 Ga. 793, 12 Am. St. Rep. 286, 7 S. E. Rep. 146; Davis *v.* Mayor, etc., of New York, 14 N. Y. 506; City of Tacoma *v.* Bridges (Wash.), 65 Pac. Rep. 186. Otherwise it is sufficient for him to show that as a taxpayer he is interested in seeing that no improper use or expenditure of public property or funds, liable to subject him to an increased burden of taxation, is made. Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147; Frame *v.* Felix, 167 Pa. St. 47, 27 L. R. A. 802, 31 Atl. Rep. 375; Wood *v.* Draper, 24 Barb. (N. Y.) 187; People *v.* Dwyer, 90 N. Y. 402; Mayor *v.* Keyser, 72 Md. 107, 19 Atl. Rep. 706; Times Pub. Co. *v.* City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. Rep. 695.

Notes

c. Inadequacy of Remedy at Law—Imminent and Irreparable Injury.

It is important to notice that to entitle the taxpayer to the extraordinary remedy of injunction, it is not sufficient to merely show that the proposed contract is fraudulent, oppressive, or unlawful. The general rules relating to the issuing of writs of injunction apply here, and if there is an adequate remedy at law, or if the threatened injury is uncertain or remote, the writ will be denied. Johnson *v.* City of Cincinnati (Sup. Ct. Cin.), 26 Wkly. Law Bul. 223; Searle *v.* Abraham, 73 Iowa 507, 35 N. W. Rep. 612; Board of Com'rs of Monroe County *v.* Conner, 155 Ind. 484, 58 N. E. Rep. 828; Pedrick *v.* City of Ripon, 73 Wis. 622, 3 L. R. A. 269, 41 N. W. Rep. 705; Pierce et al., County Com'rs, *v.* Smith, 48 Kan. 331, 29 Pac. Rep. 565; Trinity County *v.* McCammon, 25 Cal. 117; Tackett *v.* Stevenson, 155 Ind. 407, 58 N. E. Rep. 534.

In McKee *v.* Town of Pendleton, 154 Ind. 652, 57 N. E. Rep. 532, the facts were that the corporate authorities had passed a declaratory resolution ordering the improvement of a certain street and the assessment of the cost upon the abutting owners in proportion to the number of front feet owned by each, or, as it is familiarly known, according to the "front-foot rule." It was alleged, and admitted on the pleadings, that not one of the abutting lots would be benefited to the extent of the assessment which would be levied upon it, and that in some instances the entire value of the lot, after the making of the improvement, would not equal its individual assessment. It was held that a demurrer to the plaintiffs' prayer for an injunction to restrain the city from contracting for the improvement was improperly sustained, and the case was remanded with instructions that it be overruled. And yet, in a case where a strip fifty feet wide had been condemned for a street through a lot three hundred and seventy feet long, leaving the owner a strip eleven feet wide upon one side of the street so formed and another twenty one and a half feet wide upon the other side, and it was proposed to improve the newly formed street with cement sidewalks and gutters, and assess the cost upon the aforesaid strips, and it further appearing that the combined values of the strips after the making of the improvement would not exceed fifty per cent. of the cost thereof—a case much stronger upon its facts than the one just mentioned—it was held by the same court that an injunction would not lie to restrain the corporate authorities from contracting for the improvement, the court basing its decision upon the ground that the suit was prematurely brought, and that even should the improvement scheme be carried out the plaintiff would have an adequate remedy at law to resist the assessment. Taylor *v.* City of Crawfordsville, 155 Ind. 403, 58 N. E. Rep. 490.

But as regards the remedy at law, under the general rules of equity applicable, it is not sufficient, in order to defeat the plaintiff's right to an injunction, that there should merely be some remedy, but it must be adequate in all that the term implies; or, as said by the supreme court of the United States in a case where the plaintiff sought to enjoin the city from contracting for new waterworks in derogation of an existing contract with the plaintiff: "It must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity."—Mr. Justice Browne in City of Walla Walla *v.* Walla Walla Water Company, 172 U. S. 1, 19 Sup. Ct. Rep. 77. Thus, even though the remedy at law be adequate in every other respect, yet if by means of the injunction the plaintiff may save himself the worry and expense of litigation that is likely to be harassing and vexatious in its nature, or uncertain in its termination, the injunction should be granted. Pullman *v.* City of New York, 49 Barb. 57, 2 Abb. Prac. (N. S.) 29; Fones Bros. Hardware Co. *v.* Erb, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. Rep. 7; Curtenius *v.* G. R. & Ind. R. Co., 37 Mich. 583; Dodge *v.* Van Buren, 118 Mich. 189, 76 N. W. Rep. 315; Coulson *v.* Portland, Deady 481, Fed. Cas. 3,275. In short, as compared to the remedy at

law, the remedy by injunction sustains a relation something like that which is supposed to exist between the proverbial ounce of prevention and pound of cure, it requiring, as a rule, not nearly so strong a case to prevent the mischief threatened as to undo it after it is done. Cook *v.* City of Beatrice, 32 Neb. 80, 48 N. W. Rep. 828.

d. Exceptions—Massachusetts, Ohio and New York Doctrine.

In several of the states the right of the taxpayer to sue in such case has either been denied altogether or so hedged about with limitations as to render the law uncertain. Thus in Massachusetts it has been held that however the law might be elsewhere, it was otherwise in that state. Baldwin *v.* Inhabitants of Wilbraham, 140 Mass. 459, 4 N. E. Rep. 829; Prince *v.* Crocker, 166 Mass. 347, 44 N. E. Rep. 446; Steele *v.* Mun. Signal Co., 160 Mass. 36, 35 N. E. Rep. 105. And in New York, under the law as established by the courts, there was no authority either in the taxpayers or creditors of a municipal corporation to restrain or avoid a contract no matter how fraudulent, illegal, or oppressive it might be. Roosevelt *v.* Draper, 23 N. Y. 318. Nor was there any authority in the state to interfere by suit at the instance of the attorney general. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People *v.* Field, 58 N. Y. 491. This state of affairs, however, has been pretty generally remedied by statute. Browne *v.* City of Boston (Mass.), 60 N. E. Rep. 934; Ayers *v.* Lawrence, 59 N. Y. 192; Armstrong *v.* Grant, 56 Hun 226, 9 N. Y. S. 388.

Rev. Statutes Ohio, Sections 1777, 1778.

In Ohio, under Rev. Stats. §§ 1777, 1778, it is provided, in substance, that whenever the municipal authorities shall threaten to abuse their corporate powers, or to enter into the execution or performance of an illegal or unauthorized contract, the city solicitor shall apply to a court of competent jurisdiction for an injunction, and that in case of his failure or refusal to do so after written request by a taxpayer, such taxpayer may bring suit in his own name. Under this statute it has been held that a taxpayer may sue to restrain the passage of an ordinance creating a contract with a railway company under which it secures the right to lay its tracks upon a certain street without first obtaining the consent of the owners of a majority of the front feet abutting along the proposed route as required by law, and that it is not necessary that the plaintiff be an abutting owner upon the street. Knorr *v.* Miller, 25 Wkly. Law Bul. 128. Contra, Simmons *v.* City of Toledo, 5 Ohio Cir. Ct. Rep. 124. It has also been held that one whose individual interests will be affected by the execution of the contract need not request the solicitor to sue, since the statute is intended to apply only in cases where the taxpayer sues in behalf of the public, and to protect the public interests. Lake Shore Foundry *v.* City of Cleveland, 8 Ohio Cir. Ct. Rep. 671. And where the solicitor has applied for an injunction to restrain the city from entering into an alleged illegal contract, and has refused, after request by the taxpayer, to prosecute error to the decision of the court of common pleas refusing the injunction, the taxpayer may himself prosecute error to reverse such judgment. Pugh *v.* Cincinnati Edison Electric Light Co., 10 O. C. D. 573, 19 Ohio Cir. Ct. Rep. 594. But a contract by a state official for the hiring of city convicts in violation of a statute forbidding the employment of any greater number of prisoners in any occupation than ten per cent. of the number of people engaged in such occupation in the state, is not, in effect, a contract by the city which may be enjoined under this statute. Fitzpatrick, Cincinnati *v.* Bromwell Brush, etc., Co. (C. P.), 5 Ohio N. P. 165, 7 Ohio Dec. 216. See further, construing this statute, State *v.* Gibson, 8 Ohio N. P. 367, 11 Ohio S. & C. P. Dec. 90.

2. Bona Fides.

The fact that the taxpayer is suing, not for the bona fide purpose of protecting his interests as a taxpayer, but from some ulterior motive, is immaterial. It may be that his real grievance is that a contract which he felt should have been awarded to him has been awarded to

Notes

another, or he may be lending his name and maintaining the suit in the interest of some other rejected bidder; but whatever may be his real motives, the cause is to be decided upon the grounds set forth, and the court will not consider an objection that the bill was not filed in good faith. Mazet *v.* City of Pittsburg, 137 Pa. St. 548, 20 Atl. Rep. 693; Frame *v.* Felix, 167 Pa. St. 47, 27 L. R. A. 802, 31 Atl. Rep. 375; Carroll *v.* Philadelphia, 6 Pa. Dist. Rep. 397; Mayor, etc., of Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. Rep. 706; Times Pub. Co. *v.* City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. Rep. 695; Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. Rep. 811.

Under the Ohio statute providing that a taxpayer may sue to restrain the city officials from entering into an illegal contract after the city solicitor has refused to do so upon request, the fact that a competing bidder, who may be benefited by the restraining order, has agreed to indemnify such taxpayer for all expense incurred in bringing the suit, is no bar to the prosecution of the suit by such taxpayer where he originally intended bringing the action himself, but was unable to pay the costs and other necessary expenses. McClain *v.* McKisson, 15 Ohio C. C. 517.

III. INJUNCTION BY ATTORNEY GENERAL OR OTHER OFFICER.

Not only may a taxpayer sue to restrain an unauthorized contract, as has been shown, but the attorney general of the state or other proper officer may also bring a suit to enjoin such contracts under like circumstances. Taggart, Atty. General, *v.* Board of Auditors, 73 Mich. 53, 40 N. W. Rep. 852; State *v.* Com'rs of Marion County, 21 Kan. 419, 432; State, Miller, County Atty., *v.* City of Kansas City (Kan.), 57 Pac. Rep. 118; People *v.* Minor, 2 Lans. (N. Y.) 397.

In Catlin *v.* Christie (Colo.), 63 Pac. Rep. 328, under a statute which imposed upon county superintendents the duty of general supervision of the school system within their respective counties, and made it their duty to see that all provisions of the general school law were observed by teachers and school officers, it was held that a county superintendent had implied authority to maintain a suit to enjoin the directors of a district within the county from employing as teacher one not qualified, because not possessed of a teacher's license, under the subterfuge of employing her sister, who had a license, at an exorbitant salary with the understanding that she was to employ the unqualified sister as her assistant; the court saying that it was well settled that all public officers, though not expressly authorized by statute, if not prohibited, have a capacity to sue commensurate with their public trusts and duties.

The right of the attorney general to sue in such case has been based upon the theory that the injury threatened was a public one which the taxpayer could not sue to prevent without showing that he would suffer special injury. Pierce et al., County Com'rs, *v.* Smith, 48 Kan. 331, 29 Pac. Rep. 565. But the true reason has been so well expressed by Judge Cooley in a case involving the wrongful appropriation of municipal funds that we give it as stated: "The right of the attorney general to proceed in equity to enjoin an abuse of corporate power, consisting in the appropriation of corporate funds in a manner not justified by law, appears to me to rest in sound principle. The municipality and its citizens are not alone concerned in such an abuse; the corporate powers have been conferred by the state, with such restrictions and limitations as were thought important, some of which were imposed for the protection of the corporators against unjust and oppressive action of officials, and others from considerations of general public policy. It can never be admitted that because the corporation and its members in general, or even all of them, consent to or connive at the setting aside of these restrictions and limitations, the state which deemed them important, shall not be at liberty to complain, for this would be to annihilate the just and necessary supremacy of the state, and to make the corporators sole judges

Notes

of what franchises they should exercise, and what powers the corporation should possess over them. It is the right of the state at all times to keep the grantees of its franchises within the limits prescribed in the grant; and public policy in general requires that serious departures shall not be overlooked, even though the parties injured by the particular act do not complain; for one abuse becomes the precedent for another; and the attorney general does well to interfere when a municipality assumes to do injurious acts which the state, in conferring the power to act at all, has expressly prohibited. * * * Every misuse of corporate authority is in a legal sense an abuse of trust; and the state, as the visitor and supervisory authority and creator of the trust, is exercising no impertinent vigilance when it inquires into and seeks to check it. * * * Where, however, the attorney general is to intervene in corporate affairs on behalf of the state, the abuse should be one of a substantial nature, and not of a character merely technical or unimportant. It should appear that the public has a substantial interest in the question; the right involved should be a public right, or at least not a private right merely; the wrong done, or attempted, if it consist solely in a misuse or misappropriation of funds, should be either one involving questions of public policy, or, where that is not the case, the amount involved should be something more than merely nominal; something that is not beneath the dignity of the state to take notice of and protect by such proceeding. The remedy is somewhat extraordinary and substantial grounds ought to appear to justify a resort to it." Attorney General *v.* City of Detroit, 26 Mich. 263, 264–267.

IV. INJUNCTION BY PERSON CLAIMING SPECIAL OR EXCLUSIVE PRIVILEGE.

1. Generally.

So where the proposed contract threatens to injure the legal interest of a person claiming a special or exclusive privilege, such person has a standing to enjoin the contract in order to protect that interest. Defiance Water Co. *v.* City of Defiance, 90 Fed. Rep. 753; Walla Walla Water Co. *v.* City of Walla Walla, 60 Fed. Rep. 957, affirmed in City of Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. Rep. 77. In this case it was held that where the city had contracted with a water company for a water supply for a certain number of years at an annual stipulated sum, binding itself not to erect or contract for waterworks during that time, but reserving the right to purchase or condemn the waterworks of the plaintiff at any time during the life of the contract, that the plaintiff water company was entitled to an injunction restraining the city from entering into a contract for the erection of waterworks during the life of its contract without purchasing or condemning the plaintiff's works as agreed in the contract; and the decision was affirmed in the federal supreme court on the ground that there was no other remedy so adequate or appropriate as the remedy by injunction.

In Lewis *v.* Denver City Waterworks Co., 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. Rep. 993, Des Moines Gas Co. *v.* City of Des Moines, 44 Iowa 505, 24 Am. Rep. 756, and Montgomery Gaslight Co. *v.* City Council of Montgomery, 86 Ala. 372, 4 L. R. A. 616, 5 So. Rep. 735, the right of one occupying such a position to maintain a bill for an injunction to protect his interests was unquestioned, but the relief prayed was denied on the ground that the facts did not present a case sufficiently strong to warrant the court in enjoining the passage of the proposed ordinance authorizing the contract. And in Alpers *v.* City and County of San Francisco, 32 Fed. Rep. 503, where the plaintiff claimed the exclusive privilege, under a contract with the city, of removing and having all dead animals in the city not slain for food, it was held that an injunction would not issue to restrain the council from passing any resolution, order, or ordinance looking to the letting of a contract disposing of the carcasses of dogs killed by the pound keeper to other persons during the life of the

Notes

plaintiff's contract; but an injunction was granted restraining the pound keeper from delivering the carcasses to any person other than the plaintiff.

2. Privilege Claimed under Ultra Vires Contract.

In City of Newport *v.* Light Co., 84 Ky. 166, it was held that a gas company, which under its contract had the exclusive right to light the city with gas for a period of years, was entitled to an injunction restraining the city from entering into any contract with another company for lighting the streets during that time either by gas or otherwise; but in City of Newport *v.* Newport Light Co., 14 Ky. Law Rep. 845, 21 S. W. Rep. 645, in a proceeding by the light company to have the corporate officials punished for contempt in violating the aforesaid injunction, it was held that the clause restraining the city from contracting with another for lighting the streets by gas "or otherwise" was not intended to prevent the city from contracting with another for electric lights during the life of the first contract, or if it was so intended, the growth of the city and the march of progress, since the granting of that injunction, had rendered it inequitable and against public policy to continue it longer in force as against a contract for electric lights, and thereby compel the city to use only the gas lights furnished by the plaintiff company during the remainder of the life of the plaintiff's contract, which had many years yet to run. It was ordered, therefore, that the rule against the defendants to show cause why they should not be committed for the contempt be discharged. This latter decision was correct, though the court seems somewhat at a loss for a tenable ground upon which to base it. The underlying principle was that the city could not bargain away its police power in the first instance; it had no power to enter into a contract whereby it precluded itself for a period of twenty-five years from adopting a system of lighting by electricity or other improved method which might be brought into general use during that time; and hence the contract was never valid.

3. Refusal of Person Claiming Special Privilege to Perform Contract Thereunder.

In Gaslight & Coke Co. *v.* City of New Albany, 139 Ind. 660, 39 N. E. Rep. 462, the plaintiff sought to compel the city to specifically perform its contract with the plaintiff for street lighting, and to enjoin it from contracting for light with any other person or company. It appeared that the city had contracted with the plaintiff company for gaslights for a period of years with the reservation that if at any time during the life of the contract it should decide to change from gas to electricity in any part of the city, the plaintiff company should substitute such lights for its gaslights in that portion of the city at a price to be reached by equitable agreement between itself and the city. It further appeared that the city officers having determined to make such a change in a portion of the city, the plaintiff company had refused to enter into any agreement, equitable or otherwise, concerning the price of the lights, except to furnish them at such prices and upon such terms as it might choose to dictate. It was held that he who seeks equity must do equity; and the plaintiff company having refused to entertain any proposition from the city in regard to the price of the electric lights, or to enter into competitive bids, or to offer to furnish such lights at their reasonable value, had no standing to compel specific performance or to enjoin the city from contracting with other parties.

4. Legal Interest—What Is Not.

Fleitas *v.* City of New Orleans, and Bd. of Com'rs of Port of New Orleans *v.* Same (one case), 51 La. Ann. 1, 24 So. Rep. 623, well illustrates the point that the party seeking to enjoin the contract must show that he has some legal interest at stake. The facts were as follows: The city of New Orleans leased to Fleitas for a period of twenty-five years a space on the public quay to be used as a sugar landing. Under the contract Fleitas was to erect suitable sheds for

Notes

landing and storing sugar, exact certain charges, and pay the city a certain percentage of the gross receipts. At the end of the twenty-five years, the city was to either resume control of the space leased, and pay Fleitas one-half of the appraised value of the sheds, or was to extend his lease for a further period of fifteen years; the sheds and the space on which they stood, to vest, at the end of that period, absolutely in the city of New Orleans. Shortly after the making of this contract, Fleitas, with the consent of the city, assigned all of his rights, title, interest, and franchises of every kind thereunder, appertaining or belonging thereto, to a company organized by himself and his sureties under the original contract, and in which he and said sureties were the principal stockholders. Subsequently, the port of New Orleans, owing to the increase of its shipping and the extension of the piers, levees, and wharves, having outgrown the corporate limits of the city of New Orleans until it was situate partly in three parishes, so that its shipping interests were jeoparded and retarded because of the conflicting authority of so many different sets of officers in the different jurisdictions, the legislature created a board of commissioners and placed the shipping interests of the entire port, including the regulation and policing of the wharves, landings, piers, etc., under its control. As the first twenty-five years of the Fleitas contract, now assigned, drew to a close, the city advertised for bids for a renewal of the lease, stating that the successful bidder would have to pay in advance the one-half of the appraised value of the sheds which it had contracted to pay to Fleitas, or to his assignees. Thereupon, Fleitas filed a bill to enjoin the city from entering into another contract for the lease of the sheds, setting forth that the twenty-five years had not wholly expired, and that the appraisement of the sheds was made by appraisers appointed by the city and his assignees, instead of by the city and himself as provided under the original contract. The board of port commissioners also filed a bill to enjoin the city from making another contract of lease, setting forth that the property proposed to be leased had, under the act by which said board was created, been taken from the city of New Orleans and vested in itself. It was held that neither Fleitas nor the board of commissioners had any standing to enjoin the city from making the proposed lease. As to Fleitas, he, having assigned all his right and interest of every kind under the original contract, was completely out of it, and had no standing to object to anything any more than any other stranger. As to the board of port commissioners, it was decided that under the act by which they were created, the control of the sugar sheds and the space on which they stood, so far as the leasing of the same and receiving and controlling the revenue therefrom was concerned, was not vested in them, but remained, as formerly, in the city of New Orleans; therefore their standing to enjoin the proposed lease was no better than that of Fleitas.

In Canal & Claiborne St. Ry. Co. *v.* City of New Orleans, 39 La. Ann. 709, 2 So. Rep. 388, the facts were that the city had granted to the plaintiff company the right of way on certain streets for a period of twenty years. Under the contract, the franchise, tracks, fixtures, etc., were to revert to the city at the end of the twenty years at an appraised value. At the end of the twenty years the city advertised the franchise for sale, with the privilege to the purchaser of using the existing tracks and other fixtures, but stated that such purchaser would be required to make an equitable settlement with the old company for the property so used. It was held that an injunction would not be granted to restrain the city from contracting for the resale of the franchise.

In Furey *v.* Town of Gravesend, 104 N. Y. 405, 10 N. E. Rep. 698, where authority was conferred upon the town trustees to convey certain lands belonging to the town to the lessees thereof, it was held, in the absence of an averment that they had offered or were willing to purchase the lands themselves, that such lessees had no standing to enjoin the trustees from conveying the lands to other persons;

otherwise they would have had it in their power to prevent the town from ever selling them to any one else without being under any obligation to purchase themselves.

V. INJUNCTION BY REJECTED BIDDER.

But a rejected bidder, as such, has no standing to enjoin the corporate authorities from letting the contract to another, for the reason that the statutes requiring the contract to be let to the lowest bidder, or requiring public property to be sold to the highest bidder, are enacted for the protection and benefit of citizens and taxpayers, and not in the interest of contractors. Colorado Pav. Co. *v.* Murphy, 49 U. S. App. 17, 37 L. R. A. 630, 78 Fed. Rep. 28; Kelly *v.* City of Chicago, 62 Ill. 279; Times Publishing Co. *v.* City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. Rep. 695; State *v.* Milligan, 3 Wash. 144, 28 Pac. Rep. 369; Kelly *v.* City of Baltimore, 53 Md. 134; McCafferty *v.* Glazier, 10 How. Prac. 475; Johnson *v.* West Side St. Ry. Co. (Ohio Com. Pl.), 10 Wkly. Law Bul. 345; Kerr *v.* Central Bd. of Education (Pa.), 25 Pittsb. Leg. J. 54.

In Adams *v.* Ives, 1 Hun 457, 3 Thomp. & C., 63 N. Y. 651, the commissioners appointed to lay out a highway advertised for bids, and directed that each estimate be accompanied by the names of two sureties who should be satisfactory to the commissioners. The plaintiff put in a bid, naming two sureties, and his bid was accepted; but before the execution of the contract, he withdrew one of the names and asked to substitute a third. To this the commissioners refused to give their consent and notified him to execute the contract with the original sureties. Upon his failure to do so, they proceeded to award the contract to another bidder. It was held that the plaintiff had no standing to enjoin the execution of the contract with the other bidder.

In City of Fort Smith *v.* Brogan, 49 Ark. 306, 5 S. W. Rep. 337, the facts were that at an auction sale of lots held by the city in trust for the benefit of the common schools, the city claimed the right to sell the lots as diminished by the taking away of a strip for the purpose of widening the street on which they abutted. The plaintiffs denied the right of the city to appropriate the strip for street purposes, and claimed the right to bid, and did bid, for the lots as they were originally plotted and undiminished. Their bid being the highest, the city accepted it, and tendered deeds to the lots, describing them as they were after being diminished by the taking away of the strip. The plaintiffs refused to accept such deeds, and the city was proceeding to resell the lots when the plaintiffs filed their bill for an injunction. It was held that the only standing that the plaintiffs could have to maintain their suit was on the ground of the threatened injury to their interests under the contract; but since the city had offered only the diminished lots for sale, and the plaintiffs had bid upon them as undiminished, there had been no contract, and hence the bill for injunction must be dismissed.

But the fact that a plaintiff seeking to enjoin the letting of a contract on the ground that it was not let to the lowest bidder as required by law, is himself the rejected lowest bidder, does not disqualify him from maintaining the suit where he sues as a taxpayer and not simply as one having a grievance because of the rejection of his bid. Times Publishing Co. *v.* City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. Rep. 695; State *v.* Milligan, 3 Wash. 144, 28 Pac. Rep. 369; Baum *v.* Sweeny, 5 Wash. 712, 32 Pac. Rep. 778. So where the council, acting under an invalid ordinance forbidding contracts for city printing to be let to any but those employing union labor, refused the plaintiff's bid because he did not employ union labor, and awarded the contract to the next lowest bidder, it was held that as a taxpayer he was entitled to an injunction restraining the council from proceeding to let the contract. Holden *v.* City of Alton, 179 Ill. 318, 53 N. E. Rep. 556.

In Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. Rep. 811, it appeared

that the plaintiff, a taxpayer of the town, in response to an advertisement by the board of school commissioners for a supply of coal for the public schools, had entered a bid offering to furnish it at so much. This bid was the lowest made; but the board, instead of awarding the contract to the plaintiff, awarded it to one of their own number at a price somewhat higher. It was held that the plaintiff, as a taxpayer, was entitled to enjoin the execution of the formal contract between the board and the accepted bidder on the ground that it was against public policy and in violation of the statute.

VI. SPECIFIC INSTANCES IN WHICH INJUNCTION WILL BE GRANTED OR REFUSED.

As to the specific instances in which an injunction will be granted or refused at the suit of one seeking to enjoin the corporate authorities from entering into a contract, it is obviously impossible to enumerate them all, and only a few examples will be given under the more common heads.

1. Where Contract Is Sought to Be Entered into by Ordinance.

First, it may be said that the one instance requiring the very strongest case of all in order to obtain the relief prayed, is where the contract sought to be enjoined is proposed to be created by ordinance. Here the principle that the legislative discretion of municipal bodies is not subject to the control or interference of the courts, presents an almost insurmountable barrier to relief by way of injunction, and the plaintiff must show either fraud, oppression, or gross abuse of corporate power, and that the mere passage of the ordinance will occasion injury so immediate and so irreparable as to be beyond the power of redress by subsequent judicial proceedings. Lewis *v.* Denver City Waterworks Co., 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. Rep. 993; Spring Valley Waterworks *v.* Bartlett, 16 Fed. Rep. 615; Dailey *v.* Nassau County Ry. Co., 65 N. Y. S. 396; Murphy *v.* East Portland, 42 Fed. Rep. 308; Davis *v.* Mayor, etc., of New York, 14 N. Y. 506; Cincinnati St. Ry. Co. *v.* Smith, 29 Ohio St. 291; People *v.* Dwyer, 90 N. Y. 402; City of Chicago *v.* Evans, 24 Ill. 52.

In Des Moines Gas Co. *v.* City of Des Moines, 44 Iowa 505, 24 Am. Rep. 756, it was held that an injunction would not lie at the suit of a plaintiff claiming an exclusive franchise to restrain the city from passing an ordinance granting a similar franchise to another company. To the same effect, see Montgomery Gaslight Co. *v.* City Council of Montgomery, 86 Ala. 372. 4 L. R. A. 616, 5 So. Rep. 735; Alpers *v.* San Francisco, 32 Fed. Rep. 506; Lewis *v.* Denver City Waterworks Co., 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. Rep. 993; Spring Valley Waterworks *v.* Bartlett, 16 Fed. Rep. 615. But in Daly *v.* Ga. Southern, etc., R. Co., 80 Ga. 793, 12 Am. St. Rep. 286, 7 S. E. Rep. 146, it was held that an injunction would issue at the suit of an abutting owner to enjoin the corporate authorities from granting to a railroad company for depot purposes a portion of a public street, consisting of a strip eighty feet wide by four hundred and eighty feet in length, on the ground that it was wholly beyond their power, and would result in the creation of a public nuisance causing special injury to the abutter. See also, Davis *v.* Mayor of New York, 14 N. Y. 506; Davis *v.* Mayor of New York, 1 Duer 498, affirmed in 9 N. Y. 263; Cincinnati St. Ry. Co. *v.* Smith, 29 Ohio St. 291.

It is of no avail to a city council, however, to attempt to put an unauthorized contract into the form of an ordinance merely for the purpose of bringing it within the rule that the courts will not interfere with their legislative discretion. Such a proceeding is a gross abuse of corporate power, and the subterfuge will not be protected by a court of equity; and this is especially true if the contract relate to property or other matters owned or controlled by it in its capacity as a private corporation. Thus in Roberts *v.* City of Louisville, 92 Ky. 95, 17 S. W. Rep. 216, an injunction was granted at the suit of parties interested as taxpayers, and as dealers engaged in buying and shipping coal to Louisville, to restrain the mayor and city council

Notes

from passing an ordinance transferring all of the city's right, title, and interest in its wharf property along the river front to the commissioners of the sinking fund. It was charged in the bill, and it was not contradicted in the answer, that the transfer was to be made to the end that the commissioners might lease or transfer the property to private individuals, who would increase the wharfage dues and prevent a continuance of the full, free, and general use of the wharves by the plaintiffs and the rest of the public; that the commissioners were insolvent, and that the plaintiffs' sole remedy and only mode of obtaining adequate relief was by injunction to restrain the passage of the ordinance. In behalf of the mayor and council, it was urged with great force that a court of equity had no jurisdiction to interfere with the legislative discretion of the city governing body. The court admitted that if it was true that every municipal ordinance had the quality and force of a law of the state legislature, then courts of equity would be without power to enjoin or interfere with the passage of any, because each of the three departments of the state government being distinct and independent within its sphere, was not subject to the coercion of either of the others. But, said the court, the power delegated to the municipality to legislate was not, as to all subjects, absolute, but on the contrary, was not only restricted by statute, but was also subordinate to settled principles of law and equity, in view of which it was presumed to have been delegated; moreover, there was a distinction to be made between acts done in the discharge of governmental and legislative duties, and those done in its private character in the management of property and rights held by it in trust for the benefit of its citizens. In short, the court was of the opinion that the wharf property was held by the city in its capacity as a private corporation, and in trust for its taxpayers and inhabitants, and that the taxpayers, or other persons having a legal interest therein, had the same power to restrain an unlawful or unwarranted disposition thereof as the stockholders of a purely private corporation would have to restrain its governing board under similar circumstances; and the fact that the contract was taking the shape of an ordinance would not deprive the plaintiffs of their right to equitable relief.

And in Coulson *v.* City of Portland, Deady 494, Fed. Cas. 3,275, it was said: "A court of equity has jurisdiction over a municipal corporation in regard to its conduct concerning property and franchises held by it in trust for the inhabitants thereof the same as in the case of a natural person, and it will enjoin and prevent such corporation from disposing of its property or franchises fraudulently, or for a mere nominal consideration; and this, although the forms of legislation are used to give the transaction the appearance of an exercise of political power for public purposes. The privilege of exemption from judicial interference terminates where legislative action ends."

However, there are some cases which hold, or seem to hold, that the passage of an ordinance will not be restrained in any case. Thus in Harrison *v.* City of New Orleans, 33 La. Ann. 222, 39 Am. Rep. 272, it was held that an injunction would not issue to restrain the grant of a franchise to a certain railway company, the court saying that it was elementary that an injunction would not lie to restrain a municipality from voting or passing any ordinance; and that moreover, it was uncertain whether the ordinance sought to be enjoined would ever be passed, or, if it should be, whether the company would accept its terms or exercise the franchise granted. And in State, Rose *v.* Superior Court, 105 Wis. 65, 48 L. R. A. 819, 81 N. W. Rep. 1046, it was held that an injunction restraining the city council from passing an ordinance creating a contract between the city and a street-railway company was absolutely void for want of jurisdiction, and that members of the common council were guilty of no contempt in disregarding it.

Stevens *v.* St. Mary's Training School, 144 Ill. 336, 36 Am. St. Rep. 438, 32 N. E. Rep. 962, was the case of a bill filed on behalf of the taxpayers of the city of Chicago to restrain the county commis-

sioners from approving or ordering paid any claim against the city for compensation for the instruction and maintenance of the inmates of the school, and from contracting for the payment of such claims in the future. Such contracts for the payment of public moneys to the support of sectarian schools were clear violations of law, but the court held that it could not and would not attempt to control the discretionary or legislative powers vested by law in municipal corporations; hence, an injunction restraining the passage of an ordinance or resolution authorizing the payment or contract must be denied.

In Alpers *v.* San Francisco, 32 Fed. Rep. 506, it was said by Mr. Justice Field: "Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot, in the one case, forbid the passage of a law, nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

2. Fraud.

Before a contract which is wholly within the discretion of the corporate authorities, and otherwise valid in all respects, will be restrained on the ground of fraud, the fraud, or circumstances amounting to fraud, must be clearly made to appear. Ziegler *v.* Chapin, 126 N. Y. 342, 27 N. E. Rep. 471; Pullman *v.* City of New York, 54 Barb. 169; Downing *v.* Ross, 1 App. D. C. 251; Lucia *v.* Montpelier, 60 Vt. 537, 1 L. R. A. 169, 15 Atl. Rep. 321; Talcott *v.* City of Buffalo, 125 N. Y. 288, 26 N. E. Rep. 263.

In a contest among competitive bidders for an electric lighting contract it appeared that it was known to the corporate officials that a majority of the stock of the successful bidder, the B. Co., and of all the other companies bidding, except the K. Co., was owned by the P. Co., which did not bid. The K. Co., although it proposed to supply light at less cost per lamp than the B. Co., bid for only a small part of the lights, less than one-twentieth of the entire number; whereas, the B. Co., and other companies bidding, bid on the entire number. This state of facts was held insufficient to prove an allegation that the P. Co. controlled all of the bids except that of the K. Co., and that there was no real competitive bidding except between those two, and that the awarding of the contract to the B. Co. was the result of fraud; hence an injunction to restrain the mayor and comptroller, the officers designated by law for the purpose, from proceeding to the formal execution of the contract was denied. Potts *v.* City of Philadelphia, 195 Pa. St. 619, 46 Atl. Rep. 195.

As to a statement of fact which shows fraud upon its face, it was held in Avery *v.* Job, 25 Ore. 512, 36 Pac. Rep. 293, that an injunction would issue at the suit of a taxpayer to restrain the city from entering into a contract for the purchase of waterworks at twenty-eight thousand dollars which were shown to be worth not more than ten thousand. And so where the authorities were threatening to purchase land for a schoolhouse site at a price largely in excess of its value without having made any effort to obtain it at a reasonable figure, it was held that an injunction would lie to restrain the consummation of the purchase even though the comptroller, acting under authority from the council, had promised, verbally, to take the land at the

agreed price, and a deed had been delivered to the city attorney for examination. Winkler *v.* Summers, 22 Abb. N. Car. 80, 5 N. Y. S. 723.

Same—Fraud to Be Distinctly Charged and Facts Set Forth.

In some cases it has been held that the fraud must be distinctly charged, and the facts supporting it clearly set out. Thus where it was alleged that a board of water commissioners, vested with discretion to purchase certain land for waterworks purposes, proposed to purchase it from a broker, or middleman, at a price thirty-five hundred dollars in excess of the price paid, or to be paid, by such middleman to the owners, and that although the proposed purchase was for the ostensible purpose of securing the land for waterworks purposes, it was in reality for the purpose of using said land as a park, to be laid out as a part of a scheme for beautifying the grounds about the reservoir, it was held insufficient, in the absence of a charge of actual fraud, to entitle the plaintiffs to an injunction. Graeff *v.* Felix, 200 Pa. St. 137, 49 Atl. Rep. 758.

And in Press Pub. Co. *v.* Holahan, 62 N. Y. S. 872, 29 Misc. Rep. 684, it was held that the city officers would not be restrained from entering into a contract for a public improvement upon an allegation that the proposed contract was the result of a fraudulent political combination without any averment of the sources of the plaintiff's information or grounds of belief. So in Keator *v.* Dalton, 29 Misc. Rep. 692, 62 N. Y. S. 878, it was held that an allegation that the officers of the corporation had conspired and confederated with the officers of a water company for the purpose of defrauding the city by means of a proposed contract with said company, was insufficient to entitle the plaintiffs to an injunction restraining the city from entering into the proposed contract where there were no averments of the ground of such belief, nor any statement of the sources of the plaintiff's information.

3. Contract Wholly Ultra Vires.

In some instances, where it was admitted or shown that the proposed contract would be wholly illegal and void if made, the doctrine has been laid down that an injunction to restrain its execution will not lie, since a void contract is the same as no contract, and is, in legal contemplation, utterly incapable of subjecting the municipality or the taxpayer to any liability or burden whatever. Thus, where the plaintiff sought to restrain the county officials from contracting for the erection of a hall of records and other county buildings upon a plot of land outside of the county seat, and within the corporate limits of another town, alleging that the entire proceeding was illegal, and that the choosing of the proposed location was fraudulently brought about through the intrigue of one of the county officials who, as the owner of property in the neighborhood of the proposed site, was interested in having the county buildings erected on that particular lot, the injunction was denied on the ground that if the proposed contract would be illegal, as alleged, it could subject the county to no legal charge, nor add any burden to that already borne by the taxpayers. Linden *v.* Case, 46 Cal. 172.

And so where it appeared that an order for the purchase of buildings to be used for county purposes was passed by the votes of two out of three supervisors, one of which two was a mere usurper and no supervisor at all, and that, moreover, even had the board been legally constituted, it was wholly without authority to make the proposed purchase, the injunction was denied on the ground that the contract, when executed, and any order drawn on the county treasurer in pursuance thereof, would be of no more validity than if done by private persons. Trinity County *v.* McCammon, 25 Cal. 117. See also, State, Young *v.* City of Neodesha, 3 Kan. App. 319, 45 Pac. Rep. 122.

So in Mode *v.* Com'rs of Crawford County, 141 Ind. 574, 40 N. E. Rep. 1089, where the plaintiff appealed to the original jurisdiction of the appellate court to restrain the commissioners from contracting for the erection of a courthouse at one of two rival towns during the

pendency of an appeal in that court from a judgment of the circuit court ordering the removal of the county seat to one of the said towns, alleging that the execution and carrying out of such contract would, or might, nullify the decision of the appellate court on the pending appeal, the injunction was denied, among other reasons, on the ground that the action of the commissioners in making such contract could in no wise affect the decision of the court as to which town should be the county seat; the court saying that the mere unauthorized erection of a courthouse in a town could not make it a county seat, and that if the commissioners and the builders were willing to assume the risk of erecting the building under a void contract, and at a place which the decision of the pending appeal might determine not to be the county seat, the wisdom of so doing was with them.

And where a complainant seeking to enjoin the corporate officials from granting a right of way in a certain street to a street-railway company alleged that the street in question was not public, that the complainant owned to the centre thereof, holding title by grant from a religious corporation, the act of incorporation of which provided that no railway should ever be constructed upon its property without its consent, and that the grant of such right of way would be illegal and void, the injunction was denied, since if the allegations of the complaint were true, the grant would be wholly void and of no effect. Daily *v.* Nassau County Ry. Co., 65 N. Y. S. 396.

It is obvious that the theory of these cases rests upon, and is, in fact, no more than an application of the rule that an injunction will not lie where there is an adequate remedy at law or where the threatened injury is uncertain and remote, and is sound only so far as applied to such cases; for where the proposed contract, even though it be absolutely void, is likely to result in irreparable injury, or in expensive and perhaps protracted and vexatious litigation, in which the parties seeking to set aside the contract or to resist payment thereunder, will be met with pleas of estoppel and laches, and claims of quantum meruit, benefits received, etc., it cannot be said that the remedy at law is as certain and adequate as the remedy in equity; and where such is the case, the injunction should be granted. Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. Rep. 811; Sinclair *v.* Board of County Com'rs, 23 Minn. 404, 23 Am. Rep. 694. Thus where the city, without authority, proposed to guaranty the bonds of a private company for the purpose of enabling such company to erect an electric light plant and supply the city with light, it was held that the proposed contract of guaranty should be enjoined, notwithstanding the bonds would be void even in the hands of innocent holders. Lynchburg & R. St. Ry. Co. *v.* Dameron, 95 Va. 545, 28 S. E. Rep. 951.

In List *v.* City of Wheeling, 7 W. Va. 501, the material facts were as follows: By act of the legislature in February 1872, the city of Wheeling was authorized to subscribe to the stock of two railway companies in the sum of $500,000 and $300,000 respectively, provided such subscriptions should be favored by three-fifths of the voters of said city voting at an election to be ordered for that purpose. In April following, the city council ordered an election, which was held on the first of the following June, and resulted in the subscription being carried by the necessary three-fifths majority. In the following January, 1873, the council met and passed an ordinance authorizing and directing certain officials to subscribe for the stock on behalf of the city. In the meantime, between the time of the election of the first of June, 1872, and the passage of the ordinance ordering the subscription in January, 1873, to wit, on the 22d of August, 1872, the state had adopted a new constitution which contained a prohibition against municipal corporations contracting or incurring any indebtedness except in a manner specified, which indebtedness was forbidden to exceed five per cent. of the value of the taxable property of the municipality in any event. Upon a bill filed to restrain the officials designated from making the subscription in pursuance of the order of January, 1873, it was held that the constitution became operative

upon its adoption in August, 1872, superseding the act of the legislature of February, 1872, and all proceedings had thereunder; and it appearing that the aggregate amount which it was proposed to subscribe would exceed the constitutional limit of indebtedness, a perpetual injunction was awarded restraining the defendants from making the subscription or contracting any debt therefor except in the amount and manner specified in the constitution.

In Farmer *v.* City of St. Paul, 65 Minn. 176, 33 L. R. A. 199, 67 N. W. Rep. 990, a perpetual injunction was granted at the suit of a taxpayer to restrain the corporate authorities from making any future contract with a private sectarian corporation for the care and keeping of female prisoners sentenced from the city courts, such contract being in direct violation of the constitutional provision against expending public moneys in aid of sectarian institutions.

4. Same—Illegal Disposition of Public Funds or Property.

This principle meets with frequent illustration in cases where the corporate authorities are attempting or threatening to make illegal dispositions of public funds, property, or franchises. Baltimore *v.* Gill, 31 Md. 375; Stuyvesant *v.* Pearsall, 15 Barb. 244; Milhau *v.* Sharp, 15 Barb. 195.

In McCord *v.* Pike, 121 Ill. 288, 2 Am. St. Rep. 85, 12 N. E. Rep. 259, it was held that an injunction would issue at the suit of a taxpayer to restrain the fraudulent sale of land belonging to the county, there having been a higher bid than the one accepted by the commissioners. And in Rutherford *v.* Taylor, 38 Mo. 315, it was held that the illegal sale of a portion of a lot which had been dedicated to a public use as a site for a county courthouse would be perpetually enjoined. And in Warren *v.* The Mayor of Lyons City, 22 Iowa 351, it was held that one who had owned the original site of the town and who, upon the laying out of the same, had dedicated certain land as a public square, and who at the time of filing his bill owned valuable lots abutting upon said square, was entitled to an injunction to restrain the mayor and city council from entering into any contract or contracts for selling the same in small lots to private parties to be used for private purposes.

So where the state constitution provided that the legislature should not delegate to any special commission, private corporation, company, or individual, any power to control or interfere with any town, city, or county money or property, and that town, city, and county moneys should be deposited with the treasurer or other legal depositary, and that the making of profit out of such moneys should be deemed a felony, it was held that a provision of the city charter requiring that the city funds should be deposited with the bank offering the highest rate of interest for the same was unconstitutional, and that an injunction would issue upon the suit of a taxpayer to restrain the city from making any contract under such provision regarding the disposition of its public funds. Yarnell *v.* City of Los Angeles, 87 Cal. 603, 25 Pac. Rep. 767.

So the illegal sale of tax certificates by the county officials will be restrained at the suit of an interested taxpayer where it appears that the funds so squandered will have to be replaced by other taxation against which there will be no remedy. Willard *v.* Comstock, 58 Wis. 565, 46 Am. Rep. 657, 17 N. W. Rep. 401.

5. Statutory Restrictions.

Close akin to the foregoing is the case where the making of the contract is not altogether forbidden, but is forbidden under particular circumstances or forbidden to be made in other than a particular manner, as where the limit of municipal indebtedness has been reached or where it is forbidden to be let to other than the lowest bidder. In such cases the validity of the contract will turn either upon a question of fact or construction, and where the facts are disputed or the construction doubtful, the remedy at law is apt to be inadequate, for the reason that claims arising thereunder are likely to be more hotly contested. It follows that relief by injunction is

Notes

granted oftener in such cases than where the contract is plainly and unequivocally ultra vires. Moreover, it is a wholesome doctrine that municipal bodies should be kept within the bounds and restrictions with which the legislature has seen fit to hedge them about, and for this purpose there is no remedy so appropriate or effectual as the remedy by injunction.

a. Contracting Indebtedness beyond Limit.

These principles find frequent illustration in cases where the proposed contract would increase the municipal indebtedness beyond the limit fixed by law. As a rule such a contract will be restrained at the suit of a taxpayer. List *v.* City of Wheeling, 7 W. Va. 501; Putnam *v.* City of Grand Rapids, 58 Mich. 416; Cummings *v.* Sheble, 1 Phila. 492; City of Springfield *v.* Edwards, 84 Ill. 627; Atty. General *v.* Wilmington, 4 Del. Ch. 575.

A contract whereby a city binds itself under seal to make specified annual payments for a period of years for a water supply creates a bonded indebtedness for the sum total of such annual payments, and where such sum total increases the city's indebtedness beyond the constitutional limit, an injunction will issue at the suit of a taxpayer to restrain the city from entering into such contract. Duncan *v.* City of Charleston (So. Car.), 7 Mun. Corp. Cas. 343, 39 S. E. Rep. 265. But see contra, City of Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416.

So where the tax levied for any fiscal year has been exhausted before the expiration of that year, and the state constitution provides that the indebtedness incurred in any year shall not exceed the income and revenue provided for that year, without a vote of two-thirds of the electors, an injunction will issue at the suit of a taxpayer to restrain the corporate officials from contracting such indebtedness for even the supplies and materials necessary for the maintenance of the city government to the end of such year, and from including the price of such supplies in the tax levy for the ensuing year. Bradford *v.* City and County of San Francisco, 112 Cal. 537, 44 Pac. Rep. 912.

In Middleton *v.* Greeson, 106 Ind. 18, 5 N. E. Rep. 755, it was held that the taxpayers of a school district were entitled to an injunction restraining the trustees thereof from entering into a contract for the erection of a school building at a cost in excess of the funds at their command and in violation of a public statute forbidding the trustees from contracting any debt except upon the order of the county commissioners.

In Browne *v.* City of Boston (Mass.), 60 N. E. Rep. 934, the facts were as follows: The city of Boston was indebted to within $24,000 of its debt-incurring limit; but wishing to purchase certain lands whose value exceeded that amount, it entered into a scheme with the owners of the lands whereby they were to mortgage the lands for the excess above $24,000, and then sell them to the city for that sum, subject to the mortgages, though it was part of the agreement that the deeds should stipulate that the city was not to be liable for the amount due under the mortgages. The mayor and aldermen passed an order for the carrying out of the scheme, and the plaintiffs, taxpayers of the city of Boston, filed their bill under Mass. Stats. of 1885, ch. 178, sec. 3, and Stats. of 1898, ch. 490, to enjoin the execution of the contract. It was held that the entire scheme was an illegal attempt to evade the statute limiting the city's indebtedness, since, in order to hold the lands, the city would have to pay the mortgages regardless of any stipulation in the deeds; hence the injunction was granted as prayed.

b. Contracting for Longer Term Than Charter Permits.

So where authority is given to make a contract for a limited period of time, as where a contract for lights is forbidden to extend over a period of one year, or a street-railway franchise for more than twenty years, an injunction will lie to forbid the making of the contract for any greater period of time. Pullman *v.* City of New York,

Notes

49 Barb. 57, 2 Abb. Prac. (N. Y.) 29; Seccomb *v.* Wurster, 83 Fed. Rep. 856.

c. Contracts Let on Bids.

(1) Failure or Refusal to Let to Lowest Bidder.

Where the statute provides absolutely that a contract shall be let to the lowest bidder, and the officials entrusted with the letting of the contract have accepted the bid of one not the lowest bidder, and are threatening to enter into contract with such person, it is generally held that the execution of the contract may be restrained by injunction. The objection that the courts cannot control or interfere with municipal officers in the exercise of their discretion does not apply in such case for the obvious reason that all discretion to let to any but the lowest bidder has been taken away by the statute. Fones Bros. Hardware Co. *v.* Erb, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. Rep. 7; Frame *v.* Felix, 167 Pa. 47, 27 L. R. A. 802, 31 Atl. Rep. 375; Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. Rep. 811.

In Mueller *v.* Eau Claire County (Wis.), 84 N. W. Rep. 430, where the statute required the contract to be let to the lowest bidder, an injunction was granted to restrain the supervisors from letting the contract to place the heating fixtures and appliances in a county building to one not the lowest bidder, although the bid of such person was but three dollars higher than the lowest, and the contract involved an expenditure of several thousand dollars.

In Mayor of Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. Rep. 706, the facts were that an ordinance required a certain contract for electric lights to be let to the lowest bidder, and specified the manner of advertising for bids, and the opening of the same. Under the ordinance, all bids were to be filed in the office of the superintendent of lights before noon of a certain day, at which time the mayor, comptroller, and superintendent of lights were to meet, open the bids, and award the contract to the lowest bidder. At the appointed day and hour, the mayor and comptroller met, and at six minutes past twelve, in the absence of the superintendent, opened a bid which had been filed in the mayor's office, and awarded the contract to that bidder. Four minutes later, that is, at ten minutes past twelve, the superintendent appeared with a bid which had been filed in his office before twelve o'clock, but the mayor and comptroller refused to consider it, holding that the contract had already been awarded. It was held that the award was illegal as violating both the spirit and letter of the ordinance, and that an injunction should issue to restrain the execution of a formal contract in pursuance of the award.

(2) Conditions Which Tend to Prevent or Stifle Competition.

(a) Requiring Contractor to Employ Union Labor.

And so where conditions are imposed which tend to prevent bidders from bidding as low as they otherwise would, an injunction will lie to restrain the letting of the contract until the proposals are made to conform to the statute. Thus, where the board of supervisors had advertised for bids for work on a county building, but had refused to let the contract to the lowest bidder because of his refusal to employ none but union labor in pursuance of a resolution of the board that none but union labor should be employed in order to prevent the work from being delayed by strikes, which were likely to result in case nonunion labor was employed, it was held that an injunction would issue at the suit of a taxpayer to prevent a waste of county funds by letting the contract to a higher bidder who would engage to employ only union labor. Davenport *v.* Walker, 68 N. Y. S. 161, 57 App. Div. 221. And in Frame *v.* Felix, 167 Pa. 47, 27 L. R. A. 802, 31 Atl. Rep. 375, where the advertisement for bids specified that the contractor must employ no man not a citizen of the United States, and pay no man less than $1.50 per day for his services, it was held to be inconsistent with the statute requiring the contract to be let to the lowest bidder, and the right of the taxpayer to enjoin the making of the contract under such conditions was said to be unquestionable,

Notes

the court saying that the bill came within a well-defined head of equity jurisdiction as a bill *quia timet*. See, also, Holden *v.* City of Alton, 179 Ill. 318, 53 N. E. Rep. 556.

(b) Use of Patented or Monopolized Materials.

In this connection it has been held that an injunction would issue to restrain municipal officers from letting a contract under specifications calling for the use of patented or monopolized material, on the ground that such specifications tend to stifle competition and are incompatible with the statute requiring the contract to be let to the lowest bidder. Redersheimer *v.* Flower, Mayor, 52 La. Ann. 2089, 28 So. Rep. 299. Many courts take the view, however, that specifications calling for the use of patented or monopolized material are not incompatible with a statute requiring the contract to be let to the lowest bidder. See Holmes *v.* Common Council of Detroit, 120 Mich. 226, 77 Am. St. Rep. 587; Carroll *v.* City of Philadelphia, 183 Pa. St. 55, 38 Atl. Rep. 1102. And especially so if the specifications be not unreasonably restrictive. Berghoffen *v.* City of New York, 64 N. Y. S. 1082, 31 Misc. Rep. 205.

(3) Where Proposals Differ from Specifications or No Specifications Are Furnished.

Where contracts are required to be let to the lowest bidder there can be no competitive bidding unless some standard is furnished for the bidders to go upon. There must be some plan, specification, or data of some kind sufficient to enable the bidders to bid intelligently. No bids for different kinds of work and referring to different specifications can be recognized as coming in competition with each other for the purpose of determining the lowest bidder under the requirements of such a statute. Atty. General *v.* Detroit, 26 Mich. 263; Fones Bros. Hardware Co. *v.* Erb, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. Rep. 7; Detroit *v.* Hosmer, 79 Mich. 384, 44 N. W. Rep. 622; Bowen *v.* Drake County Com'rs, 21 Ohio St. 311; People *v.* Buffalo County Com'rs, 4 Neb. 150; Bigler *v.* New York, 5 Abb. N. Car. 51; People *v.* Contracting Board, 33 Barb. 510. This being the case, a taxpayer is entitled to an injunction in such cases to restrain the letting of the contract until plans and specifications sufficiently definite to enable the bidders to bid as upon a common standard are furnished. Fones Bros. Hardware Co. *v.* Erb, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. Rep. 7; Mazet *v.* City of Pittsburgh, 137 Pa. St. 548, 20 Atl. Rep. 693.

In City of Detroit *v.* Hosmer, Circuit Judge, 79 Mich. 384, 44 N. W. Rep. 622, it was held, under a charter provision requiring certain contracts to be let to the lowest bidder after advertising for bids, that specifications for proposals for city lighting which stated the candle power required for each light, but which did not name any particular system of lighting, were sufficiently definite, and that an injunction granted to restrain the city from proceeding to contract for lights after such advertisement, was improperly granted; and the necessities of the city being so imperative that they could not await the slow process of appeal, a mandamus was granted ordering the circuit judge to dissolve the injunction. See, also, Atty. General *v.* Detroit, 26 Mich. 263.

And so where a standard is furnished, but some or all of the bidders, instead of bidding thereon, make proposals based upon specifications of their own, and calling for materials other than those contained in the specifications supposed to furnish the standard, there is still no competitive bidding, and the letting of the contract to any but the lowest bidder bidding in accordance with the prescribed standard may be enjoined. Mazet *v.* City of Pittsburgh, 137 Pa. St. 548, 20 Atl. Rep. 693; Pease *v.* Ryan, 7 Ohio Civ. Ct. Rep. 44; McIntyre *v.* Perkins, 9 Phila. 484.

In Ryan *v.* Ashbridge, 10 Pa. Dist. Rep. 153, the director of public works, after the date for receiving sealed proposals had passed, wrote to one of the bidders asking just what, or how much, work his bid

Notes

was intended to include, couching the interrogation in language which could not fail to suggest to a business man of ordinary intelligence that unless it was meant to include more than was apparent on the face of it, it would be rejected. In reply the bidder stated that is bid was intended to include all the work, with certain exceptions, necessary to complete the contract for a lump sum. The letter amounted, practically, to a new bid, and as such was less than the proposal of any other bidder. The director, acting upon the letter, awarded the contract to that bidder. Upon a bill filed to enjoin the mayor and council from executing the contract in pursuance of the award, it was held that the action of the director in writing the letter and awarding the contract had amounted to nothing less than the acceptance of a secret and noncompetitive bid, and that an injunction to restrain the formal execution of the contract should issue as prayed.

And where an advertisement for bids for asphalt paving required bidders to file samples and certain statements and affidavits as to the size and location of their factory, and that the material which they proposed to use had been in actual use in other cities and had stood the test of ordinary travel for a period of two years, it was held that an injunction would not issue to restrain the city from letting the contract to a bidder complying with all the requirements of the advertisement simply because there was another bid somewhat lower, but which failed to comply with the requirements. Berghoffen *v.* City of New York, 31 Misc. Rep. 205, 64 N. Y. S. 1082.

But where the advertisement for bids for street lighting stated that the lamps to be used must measure up to the requirements of certain specifications embodied therein, and required each bidder to accompany his bid with a sample lamp of the kind that he proposed to use, it was held that the contract would not be enjoined on the ground that the lamp accompanying the accepted bid did not correspond with the specifications, since the lamp was only the bidder's interpretation of the specifications, with which, under the contract, he could be made to comply. Many *v.* City of Cleveland, 19 Ohio Cir. Ct. Rep. 58, 10 O. C. D. 157.

(4) Letting to Lowest Responsible Bidder.

What has just been said in regard to enjoining a contract for failure to let to the lowest bidder is to be understood as applying only in those cases where all discretion to let to any but the lowest bidder has been taken away. If there is no requirement that the contract be let on bids, or if it is required to be let to the lowest responsible bidder, or to the lowest reliable bidder, or lowest and best bidder, or other like expression, the courts will not, in the absence of fraud or gross abuse of discretion, undertake to review the decision of the officials entrusted with the letting of the contract. City of Baltimore *v.* Weatherby, 52 Md. 442; Findley *v.* City of Pittsburg, 82 Pa. 351; Kelly *v.* City of Chicago, 62 Ill. 279; Keith *v.* Johnson (Ky.), 59 S. W. Rep. 487; Attorney General *v.* City of Detroit, 26 Mich. 263.

In Kingsley *v.* Bowman, 33 App. Div. 1, 53 N. Y. S. 426, where the board of supervisors were vested with discretion as to the number of pamphlet copies of their proceedings that they would have published, as well as to the price to be paid therefor, it was held that they could not be enjoined from entering into a contract for the printing thereof at a price slightly higher than that of the lowest bidder.

In Dibble *v.* Town of New Haven, 56 Conn. 199, 14 Atl. Rep. 210, a committee appointed to let the contract for building an almshouse to the lowest responsible bidder, had awarded, or voted to award it to one whose bid was twenty-seven hundred dollars higher than that of the lowest bidder. Upon a suit to restrain the town from ratifying the action of the committee and from entering into a formal contract with the accepted bidder, it was held that the municipality was as free to exercise its discretion in the matter as though it were an individual expending his own money, and that if the town meeting, by a majority vote, should ratify the award of the committee, the minority would be without remedy.

Notes

A statute which requires the corporate authorities to advertise for bids for all contracts, and to let the same, if at all, to the lowest responsible bidder, does not require that the publication of such advertisements shall be let to the lowest bidder, for the reason that since the officials may, in their discretion, advertise for different contracts in different papers, without ascertaining which paper will publish each individual advertisement the cheapest, there is no reason why they may not contract with one paper to publish all of their advertisements without letting such contract to the lowest bidder. Hence, an injunction will not issue to enjoin them from contracting with one paper for the publication of such advertisements without letting it to the lowest bidder. Public Ledger Co. *v.* City of Memphis, 93 Tenn. 77, 23 S. W. Rep. 51.

d. Failure to Perform Statutory Prerequisites.

In general, in any case where the statute provides that a contract shall be entered into only after certain preliminary steps or conditions have been taken or performed—as that two-thirds of the electors shall express their approval at an election held for the purpose, or that the money to be expended thereunder shall have first been appropriated—the wholesome doctrine that municipal corporations are to be kept strictly within their powers gives jurisdiction to a court of equity to enjoin the contract until the requirements of the statute have been met. Fones Bros. Hardware Co. *v.* Erb, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. Rep. 7; Savidge *v.* Village of Spring Lake, 112 Mich. 91, 70 N. W. Rep. 425; State *v.* Marion County Com'rs, 21 Kan. 419; Benton County Com'rs *v.* Templeton, 51 Ind. 266; Bradford *v.* City and County of San Francisco, 112 Cal. 537, 44 Pac. Rep. 912; List *v.* City of Wheeling, 7 W. Va. 501.

Thus, where a city council could legally expend no money beyond what was provided for in the annual appropriation bill, except in case of casualty or accident rendering the same necessary, and then only upon a two-thirds vote of the electors, it was held that where such conditions had not arisen nor such vote been taken, a taxpayer could enjoin a contract under an illegal ordinance appropriating money, aside from that carried in the appropriation bill, for street lights. City of Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. Rep. 359.

In State *v.* Commissioners, 39 Ohio St. 58, an injunction was granted to restrain the county commissioners from letting the contract for the construction of a certain highway and from spending any part of the county road fund before they had acquired the entire right of way for the proposed highway as required by the statute authorizing the construction thereof.

And in Middleton *v.* Greeson, 106 Ind. 18, 5 N. E. Rep. 755, it was held that the taxpayers of a school district were entitled to an injunction restraining the trustees of the district from contracting for the erection of a school building at a cost in excess of the funds at their command and in violation of a statute forbidding them to contract any debt except upon the order of the county commissioners.

In Potts *v.* City of Philadelphia, 195 Pa. St. 619, 46 Atl. Rep. 195, however, where the charter and ordinances of the city of Philadelphia required that the advertising for proposals and the determination of bids for electric lighting be done by the board of public works, and the formal execution and signing of the contract to be done by the mayor and comptroller, it was held to be a mere irregularity, and not a jurisdictional defect, that the advertising for bids and the determination of the lowest bidder was done by the board of public safety instead of by the board of public works, it appearing that the former had charge of all the electric lighting in the city and possessed all the facilities for regulating and supervising the same, and that it had been the custom for it to advertise for such bids for a number of years. Accordingly it was held that the mayor and comptroller would not be enjoined from proceeding to the formal execution of the contract.

SMITH, Mayor, *et al. v.* STATE *ex rel.* GODARD, Atty. Gen., *et al.*

(*Supreme Court of Kansas, Division No. 1, April 5, 1902.*)

[68 Pac. Rep. 641.]

Municipal Contracts—Suit to Enjoin*—Confession of Judgment in Injunction Suit.

The state, on relation of the attorney general, brought suit against a city of the second class, to enjoin its mayor and councilmen from making contracts involving an expenditure of money out of the general revenue fund in excess of the amount which the city was authorized by law to raise by taxation for general revenue purposes. Due service of summons was had on the city. At a regular meeting of the city council, at which a quorum of its members was present, a resolution was passed by a majority of the members, confessing judgment in the suit, and authorizing the city attorney to appear in court and confess judgment on behalf of the city, which was done: *held*, that the judgment was valid and binding.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county Wm. G. Holt, Judge.

Action by the state, on the relation of the attorney general, against N. E. Smith, as the mayor of the city of Rosedale, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Argued before DOSTER, C. J., and SMITH, GREENE, and ELLIS, JJ.

Hutchings & Keplinger, for plaintiffs in error.

A. A. Godard, Atty. Gen., Philip Earhart, Geo. W. Littick, and Nathan Cree, for defendants in error.

SMITH, J. This was an action brought by the state of Kansas, on relation of the attorney general, to restrain the city of Rosedale, a city of the second class, and its mayor and councilmen, from carrying out the terms and provisions of two ordinances providing and contracting for additional electric lights, whereby the city would obligate itself to pay out more money than it is authorized to raise for general revenue purposes, and which it was beyond its power to meet by lawful taxation.

The city council of Rosedale consists of eight members. Pending the injunction suit, a regular meeting of the council was held, at which there was a quorum present. By a vote of four of the members, which was a majority of a quorum, a resolution was passed confessing judgment in the injunction action, and instructing the city attorney to appear in court on behalf of the city and confess judgment. This was done by the city attorney, who presented the resolution in open court, and a judgment was entered, enjoining the city from allowing any claims against it, payable out of the general

*See note appended to Barto v. Bd. of Sup'rs of City and County of San Francisco, ante, p. 700.

revenue fund, or from drawing any orders on the treasurer, or making any written obligations in excess of the yearly amount of the general revenue fund, or from incurring any expense payable out of such fund in excess of the amount thereof. Four of the councilmen objected to the action of the court below in entering judgment, and have prosecuted error.

Passing the question of their standing in this court, and their right to complain of a judgment to which they are not parties, we think the resolution conferred authority on the city attorney to consent to the judgment. The judgment was not confessed in the technical manner provided in section 4856 of the General Statutes of 1901. It is conceded by counsel for plaintiffs in error that the statute cited has no application to judgments in injunction suits. We regard the judgment complained of to have been rendered by consent, which estops the party consenting to its rendition from hereafter objecting to its validity. A judgment entered by confession without the filing of an affidavit, required by section 4854, Gen. St. 1901, is valid between the parties. Caley v. Morgan, 114 Ind. 350, 16 N. E. 790; Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Plummer v. Douglas, 14 Iowa, 69, 81 Am. Dec. 456; Miller v. Earle, 24 N. Y. 110; Churchill v. Lyon, 13 Iowa, 431. The object of the suit was to deter the city from doing acts in excess of its authorized powers as a municipal corporation under the laws of the state. By resolution it conceded that it was rightly charged by the allegations contained in the petition, and in this form of expression conveyed its consent to the court that judgment might go against it. A quorum of members being present at the regular meeting of the council at which the resolution was passed, authorizing the entry of judgment, a majority of the quorum could lawfully adopt it. In Rushville Gas Co. v. City of Rushville, 121 Ind. 206–208, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388, a resolution was voted on and carried at a meeting of the city council of Rushville, authorizing a special committee to enter into a contract with an electric light company for lighting the city. Six members composed the city council, but three of them, though present, declined to vote, and the mayor declared the resolution adopted. The court said: "The rule is that, if there is a quorum present, and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required. All that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed; and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effect-

ive. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members." The rule stated applies also to the acts of the directors of private corporations. Smith v. Association, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53, and note; Ten Eyck v. Railroad Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; 2 Cook, Stockh. & S. p. 1492. The first grant of power given by statute to cities of this class is to "sue and be sued." Gen. St. 1901, § 939.

There can be no good reason why a municipal corporation may not consent to or confess a judgment in the same manner and to the same effect as a natural person or a private corporation. We have not been cited to any section of the statute which requires a city of the second class to act by ordinance when it confesses or consents to a judgment against it. Here the consent of the governing body to the rendition of the judgment was given in a lawful manner by a majority of a quorum of the council, if such consent can be given at all by resolution. In Board v. De Kay, 148 U. S. 591–598, 13 Sup. Ct. 709, 37 L. Ed. 573, a board of education of a city of the second class in this state was authorized to issue bonds only after having obtained the consent of the city council. This consent was given by a resolution. The court said: "The general rule is, that where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. State v. Mayor, etc., of City of Jersey City, 27 N. J. Law, 493; Butler v. City of Passaic, 44 N. J. Law, 171; Merchants Union Barb Wire Co. v. Chicago, B. & Q. Ry. Co., 70 Iowa, 105, 28 N. W. 494; Sower v. City of Philadelphia, 35 Pa. 231; San Francisco Gas Co. v. City of San Francisco, 6 Cal. 190; First Municipality v. Cutting, 4 La. Ann. 335; City of Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503; 1 Dill. Mun. Corp. (4th Ed.) § 307, and notes. Nor is there anything in Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815, in conflict with this. That simply holds that, when a charter requires that certain things be done by ordinance, they cannot be done by resolution. In this act incorporating cities of the second class there is nothing which, either in terms or by implication, requires that the consent of the city council should be given only by ordinance. A resolution was, therefore, sufficient." See City of Alma v. Guaranty Sav. Bank, 8 C. C. A. 564, 60 Fed. 203; Blanchard v. Bissell, 11 Ohio St. 96.

Counsel for plaintiffs in error predict dire results, should it

be held that a minority of the council may confess judgments, thereby putting it in the power of such minority to paralyze all city government. We quote in answer to such argument the language of Mr. Justice Miller in U. S. v. Lee, 106 U. S. 196–217, 27 L. Ed. 181: "Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government; and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail."

The objection that the judgment does not follow the special prayer of the petition is untenable, for the reason that the petition concludes with a prayer for general relief. 16 Enc. Pl. & Prac. p. 782.

The judgment of the court below will be affirmed. All the justices concurring.

McMANUS *v.* CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, Feb. 24, 1902.*)

[51 Atl. Rep. 320.]

Municipal Contracts—To Be in Writing—Recovery for Extra Work Done under Oral Directions.*

Under a contract to construct a building for a city for a fixed sum, according to accompanying plans and specifications, the contract providing that the amount to be expended thereunder should not exceed such sum, and being expressly made subject to Act June 1, 1885, declaring that all contracts relating to the city affairs shall be in writing and executed in the name of the city, recovery of more than that sum cannot be had, though changes were made on the oral direction of the city architect, some of which were required by the city building laws, and commanded by the city building inspectors. Mitchell and Fell, JJ., dissenting.

Appeal from court of common pleas, Philadelphia county.

Action by Michael McManus against the city of Philadelphia. From the decree of the court sustaining exceptions to award of referee, plaintiff appeals. Affirmed.

F. B. Bracken, John J. Clarke, and E. H. Hanson, for appellant.

Chester N. Farr, Jr., Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

DEAN, J. McManus, the appellant, on 17th of April, 1894, made a written contract with the city to build a police and fire patrol station on Fairmount avenue for the round price of $27,980. It was to be built according to plans and specifications, which were appended to and made part of the contract. Then appears this clause in the contract: "It is further understood and agreed that this contract is entered into under and subject to the provisions of the act of assembly

*See *Watterson v. Mayor* of Nashville, 6 Mun. Corp. Cas. 891.

* * * entitled 'An act to provide for the better government of cities of the first class in this commonwealth,' approved the 1st day of June, 1885." P. L. 1885, p. 37. There was also this stipulation: "It is further distinctly understood and agreed that the total amount to be expended for the work to be done under this contract shall in no event exceed the sum of twenty-seven thousand nine hundred and eighty dollars." It was further agreed that all the work done and materials furnished should be subject to the inspection and approval of the director of the department of public works for the city. During the progress of the work it is alleged by McManus that it was discovered the specifications in some particulars violated the city building regulations, and these were changed at considerable expense to him, under the directions of the city architect, so as to conform to them; another of the specifications called for a kind of building stone not obtainable; so another kind, at an additional expense, under the instructions of the same officer, was purchased; that other modifications more costly to the contractor were made under the directions of the same city officer. The city paid to the contractor the entire contract price, less the sum of $416, which it claimed the right to deduct because an item of tile work, estimated at $1,800 in the contract, had only cost the contractor $1,384. The changes, substitutions, and additions to the specifications made by the contractor amounted to $2,811, for which he demanded payment. The city denied (1) that such changes had been authorized by its subordinate officers, the architect and his assistants; (2) it denied any authority on the part of these officers to permit such changes, even if they had been permitted by them. Thereupon McManus brought this suit. The issue was referred to George W. Harkins, Esq., to find the facts and decide the law, under the act of May 14, 1874. After a full hearing of the testimony, he awarded to plaintiff the sum of $2,972, very nearly, including balance due on contract, the amount of his claim. The city filed exceptions to the referee's report in the court below. All of them were sustained, except the one to the allowance of $416, the balance of the contract price, and judgment was entered for plaintiff for this amount, with interest, making $569.92. From the decree of the court sustaining the exceptions to all charges for additions and alterations McManus brings this appeal, alleging the decree to be erroneous.

The gist of plaintiff's case is very clearly set forth by the referee in his report. The evidence was contradictory, but from the weight of it the referee finds that all the changes and additions made by the contractor were made by the directions of the city architect and his assistants, and that they were properly made. Therefore we assume the facts to be with the appellant. The question, then, that confronts us is, under the contract and the law is the city under a legal obligation to pay for the changes? We start with the express stipulation in the

contract: "The work to be done under this contract shall in no event exceed the sum of twenty-seven thousand nine hundred and eighty dollars,"—this being the round sum at which McManus agreed to erect the building. But suppose the city, after the contract has been awarded and the work had been commenced, desires to make alterations and changes, either in plans or materials, which will enhance the cost; how shall that end be reached? There is no reason why such alterations and changes should not be made, if the city deemed them necessary or desirable. At this point the act of June 1, 1885, which is expressly made part of the contract, points the way to the desired end. By article 14 of this act, it is provided that "all contracts relating to city affairs shall be in writing, signed and executed in the name of the city." P. L. 1885, p. 51. Two natural persons may make a contract, and afterwards change, alter, and amend any part of it by parol; but if a municipal corporation has restricted its power, either by its own law, or is restricted in power by a law of the commonwealth, it cannot transgress either law. And where a power to change a contract such as this exists, as it does exist, in the city, it must be exercised in the manner pointed out by law. By the fourteenth article of the act of 1885, we said in Malone v. City of Philadelphia, 147 Pa. 416, 23 Atl. 628: "This section is mandatory, and therefore no contract can be made by the city otherwise than in writing. But it would be vain to put such prohibition upon the city government if, when executing a contract with all the required solemnities, it could delegate to a subordinate authority to waive or vary its terms by oral agreement or loose conversation. In case of such parol alteration, if effectual, the contract would not be in writing, as required by the statute." And to the same effect are the cases of Hepburn v. City of Philadelphia, 149 Pa. 335, 24 Atl. 279; Filbert v. City of Philadelphia, 181 Pa. 530, 37 Atl. 545; and other cases. The learned judge of the court below relied on the law as announced in these cases in sustaining the exceptions, and he was clearly right.

The referee in declining to follow the cases cited undertakes to distinguish them from the one before us on their facts, but in this he fails. True, they do not present throughout the same facts, but on the main fact there is no difference. In each, except in the case of Filbert v. City of Philadelphia, supra, the contractor sought to enforce a liability of the city on parol directions, outside the contract, from subordinate officers of the city. The latter in each case successfully invoked the act of 1885, and defeated recovery on the parol modifications of the written contract. A recovery in the Filbert Case was allowed, with great reluctance, and no uncertain censure of the city methods, because there was written authority in the written contract to the city officers to make changes. The real reason the referee gives for disregarding the decided cases

is as follows: "But, in view of the great injustice that would follow its application under the peculiar circumstances of the present case, such a most inequitable decision should be avoided, if justly it can be. These changes were not made by the contractor of his own motion. He did not voluntarily depart from the prescribed conditions of his contract, and is not responsible for the departure from them. They were the outcome either of the errors and mistakes of the department itself, or of unforeseen happenings, or of exigencies that developed in the progress of the work. They were made with the approval of the officers of the department, and he has borne the expense thereof out of his own pocket. The city has had, and now is enjoying, the advantage of them, and there is no just reason why she should not pay for them. Swift and vigorous condemnation would follow repudiation of such liability by a private individual, and it is difficult to understand why a different code of ethics should prevail in the case of the city." The reason why the same code does not apply in the case of a municipality is that it is not the law. The very reason, too, of the law is that municipal corporations should not be made answerable for money on sentiment, but only for contract liability under the law. A strict adherence to this rule is the only protection which such corporations can invoke.

The decree of the court below overruling exceptions to the award to plaintiff of $569.92 is affirmed, and the decree sustaining exceptions of city to balance of award is affirmed.

MITCHELL, J. (dissenting). It clearly appears that plaintiff furnished iron girders and supporting walls of a more expensive character than the contract and specifications called for. This, however, was not done either as a voluntary change by him or under a mere parol agreement between him and the city officers, but under compulsion of the statute law, at the command of the building inspectors. This feature, in my opinion, distinguishes this case from those decided under the act of 1885. The building laws were applicable and mandatory, and could not be set aside by the contract. Obedience to them was compulsory. As to these items I would reverse the judgment, and find for the plaintiff.

FELL, J., joins in this dissent.

McMANUS *v.* CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, Feb. 24, 1902.*)

[51 Atl. Rep. 322.]

Municipal Contracts—Required to Be in Writing—Recovery for Extra Work Done under Oral Directions.*

Under a contract to do work for a city at a certain amount per yard, providing that the total amount to be expended for the work under

*See Watterson *v.* Mayor of Nashville, 6 Mun. Corp. Cas. 891; McManus *v.* City of Philadelphia, ante, p. 721.

the contract shall not exceed a certain sum; that no allowance shall be made for extra work, unless such work be directed by the engineer in writing; and that the contract is subject to Act June 1, 1885, declaring that all contracts relating to the city affairs shall be in writing and executed in the name of the city,—recovery cannot be had in excess of the sum limited, though further work is done on the oral direction of the engineer.

Same—Same—Same—Arbitration—Conclusiveness of Award.

In the absence of fraud, the decision of the arbitrator against a claim bars further action, under provision of contract that all disputes shall be referred to a certain person, and his decision shall be final and conclusive.

Appeal from court of common pleas, Philadelphia county.

Action by Michael McManus against the city of Philadelphia. Judgment for defendant. Plaintiff appeals. Affirmed.

John J. Clarke and F. B. Bracken, for appellant.

Chester N. Farr, Jr., Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

DEAN, J. On 18th of August, 1896, plaintiff by writing contracted with defendant to do certain work in and about Queen Lane Reservoir, made necessary because of original defects in the construction. By the contract, he undertook to build a retaining wall around the reservoir slopes, reconstruct the outer slopes of the banks so as to change a too abrupt grade into one of two to one, and then sod the slopes. A schedule of prices was fixed. He was to receive 57 cents per cubic yard for filling; 22 cents for excavation; $4.97 for masonry; 13 cents per square yard for sodding. During the progress of the work it was found that the material in the old slopes was so defective that instead of cutting into them, commencing part of the way down from the top, as had been contemplated, it was necessary to commence at the top, and do the work from there to the bottom. This change was made under the oral direction of the assistant city engineer. There were other changes from the specifications, but this was the principal one, and involved the large additional expense to the contractor. The sodding was done after the date at which the contract was to be completed, and after the appropriation therefor was exhausted, but at the time the contract was made there were sufficient funds in the hands of the department appropriated for that purpose; but when the sodding was completed the money appropriated had already been used for other purposes. The city refused to pay for any extra work on the grounds: (1) That no such work had been authorized by the city; (2) that it had not been authorized in writing as required by law; (3) under an abitration clause in the contract the decision of an arbitrator, the city engineer, was to be final and conclusive, and he has decided the contractor is not entitled to any payment beyond the written contract price; (4) and, further, the city cannot lawfully pay for the sodding because there is no money remaining of the amount appropriated for that purpose. Thereupon the contractor brought

this suit to recover the contract price of 44,214 square yards for sodding, at 13 cents per yard, amounting to $5,747.82, and for extra excavation and filling $12,430.41, both amounting to $18,178.29. The issue was referred under the act of May 14, 1874, to George W. Harkins, Esq., to hear the parties, find the facts, draw conclusions of law, and report to the court. On both facts and law he found for plaintiff, and awarded to him his entire claim. The city filed exceptions to the report, which were sustained, and we have this appeal by plaintiff, who, in substance, assigns for errors the action of the court in sustaining the exceptions, and relies on the award of the referee as correct, both in its facts and law.

The case, in most of its features, is not different from that between the same parties (No. 187, January term, 1902), in which opinion has been handed down this day. 51 Atl. 320. There is one particular however, in which they differ: This is not a contract to do certain work for a lump sum, as in the contract referred to, but to do certain work according to specifications, at a fixed price per cubic and square yard. But this clause appears in the first written contract in this case: "It is further distinctly agreed and understood that the total amount to be expended for the work done under this contract shall in no event exceed the sum of $58,200." The contract, as already noticed, is dated 18th of August, 1896. But the city, on discovering that to properly repair the reservoir, so that it would answer the purpose intended, would require a much larger sum than originally estimated, on the 23d of February, 1897, made with plaintiff a supplemental agreement in writing that the maximum price should in no event exceed $71,200 instead of $58,200, and that in all other respects the original agreement should remain unchanged. We have here, then, a claim for work extra to the original contract. That contract expressly says in clause 54 as follows: "No allowance shall be made to the contractor for any work as extra work, unless the contractor is directed in writing by the engineer to do such extra work at a price satisfactory to the director." Then again, in clause 5 appears this stipulation: "No deviation from the drawings or specifications will be permitted, unless by special direction previously given in writing by the engineer." It was further agreed in the written contract that it was subject to the act of June 1, 1885, which declares that "all contracts relating to the city affairs shall be in writing, signed and executed in the name of the city."

We then have the law of the commonwealth and the law of the contract, both in opposition to the plaintiff's claim for extra work. For that it was work extra in the minds of both parties at the time the contract was first made is practically conceded by both; indeed, the learned referee in substance so rules. In that contract the total expenditure was limited to $58,200. But then during the progress of the work, and within six months afterwards, both realized that this was not

enough money to properly do the work. What course did they adopt? The contractor, it may be assumed, would not risk the expenditure of $13,000 more on the mere oral direction of the engineer to go ahead, but demanded a written contract such as the original contract and the law required. Then was made in writing, in the name of the city, the supplemental contract of 23d of February, 1897, increasing the maximum amount to be expended to $71,200. There is no written allowance for extra work beyond this sum. The learned referee has found as a fact that the assistant city engineers orally directed the contractor to do work beyond the value of this maximum and to the amount of his charges, and the evidence seems to justify his finding; but the mere oral directions of assistant city engineers are not sufficient to amend or add to a written contract or to nullify the law. We concede that if this maximum expenditure had not been inserted in the written contract, there being no bid at a lump sum, but only at a stipulated price per yard, the work to be done under the supervision and direction of the city engineer, then his oral instructions to extend the work and enlarge the quantity of excavation and fill are within the terms of the writing. But any attempted change of the written price per yard would not have been within its terms. Any attempt to step over the limit of the aggregate written cost of the work, on the ground of oral instructions from the city engineer, cannot avail the contractor.

We do not deem it necessary to again cite at length the decisions in Malone v. City of Philadelphia, 147 Pa. 416, 23 Atl. 628; Hepburn v. Same, 149 Pa. 335, 24 Atl. 279; Filbert v. Same, 181 Pa. 530, 37 Atl. 545; and the last case heretofore noticed between these same parties. The interpretation of article 14, Act June 1, 1885, is in these cases announced clearly and with sufficient elaboration. We intend to adhere rigidly to the rulings in those cases. Without such interpretation, the act of 1885 in that section is useless. That a contract solemnly entered into between a municipal corporation in writing can be altered, added to, or amended by the mere say so of a subordinate officer and his subordinates leaves the corporation subject to the very abuses which flow from the unchecked fraud, falsehood, and dishonesty the statute seeks to guard against. And there is no hardship to the contractor in enforcing this rule. He can protect himself by proper stipulations in his first written contract from unforeseen increased expenditures. If he do not do this then, he must and ought to take the risk. He is not bound to accept a contract from a city any more than he is forced to make one with an individual.

The referee, under the clause: "All disputes between the city and the contractor * * * shall be referred to the engineer, and his decisions shall be final and conclusive,"—finds that *this extra work* claimed for and denied by the

city was not a dispute, within a proper interpretation of the contract. But his reasons for so finding only affect the credibility of Trautwine, the chief engineer, and his assistants; in other words, he finds that Trautwine was neglectful and ignorant of the facts on which he based his decision. This may be so, but, as long as no fraud was shown, the contractor is bound by the decision of the arbitrator he joined in selecting.

The court below based its decree overruling the referee and sustaining the exceptions on the fact that the decision of the arbitrator was final and conclusive. We put our affirmance of the judgment as to extra work on both grounds.

Nothing is said about the claim of $5,747.82 for sodding in the opinion of the court below. It is not touched upon. If our ruling would affect the judgment, we would pass on this question, and affirm the referee's conclusion. But, as we have decided that in no event can payments to the plaintiff exceed the sum of $71,200, the maximum of the supplementary agreement, such ruling would not help appellant. He admits that he has already received $69,682. Add to this the judgment which the city agreed in the court below might be entered for him, and the aggregate is slightly in excess of this maximum amount.

Therefore we simply affirm the judgment.

NEWBURYPORT WATER CO. *v.* CITY OF NEWBURYPORT.

(*Circuit Court, D., Massachusetts, March 5, 1902.*)

[113 Fed. Rep. 677.]

Constitutional Law—Obligation of Contracts.*

St. Mass. 1893, c. 471, authorized a city to build its own waterworks, after submission to a vote of the people, notwithstanding the previous grant of a franchise to plaintiff. After a vote of the city to supply itself with water without buying the works of plaintiff, St. Mass. 1894, c. 474, was passed, obliging the city to purchase plaintiff's waterworks before proceeding to supply itself with water, if plaintiff within a certain time notified the mayor of the city of its desire to sell: *held*, that such latter act is not a violation of Const. U. S. art 1, § 10, prohibiting an act impairing the obligation of contracts because of the contract for water existing between the plaintiff an

*See generally, upon this subject, City of Covington *v.* Commonwealth, 1 Mun. Corp. Cas. 591; City of Danville *v.* Danville Water Co., 2 Mun. Corp. Cas. 479; Iron Mountain R. Co. *v.* City of Memphis, 3 Mun. Corp. Cas. 677; Capital City, etc., Co. *v.* City of Tallahassee, 5 Mun. Corp. Cas. 265; Lincoln St. Ry. Co. *v.* City of Lincoln, 5 Mun. Corp. Cas. 229; Hicks, County Auditor, *v.* Cleveland, 5 Mun. Corp. Cas. 533; Pike's Peak Power Co. *v.* City of Colorado Springs, 5 Mun. Corp. Cas. 175; Pawcatuck, etc., R. Co. *v.* Town Council, 5 Mun. Corp. Cas. 369; City of Westport *v.* Mulholland, 6 Mun. Corp. Cas. 800; St. Paul Gaslight Co. *v.* City of St. Paul, ante, p. 154; Mayor, etc., *v.* Knoxville Water Co., ante, p. 238, and note; Oshkosh Waterworks Co. *v.* City of Oshkosh (collecting cases), ante, p. 263

the city, as it simply gave plaintiff the option of selling its property on the terms mentioned.

Same.

Evidence that the commissioners, in valuing plaintiff's property under the act of 1894, did not in fact value the water contract which plaintiff had with defendant, could not affect the terms of the act, so as to render it unconstitutional.

In Equity. For former opinions, see 85 Fed. 723, and 103 Fed. 584.

Robert M. Morse and Lauriston L. Scaife, for complainant.
Albert E. Pillsbury and Horace I. Bartlett, for defendant.

Before COLT, Circuit Judge, and BROWN, District Judge.

PER CURIAM. It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that consequently the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the constitution, which provides that "no state shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894, to the effect that they did not in fact value the water contract entered into between the complainant and defendant. The act of 1893 authorizes municipal competition, which the legislature had a legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option, if it chose, to sell its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the waterworks, if the complainant so desired, before it should undertake to build waterworks of its own. Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material, and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation

of the contract clause of the constitution, because what was done or omitted by commissioners appointed under the act could not affect the terms of the legislative act itself, or make the act unconstitutional. Furthermore, after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony, offered by the plaintiff, that the commissioners did not value the water contract. The motion to enter the final decree dismissing the bill is granted.

CITY OF NORTHPORT *v.* NORTHPORT TOWN SITE CO.

(*Supreme Court of Washington, March 10, 1902.*)

[68 Pac. Rep. 204.]

Public Improvement Contract—City Councilman Unlawfully Interested in Same*—What Constitutes Such Interest.

Where a member of a city council was a large stockholder and the business manager of a lumber company, and, as such manager, pursuant to negotiations between himself and a contractor who was the bid for a contract for street improvements, sold to such contractor materials for such improvement after the contract had been awarded to him, and agreed to receive warrants issued for such improvement in payment for such material, he was interested in the improvement contract, within the purview of 1 Ballinger's Ann. Codes & St. § 968, forbidding any city officer to be interested, directly or indirectly, in any contract with the city.

Same—Same—Will Be Set Aside by Court of Its Own Motion though Improvement Has Been Completed.

Under 1 Ballinger's Ann. Codes & St. § 968, providing that any contract with a city in which any city officer is interested shall be void, it is the duty of the court, of its own motion, to declare any such contract void whenever it so appears to be; and a property owner was not liable for a local assessment for sidewalk improvements made under a contract in which a councilman was interested though he had made no objections to the improvement until it was fully completed.

Appeal from superior court, Stevens county; William E. Richardson, Judge.

Proceedings by the city of Northport against the Northport Town Site Company to enforce local assessment. From a judgment in favor of plaintiff, defendant appeals. Reversed.

C. S. Voorhees, Reese H. Voorhees, and D. H. Carey, for appellant.

J. C. Harkness and J. A. Kellogg, for respondent.

REAVIS, C. J. Suit by plaintiff city to enforce a local assessment lien levied for sidewalk improvements along certain

*See Berka *v.* Woodward, 2 Mun. Corp. Cas. 566, and note.

tain streets in the city of Northport. The local assessments seem to have been duly levied for the improvements made, and upon the abutting property owned by the defendant. The complaint sets out the facts showing the regularity of the proceedings and the validity of the assessment, and demands the foreclosure of the assessment lien. The answer does not deny the regularity of the assessment, but, for defense, alleges that a member of the city council (W. S. Rose) was interested in the contract for the improvement made between the city and the contractor, A. K. Ogilvie. Judgment was for the plaintiff.

The court, among other things, found that there was no agreement or understanding existing between the said A. K. Ogilvie, when the contract for the improvements hereinbefore set forth was awarded by the city council of plaintiff city, and W. S. Rose, that the profits arising from said contract should be divided between the said Ogilvie and the said Rose, and, further, that there was no agreement or understanding between the said Ogilvie and the said Rose whereby the said Rose was or became interested, directly or indirectly, in the contract entered into between plaintiff city herein and the said A. K. Ogilvie, and that there was no agreement or understanding between the said A. K. Ogilvie and the said W. S. Rose that, in the event of the contract hereinbefore referred to being awarded to the said A. K. Ogilvie, the said Ogilvie should purchase the lumber to be used in the work done under said contract from the Crown Lumber Company. These findings were excepted to by defendant. The court found, in substance, that there was but one bid made for the construction of the improvements, and but one bid considered before the council, and that Ogilvie was the only bidder; that it was provided in the contract for the payment of Ogilvie that he should accept city warrants in payment for the work; that the council consisted of seven members, one of whom was W. S. Rose; that there were only four members present when the contract was awarded, and that Rose, as one of the four, voted to accept the bid and let the contract to Ogilvie, and that the improvements were made under said contract; that at the time the bid was accepted, and the contract let under which the improvements were made, said W. S. Rose, a member of the council, was the manager of the Crown Lumber Company, a corporation engaged in the lumber business in the city of Northport, and was also a stockholder in such corporation to the extent of 1,600 shares out of a total capital stock of 10,000 shares, and that he was such manager and stockholder for at least four months prior to the execution of the contract with Ogilvie; that there were only two other stockholders in said corporation, and that the three stockholders of the company, including Rose, were desirous of supplying the lumber necessary to be used in making the improvement; that the stockholders, including Rose, met

together frequently to discuss the sale of lumber by the cor poration to be used in the improvements, and said Rose, a manager of the corporation, did sell for the company t Ogilvie all of the lumber needed for and used in the makin of the improvements at a price of $11.60 per thousand feet being in the aggregate $2,180.26; that said Rose, as manage of the corporation, agreed to and did receive in payment fo said lumber from Ogilvie the warrants of the city of North port issued under the contract for improvements, and receive by Ogilvie in payment for said improvements; that the Crow Lumber Company was the only dealer located in the cit engaged in the sale of lumber at and prior to the time th contract was executed; that, prior to the bidding for the con struction of the improvement, Ogilvie and Rose had at leas two conversations relative to the sale of the lumber needed to be used in the improvements, and it was understood an agreed that the Crown Lumber Company would sell lumbe to Ogilvie for said improvement in the event Ogilvie's bi should be accepted, and that the lumber company woul accept warrants of the plaintiff city from Ogilvie in payment for the lumber, and it was further agreed between Rose an Ogilvie, prior to the bid made by Ogilvie, that the price a which the company should sell the lumber to Ogilvie wa $11.60 per thousand, as required for said improvements; that at the time of the allowance of the claim to Ogilvie for th construction of the improvements under his contract with th plaintiff city, W. S. Rose was still manager of the Crow Lumber Company, and a stockholder therein, as before men tioned, and was a member of the council of the plaintiff city.

Section 968, 1 Ballinger's Ann. Codes & St., relating t municipal contracts, is as follows: "No officer of such cit shall be interested, directly or indirectly, in any contract wit such city, or with any of the officers thereof, in their official capacity, or in doing any work or furnishing any supplies fo the use of such city or its officers in their official capacity; an any claim for compensation for work done, or supplies o materials furnished, in which any such officer is interested, shall be void, and if audited and allowed, shall not be paid by the treasurer. Any wilful violation of the provisions o this section shall be a ground for removal from office, and shall be deemed a misdemeanor, and punished as such." In view of the issue presented by the defense as stated in the answer, it is not material to specially review the findings o fact excepted to by the defendant. The evidence has been examined, and we are satisfied that the findings of fact made by the superior court negativing any interest of Councilman Rose in the contract for the local improvement cannot be approved. The salient fact mentioned, and found by the court, that Rose, while a member of the city council, was also a large stockholder and was business manager of the Crown Lumber Company, and that as such business manager he sold

to Ogilvie, the contractor, the material to construct the improvement under the contract, and made the agreement to receive the improvement warrants in payment therefor, is sufficient to establish the fact that the councilman was interested in the contract, and the evidence in the record amply sustains such conclusion.

It is urged by counsel for respondent that defendant ought not to be permitted to urge this as a defense to the payment of the sum justly charged against its property for the improvement, especially as it did not at any time object to the contract, or to the proceedings for the assessment and the issuance of the warrants in payment for the improvement; that, in equity, defendant should now be estopped from showing the illegality of the contract; that, remaining passive until the property was improved, defendant should not now be allowed to relieve itself from the payment for benefits received by it. A number of authorities are submitted by counsel to support this view of the case. Among them are Gas Co. v. West (Neb.) 45 N. W. 242; Currie v. School Dist. No. 26 (Minn.) 27 N. W. 922; Pickett v. School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Lucas Co. v. Hunt, 5 Ohio St. 488, 67 Am. Dec. 303; Argenti v. City of San Francisco, 16 Cal. 256; Call Pub. Co. v. City of Lincoln (Neb.) 45 N. W. 245; Mayor, etc., v. Huff, 60 Ga. 221. In the Nebraska cases mentioned, the interpretation seems to have been given to the statute of that state which was before the court, that contracts in which a public officer was interested were not absolutely prohibited, but were left optional for the municipality to affirm or repudiate at its pleasure, and that, if affirmed, and property or things of value were received under the contract, and retained for the benefit of the municipality, reasonable compensation should be made therefor. In the Wisconsin case no statutory prohibition against such contracts, is mentioned. The reasons stated in most of the opinions in the cases mentioned are founded upon the construction of the rule of public policy involved. The general public policy upon which the statute (section 968, Ballinger's Ann. Codes & St.) is founded is of ancient origin, and has been inexorably enforced by the courts throughout the history of the common law. It is that principle which requires the trustee to always occupy a position that shall be free from the dictates of any interest that may conflict with the obligations of his trust. It is said by Judge Dillon (1 Dill. Mun. Corp. [4th Ed.] § 444): "The principle generally applicable to all officers and directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract." See, also, Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076, and Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482. Our statute declares this policy, and, in plain terms, absolutely prohibits such contract. The statute is plainly punitive. It

declares such contracts void, not merely voidable, and furthe declares that any claim for compensation for work done o supplies and materials furnished shall be void, and that, eve if audited and allowed, it shall not be paid. The statut seems to have shorn such a contract of all equitable considera tions, when it declares that compensation shall not be paid b the treasurer. It is, then, not a question of any right of th defendant to challenge the validity of the contract; but, unde the statute, the duty is imposed upon the court, at its ow instance, when the facts appear, to inquire into the legality o the contract, and, if it falls within the inhibition, to declare i void. Long experience has taught lawmakers and courts th innumerable and insidious evasions of this salutary principl that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain ma be which connects the officer with the forbidden contract, i it can be followed and the connection made, the contract i void. It would seem that the interest of a stockholder of a corporation brings such stockholder within the reason of th rule prohibiting an officer from being interested in the city' business. President, etc., of City of San Diego v. San Diego & L. A. R. Co., 44 Cal. 106; 1 Greenl. Ev. (14th Ed.) § 333; Mechem, Pub. Off. 839; Currie v. School Dist. No. 26, supra; People v. Township Board of Overyssel, 11 Mich. 227. But what was the interest of the councilman in the case at bar? His company was to furnish material to construct the improvements. This arrangement was virtually made before the contract was let. The councilman was stockholder and the manager of the lumber company. He received his proportion of the profits of the purchase of the material sold to the contractor, and further, he took his pay in these improvement warrants. It is not necessary to further pursue the discussion of his interest than to observe that he was a party beneficially claiming the payment of the warrants. It is not to be supposed that he would have been unaffected as a member of the council when the validity and amount of the claims for the construction of the improvement were submitted to the council for approval. In fine, the councilman was placed in an attitude where his personal interests might conflict with his fiduciary relations. This attitude, as has been observed, the law prohibits, and the penalty is visited upon all connected with the transaction. A very pertinent and well-considered decision is that of Hunnins v. Williamson, 11 Q. B. Div. 533. There the defendant's brother entered into a contract to do work for a vestry, when the brother, being in need of funds to carry out the contract, borrowed money from the defendant, and, by way of security, assigned the benefit of the contract to him. The defendant was at the time a member of the vestry. To the objection that the defendant was not interested in the contract, the court

answered: "A third objection urged was that there was no sufficient evidence that the defendant was 'interested' in a contract made with the vestry. Under section 54 [18 & 19 Vict. c. 120], in order to render the defendant liable, he must have been 'concerned or interested in' some 'contract or work made with or executed for such * * * vestry.' In the present case we have to consider whether the defendant was interested in a contract, within the meaning of section 54. It has been contended that as the defendant merely lent money to his brother in order to enable him to carry out the contract, and merely took an assignment of it by way of security for repayment of his loan, he was not 'interested' in the contract; but surely it was much to the defendant's 'interest' to promote the fulfillment of the contract, in order that he might obtain repayment of the money which he had advanced. I think that the defendant was 'interested' in the contract, within the meaning of section 54."

The judgment is reversed, with directions to the superior court to enter judgment for the defendant.

DUNBAR, WHITE, HADLEY, ANDERS, and MOUNT, JJ., concur.

CITY OF GRAND RAPIDS *v.* LAKE SHORE & M. S. RY. CO.

(*Supreme Court of Michigan, April 8, 1902.*)

[89 N. W. Rep. 932.]

Special Improvement Assessment—Retroactive Legislation*—Validity.

The act of May 27, 1895 (Loc. Acts 1895, Act No. 443), which attempts to make certain railroads personally liable to the city of Grand Rapids for the payment of special improvement assessments made prior thereto, and for which before its passage they were not so liable, is unconstitutional and void.

Error to superior court of Grand Rapids; Richard L. Newnham, Judge.

Action by the city of Grand Rapids against the Lake Shore & Michigan Southern Railway Company. There was a judgment partly in favor of plaintiff and partly in favor of defendant, and both parties bring error. Affirmed in part, and reversed in part, in favor of defendant.

Lant K. Salsbury, for plaintiff.

Fitzgerald & Barry (Francis A. Stace, of counsel), for defendant.

LONG, J. Plaintiff brought this action of assumpsit against the defendant railway company, claiming that it was personally liable for the payment of several special improvement

*See Hall *v.* Street Com'rs of Boston, 6 Mun. Corp. Cas. 170; McNamee *v.* City of Tacoma, 6 Mun. Corp. Cas. 183; Lombard *v.* West Chicago Park Com'rs, 6 Mun. Corp. Cas. 186; Markley *v.* City of Chicago, 6 Mun. Corp. Cas. 194; New York Life Ins. Co. *v.* Board of Com'rs of Cuyahoga County, 6 Mun. Corp. Cas. 833.

assessments made at different times in the years 1892, 1893, and 1894. The declaration contains five counts, on five alleged separate, independent causes of action, arising out of five different special improvements. Plaintiff subsequently abandoned its claims under the fourth count. On the trial the court below took the case from the jury, and directed a verdict for the plaintiff on the first count for the sum of $1,277.90,—being the amount claimed for the assessment for the pavement of West Bridge street, with interest from the date of the assessment,—but held the assessments for the improvements referred to in the remaining counts illegal and void. Both parties have appealed.

It appears that, at the time when the assessment for the improvement of West Bridge street was made, there was no provision in the city charter that such assessment should be a personal demand against the owner or occupant of the property assessed; the only method provided for enforcing collection being a sale of the property assessed. The mayor's warrant did not direct or authorize any proceedings by distress or suit or otherwise for the collection thereof. The assessment was made a lien on the land, and, if not paid voluntarily, the treasurer could do no more than to so certify in his return. This condition of the law was recognized by this court in the case of Lake Shore & M. S. Ry. Co. v. City of Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195, in which case the city was enjoined from selling this same land for this same assessment. In this case, after reciting the provision of the charter as to the sale of the land, the court said: "At the time of this assessment no other means were provided by the charter for the collection of such assessments." In 1893 section 10 of title 6 was amended by a provision that the mayor's warrant should contain a clause "commanding and authorizing said treasurer, when he may deem it necessary so to do, to levy and collect the same by distress and sale of any personal property upon such premises belonging to the premises chargeable to said assessment." Act No. 418, Loc. Acts 1893, p. 1390. Of this provision this court remarked in the above case: "Just what this provision means, is difficult of ascertainment." Page 385, 102 Mich., and page 771, 60 N. W., 29 L. R. A. 195. After the decision by this court of the above mentioned case in 102 Mich., 60 N. W., and 29 L. R. A., the city sought and obtained further legislation in relation to special assessments; and at the next session of the legislature in 1895, the said section 10 was again amended, so that no lien should attach to the roadbed, right of way, or other premises of any duly incorporated railroad corporation which are necessarily used in its corporate franchises, and the city treasurer was authorized, "when he may deem it necessary so to do, to levy and collect the same by distress and sale of any personal property belonging to the person, corporation or company against whom such assessment or tax is made and

found within the corporate limits of the city of Grand Rapids, in like manner as general state, county and municipal taxes are collected out of personal property within the corporate limits of said city." Loc. Acts 1895, p. 628. The city also procured the passage of the following act, which was approved on the same day as the amendment to section 10 as above indicated; such act being entitled:

"An act to provide for the collection of certain assessments on premises belonging to the Chicago and West Michigan Railway Company, the Detroit, Lansing and Northern Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Grand Rapids and Indiana Railroad Company, the Michigan Central Railroad Company and the Detroit, Grand Haven and Milwaukee Railway Company, for public improvement in the city of Grand Rapids.

"Section 1. The people of the state of Michigan enact, that the freight houses, roadbeds, rights of way and other premises of the Chicago and West Michigan Railway Company, the Detroit, Lansing and Northern Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Grand Rapids and Indiana Railroad Company, the Michigan Central Railroad Company and the Detroit, Grand Haven and Milwaukee Railway Company, within the corporate limits of the said city of Grand Rapids, which are necessarily used in operating their respective franchises, are liable for all valid unpaid special assessments for public improvements heretofore made within said city of Grand Rapids, and legally assessed against the same, but that no lien shall attach thereto on account of such assessments, and that the payment of such assessments shall not be enforced and collected out of the same.

"Sec. 2. All such assessments which are valid and all installments thereof, together with all interest and charges thereon, and all costs and charges, for enforcing and collecting the same, are hereby declared legal demands against said respective railroad or railway corporations against whose premises said assessments were made in favor of said city of Grand Rapids, and may be enforced by said city against said railroad or railway corporations in an action of assumpsit or other proper legal action and collected out of any property of said respective railroad or railway corporations which is liable to levy and sale upon execution.

"Sec. 3. If, after the passage and taking effect of this act, any such assessment or any installment thereof is or shall thereafter become due and payable, and the same is not paid and discharged by the railroad or railway corporation against whom the same is a legal demand, the said city of Grand Rapids is hereby authorized and empowered immediately to enforce and collect the same, together with all interest and charges thereon and all costs and charges for collecting the

same in any manner provided for in this act." Act No. 443, Loc. Acts 1895.

The plaintiff brings this action, claiming the right to recover under the above act of May 27, 1895, and on the trial in the court below was permitted, by the direction of the court, to recover under said act. The defendant claims that, if plaintiff can recover at all, it must be under that act; but it is contended that the act is unconstitutional, as being repugnant to the constitution of the United States and of this state, because (1) it attempts to create a personal liability to pay assessments previously made, where such liability did not exist when the assessments were made; (2) it attempts to create a personal liability to pay special assessments for local public improvements; (3) it attempts to create a personal liability to pay an assessment without an opportunity to be heard thereon; (4) the act affects only certain specified railroad companies, and does not apply to all persons in like manner assessed; (5) it has more than one object, and its object is not expressed in its title. It is further contended by counsel for defendant that, even if the act be valid, it does not apply to the assessment in this case, because such assessment is not shown to have been a valid assessment upon the premises belonging to defendant; that the assessment itself was illegal and void, because not made in proportion to the benefits to the land; that the proofs of the assessment and of the lease to the defendant were inadmissible in evidence under the issue joined in the case; that the plaintiff has no cause of action under the facts in the case.

If any action can be maintained, it must be under the statute above quoted. Assessments upon land cannot be made a personal claim in the absence of statutory provision. In the case of Lake Shore & M. S. Ry. Co. v. City of Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195, this rule was recognized. It appeared in that case that the city charter, as it at that time existed, made no provision to enforce the collection of the tax, except by a sale of the land. Under it the railroad was made personally liable for the tax. In Mogg v. Hall, 83 Mich. 576, 47 N. W. 553, it was expressly held that a drain tax could not be collected as a personal tax against the owner; the only provision in the statute being that, if not collected, the land should be returned. The only question for consideration in the present case, therefore, is whether the act of May 27, 1895, which purports to give a right of action (Act No. 443), is valid. The act attempts to create a personal liability to pay assessments previously made, where no liability existed when the assessments were made. It declares that certain assessments theretofore made, and which prior to its passage had been charges upon the land, shall be legal demands against certain specified corporations; or, in the words of the act: "All such assessments which are valid and all installments thereof, together with all interest and charges

thereon and all costs and charges for enforcing and collecting the same, are hereby declared legal demands against said respective railroads or railway corporations against whose premises said assessments were made in favor of said city of Grand Rapids, and may be enforced by said city against said railroad or railway corporations in an action of assumpsit or other proper legal action, and collected out of any property of said respective railroad or railway corporations which is liable to levy and sale upon execution." In Hart v. Henderson, 17 Mich. 218, it was said by Mr. Justice Cooley: "Nothing is a tax simply because of being called so; but any proceedings by which a man's property is to be taken from him on a claim which has no other basis than the naked declaration of the legislature that it shall constitute a demand against him is unconstitutional and void, as not being 'according to the law of the land,' but, on the other hand, wholly unwarranted by legal principles." The only basis for the action in the present case is the declaration of the legislature that these assessments shall constitute a legal demand against said corporations. In the case of Mogg v. Hall, supra, it appeared that certain land of the plaintiff had been assessed in 1884 for the construction of a drain under the drain law then in force (Act No. 269, Pub. Acts 1881). That act, like the charter of Grand Rapids prior to 1895, did not make such assessment a personal charge on the owner, but declared it to constitute a lien on the land, and provided for a sale of the land in case of nonpayment. It was said by the court in that case: "Under this law the property of the then owner of the land could not have been seized and sold to satisfy the tax. If not paid, the only thing the collector could do was to return the land. The tax was one levied upon the land, and not against the owner. This is further shown by the fact that in the law of 1885 those taxes were expressly made a personal claim against the owner, and provision made for their collection as against him, the same as other taxes are collected. Act No. 227, Laws 1885. This is an indication that the legislature construed the act of 1881 as deficient in this respect. It is also provided in the act of 1885 that all drain taxes properly returned to the county treasurer, and remaining unpaid, may be ordered charged back by the board of supervisors, and reassessed upon such land, in the same manner that unpaid or rejected taxes may be charged back by the auditor general, and reassessed, under the general provisions of the law. * * * When this tax was originally assessed, in 1884, under the law of 1881, as before said, it could not have been made a personal claim against the owner of the land. It was never levied against him, but against the land. The law of 1885 undertakes to make these taxes a personal claim against the owner of the land. * * * This act could not have the retrospective action contemplated by the act. Taxes levied after the act *went into effect* may properly be made a personal

claim, but the rejected taxes of 1884 reassessed under the ac of 1885 cannot, in our opinion, be made a personal clain against the owner of the land." We think the above case i controlling of the present, and that no other of defendant' contentions need be considered.

The order of the court below holding the act valid, an entering judgment for the plaintiff, must be reversed. N new trial will be ordered. It follows that the appeal of th city in reference to the other taxes cannot be sustained, an as to those the judgment must be affirmed.

GRANT, J., did not sit.

HOOKER, J. (concurring). This action is a secon attempt through legal proceedings to collect an assessmen made for local improvements upon the property of the defend ant. The first failed for the reason that the legislature ha failed to provide a method of enforcing payment by proceed ing against the land assessed. In dismissing the bill in tha case, we held that the local assessment was valid, and we wer careful not to hold that the claim of the city for the assess ment was not a valid and subsisting obligation, if not a lie upon the land. Subsequently the legislature attempted t make this a personal debt due from the defendant to the city and incidentally provided that the land assessed should b discharged of any lien therefor. I concur with Mr. Justic Long in holding that this act cannot be given a retroactiv effect, and therefore that it has no application, in any of it provisions, to this cause. The judgment must therefore b reversed, and no new trial ordered; but it should be unde stood that the lien of the city for its taxes, if it ever had an is unaffected by the legislation mentioned, or by these pro ceedings.

BOSTON ASYLUM & FARM SCHOOL FOR INDIGENT BOYS *v.* CHARLES *et al.*

(*Supreme Judicial Court of Massachusetts, Suffolk, Feb. 27, 1902.*)

[63 N. E. Rep. 961.]

Special Assessment—Property Subject to—Exemption.*

St. 1835, c. 28, chartering the Boston Asylum & Farm School, an providing that it may hold real estate and personal property free fro taxes, does not exempt the real estate of the corporation from specia assessments for street improvements.

Case reserved from supreme judicial court, Suffolk county William Caleb Loring, Judge.

Certiorari by the Boston Asylum & Farm School fo Indigent Boys against Salem V. Charles and others, as stree commissioners of the city of Boston, to quash a special assess

*That all exemptions from taxation are to be strictly construed, se Wells *v.* Mayor, etc., of Savannah, ante, p. 462, and foot-note.

ment on the property of the incorporation. Case reserved, and petition dismissed.

Gaston, Snow & Saltonstall, for petitioner.
Thomas M. Babson, for defendants.

HAMMOND, J. A tax has been assessed upon certain land belonging to the petitioner, for benefit received by the widening and reconstruction of Clinton street; and the question is whether the provision in the charter of the petitioner (St. 1835, c. 28) that it may take and hold real and personal estate to a certain amount "free from taxes" exempts the land from such a tax. The question is narrow, and one not entirely free from difficulty. The plaintiff relies much on the case of President, etc., of Harvard College v. Board of Aldermen of City of Boston, 104 Mass. 470, but the language in that case was much more comprehensive than in the case before us. The exemption was from "all civil impositions, taxes, and rates," —"terms as broad as language can make them," said Wells, J., in giving the opinion, page 482. These terms, it was said, "import not a contract of indemnity, * * * but a renunciation of the taxing power." Page 484. The language in the present case, however, is not so broad and sweeping. The word used is "taxes." While in a general sense it may be said that a betterment assessment is a kind of tax, still we think that there is a well-understood difference in the meaning of the two terms as generally used in our statutes. The word "tax" is used when one is speaking of the annual tax, or any other tax which forms a part of the general burden for public purposes, while the word "assessment" is used to designate the amount to be paid into the public treasury as a part of the benefit specially received by reason of some local improvement. The first is a burden, inasmuch as it adds nothing to the value of the estate taxed. The second simply requires the landowner to share with the public the special benefit received by the local improvement, and it cannot be assessed unless there be such benefit, and even then not beyond that. The value of the estate is always diminished by the first, but never by the second. This distinction between the usual legal signification of the words seems, as above stated, to be quite generally recognized in our statutes. See the various sections of Pub. St. cc. 11, 12, as to the word "tax"; and chapter 49, §§ 92, 93; chapter 50, §§ 5, 6, 7, 20, 22; chapter 51, §§ 1–8,—as to the word "assessment." A similar distinction between the two words is judicially recognized in other states. State v. Mayor, etc., of City of Newark, 36 N. J. Law, 478, 13 Am. Rep. 464, and cases therein cited; Emery v. Gas Co., 28 Cal. 345, and cases therein cited. It is true that in this case the question arises upon the meaning of the word "tax" in a special charter, and not in the general tax act. While that fact may possibly have some significance upon other questions, yet, in view of the well-recognized

distinction in the general use and legal signification o the terms, we do not think that in this charter the firs is intended to embrace the second. The difference betwee the language in this case and that in President, etc., o Harvard College v. Board of Aldermen of City of Boston ubi supra, is material. The case must stand in the clas represented by Boston Seamen's Friend Soc. v. Mayor etc., of City of Boston, 116 Mass. 181, 17 Am. Rep. 153. The opinion in this last case contains so full a discussio of the general grounds for holding such an exemption no applicable to such a tax as the one in question that it is no necessary to do more than refer to it.

Petition dismissed.

JOHN C. GOODRICH *et al.*, Plffs. in Err., *v.* CITY OF DETROIT.

(*Argued January 20, 1902. Decided March 3, 1902.*)

[22 Sup. Ct. Rep. 397.]

Special Assessments—Due Process—Failure to Give Notice of Proceedings to Make Improvement.*

Notice to the owners of land which may be assessed for a loca improvement need not be given of the proceedings to make the im provement, in order to constitute due process of law, if none of thei property is taken for that purpose, and they have notice and oppor tunity to be heard on the question of the assessment of their property

Same—Same—Benefits Received.

A resolution that the common council fix and determine that a specified district is benefited by the opening of a certain street, an that there be assessed and levied upon the real estate therein include a certain amount, in proportion, as near as may be, to the advantag which each lot or parcel is deemed to acquire, by the improvement is in substantial conformity to Mich. Comp. Laws 1897, § 3406, whic in effect provides that the common council may assess upon suc district as it deems benefited the whole or a part of the cost of th improvement, in proportion, as nearly as may be, to the advantag which each lot derives, and limits the assessment on any lot to th benefits received.

Same—Same—Misdescription of Lands Taken to Make Improvement

A misdescription of the lands taken in proceedings to make a loca improvement constitutes no defense to a person whose lands wer not taken, against an assessment upon his property for benefits.

In Error to the Supreme Court of the State of Michigan t review a decision affirming a decree dismissing a bill to enjoi the collection of assessments for benefits from a street im provement. Affirmed.

See same case below, 123 Mich. 559, 82 N. W. 255.

Statement by MR. JUSTICE BROWN:

This was a bill in equity filed in the circuit court for th county of Wayne by Goodrich and another against the cit

*As to the necessity of notice and what notice is sufficient in loca assessment cases, see extensive note appended to Gleason *v.* Waukesh County, 3 Mun. Corp. Cas. 396.

of Detroit and its treasurer, to enjoin the defendants from enforcing the collection of certain taxes assessed upon several parcels of property owned by the plaintiffs, for benefits derived from the opening of Milwaukee avenue, upon the ground, amongst others, that such assessment was in violation of the 14th Amendment, and deprived plaintiffs of their property without due process of law.

These proceedings were taken under the authority of certain sections of the Compiled Laws of 1897, printed in the margin.*

The proceedings in the case were substantially as follows: On November 14, 1893, a resolution was passed by the common council providing for the opening and extending of Mil-

*"Sec. 3394. The city, village, or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village, or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council, board of trustees, or board of supervisors shall be annexed, which certified copy shall be prima facie evidence of the action taken by the common council, board of trustees, or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use or benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. A description of the property to be taken shall be given, and generally the nature and extent of the use thereof that will be required in making and maintaining the improvement shall be stated, and also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises. The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvements to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. The petition shall ask that a jury be summoned and impaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor. The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"Sec. 3395. Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition, stating briefly the object of said petition, and commanding them, in the name of the people of the state of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, and show cause, if any they have, why the prayer of said petition should not be granted."

"Sec. 3399. The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just," etc.

Section 3406, which is also pertinent, is reprinted in full in Voight v. Detroit, 184 U. S. —, ante, 337, 22 Sup. Ct. Rep. 337.

waukee avenue, and on January 6, 1894, a petition by the city was filed in the recorder's court, together with a map or plan of the private property proposed to be taken, certified as correct by the city engineer. The owners and persons interested in the real estate proposed to be taken were duly summoned, a jury impaneled, a hearing had, and a verdict rendered condemning certain lands, and fixing the total amount of damages at $15,214.75. This verdict was confirmed by the court.

Thereafter, and on August 7, 1894, a resolution was adopted by the common council, which was rescinded on November 20, and on January 22, 1895, another was adopted of which the following is a copy:

"Resolved, that the said common council of the city of Detroit do hereby fix and determine that the following district and portion of said city of Detroit, to wit: (Here follows list of descriptions, many of which are different from those in first assessment district) is benefited by the opening of Milwaukee avenue, from Chene street to the easterly city limits, where not already opened. And further resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement. And further resolved, that the board of assessors of the city of Detroit be, and they are hereby, directed to proceed forthwith to make an assessment roll in conformity with the requirements of the charter of the city of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be of said amount, in accordance to the amount of benefit derived by such improvements."

On March 12, 1895, the assessors reported an assessment roll for defraying the expenses of opening the avenue, which was affirmed by the common council April 4, 1895. The property of plaintiffs was included in the assessment district, which was fixed and determined by the common council.

Defendants filed an answer, which was a little more than a demurrer to the bill, and upon hearing upon pleadings and proofs the bill was dismissed, an appeal taken to the supreme court, by which the decree of the circuit court was affirmed. 123 Mich. 559, 82 N. W. 255.

Mr. E. F. Bacon for plaintiffs in error.

Mr. T. E. Tarsney for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court:

This case raises the question whether certain proceedings taken under the Compiled Laws of Michigan for the assessment of benefits upon neighboring lots derived from the open-

ing of Milwaukee avenue, in the city of Detroit, deprived the owners of such lots of their property without due process of law.

These proceedings began with a resolution of the common council declaring the necessity of opening the street. Thereupon the city petitioned the recorder's court for a jury to determine the necessity of such improvements and of taking private property (a map or plan of which was annexed to the petition), and "to ascertain and determine the just compensation to be made for such private property proposed to be taken," and for the issue of a summons to all persons mentioned in the petition as being interested in the property proposed to be taken. The jury returned a verdict in favor of the necessity of opening the avenue, of taking private property therefor, and fixed the compensation at the aggregate sum of $15,214.75.

Thereupon the common council passed another resolution fixing the district benefited by the opening, and declaring that there should be assessed upon the real estate included in such district the sum of $15,214.75, "in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." The resolution further required the board of assessors to make an assessment roll to that amount, assessing upon each lot "a ratable proportion, as near as may be, of said amount in accordance to the amount of benefit derived by such improvements." Thereupon the matter was referred to the board of assessors, who reported the amount assessed against each lot. The bill averred that none of the plaintiffs' land thus assessed abutted upon those parts of the street opened by these proceedings, but that they had already dedicated to the city all that portion of Milwaukee avenue lying in front of their lands, without cost or expense to the city.

Plaintiffs made a large number of objections to the validity of such assessment, none of which require to be noticed, except so far as they are pertinent to the provision of the 14th Amendment, concerning due process of law.

1. The first of these objections is that while the statute provides for a notice to the parties whose land is to be taken for the street, no provision is made for giving notice to the owners of the land liable to be assessed for the improvement. Section 3394 provides for the filing of a petition by the city attorney for the condemnation of land, and that the petition, among other things, shall contain "a description of the property to be taken, . . . also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises." Section 3395 provides that, "upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition," that is, all interested in the property to be taken, "commanding them, . . . [to]

show cause, if any they have, why the prayer of such petition should not be granted."

It will be observed that this section makes no express provision for notice to the owners of property not to be taken, but assumed to be benefited by the improvements. These owners, however, are not then known, because the proceedings for the condemnation of the property taken precedes the determination of the benefits and the fixing of the assessment district. The sections of the statute taken together provide for two distinct and separate proceedings: (1) for the assessment of compensation for property taken, and (2) for the assessment of benefits to property not taken. In the former, only the owners of the land taken are interested. Their rights are amply protected by §§ 3394 and 3395, requiring notice to be given to show cause why the petition should not be granted.

The argument of the plaintiffs is that the owners of the property liable to be assessed for the benefits are just as much interested in the question as to the necessity of making the improvement and the amount of compensation as are the owners of land to be taken for such improvement, and the same reasons for notice apply in the one case as in the other. A number of cases are cited which, it is argued, give countenance to this position. Paul v. Detroit, 32 Mich. 188; Wells County v. Fahlor, 132 Ind. 426, 31 N. E. 1112; State v. Fond du Lac, 42 Wis. 287; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Scott v. Toledo, 1 L. R. A. 688, 36 Fed. 385.

But whatever weight be given to these authorities, the law in this court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice.

Thus in Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of land benefited thereby, and also determine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray, p. 356, L. Ed. p. 767, Sup. Ct. Rep. p. 927: "But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited." So, in Parsons v. District of Columbia, 170 U. S. 445, 2 L. Ed. 943, 18 Sup. Ct. Rep. 521, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike of the necessity of the work and of its benefit to all abutting property. So, also, it was said in Williams v. Eggleston, 170 U. S. 304, 311, 42 L. Ed. 1047, 1049, 18 Sup. Ct. Rep. 617, 619: Nor "can it be doubted that, if the state Constitution does not prohibit, the legislature, speaking generally, may create, a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." Cooley, Taxn. 2d. Ed. p. 149.

This question, however, is decided in the case of Voigt v. Detroit, recently disposed of, 184 U. S. —, ante, 337, 22 Sup. Ct. Rep. 337, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that.

2. The second objection is that the resolution of January 22, 1895, fixing the assessment district and levying a gross amount thereon for benefits, does not expressly state that the property included therein is benefited to the amount ordered to be assessed. This resolution was passed in pursuance of § 3406, reprinted in the Voigt Case, 184 U. S. —, ante, 337, 22 Sup. Ct. Rep. 337, which provides that "if the common council . . . believe that a portion of the city . . . will

be benefited by such improvement, they may . . . determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and thereupon they shall by resolution fix and determine the district or portion of the city . . . benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement."

The resolution declares that the "common council do hereby fix and determine that the following district . . . is benefited by the opening of Milwaukee avenue," . . . and "that there be assessed and levied upon the several pieces and parcels of real estate, included in the above description, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." If this resolution be not a literal, we think it is a substantial, compliance with the statute, declaring that if the common council believe that the property will be benefited by such improvement, they may determine the proportion of the compensation to be assessed upon the owners; but whether this be so or not, there was no want of due process of law within the 14th Amendment, inasmuch as § 3406 expressly provides, following the language already quoted, "that the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying, and collecting the expense of a public improvement when a street is graded." Interpreting this, the supreme court of Michigan held in the case of Voigt v. Detroit, 123 Mich. 547, 82 N. W. 253, that "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement;" and further, that "when the proceeding has reached that stage when it becomes necessary to decide what proportion of the cost of a proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question." There was, in that case, as well as in the one under consideration, no claim in the bill that plaintiffs' property was not benefited by the proposed improvement in excess of the amount assessed, nor was there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property. Upon such hearing the property owner may insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtain every advantage which he might obtain were he informed of every step of the proceed-

ings. The terms of the resolution, that each lot shall be assessed "in accordance with the amount of benefits derived from such improvements," opens the whole question of the amount of benefit derived by the lot, even to showing that no benefit whatever was occasioned by the improvement. It does not follow, however, that he has a right to be heard upon the extent of the territory to be embraced within the assessment district.

3. The last objection, that there were several of the parcels of land constituting the extension of Milwaukee avenue so defectively described that the judgment of condemnation was absolutely void, is untenable. Not only is it not shown that the plaintiffs were interested in the lands alleged to be misdescribed, but it is obviously impossible, in a proceeding to assess benefits upon other property, to show a misdescription in the lands taken for such improvement. Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9 L. Ed. 490; Comstock v. Crawford, 3 Wall. 396, 18 L. Ed. 34. It is not only an attempt to raise the question collaterally by one who has no interest in it, but it is exceedingly doubtful if a simple misdescription involves any federal question whatever. The errors, too, were merely clerical, since a map of the property taken, annexed to the condemnation proceedings, exhibits accurately the lands affected thereby.

There was no error in the decree of the Supreme Court affirming the dismissal of the bill, and it is therefore affirmed.

MR. JUSTICE HARLAN did not sit in this case.

EDWARD W. VOIGT, Plff. in Err., *v.* CITY OF DETROIT and Thomas M. Lucking, Receiver of Taxes of Said City of Detroit.

(*Argued December 6, 1901. Decided February 24, 1902.*)

[22 Sup. Ct. Rep. 337.]

Special Assessments—Constitutional Law—Sufficiency of Notice and Opportunity for Hearing.*

Failure to provide for any notice or opportunity to be heard on the question, what lands shall be included in an assessment district, or what shall be the maximum aggregate amount to be assessed upon the district, does not make Mich. Comp. Laws 1897, § 3406, unconstitutional on the ground that a person compelled to pay an assessment on his property is denied due process of law, since his constitutional rights in this respect are fully protected by the opportunity which the statute gives him to be heard on the question of the amount of the assessment apportioned to his property, and this the statute limits to the amount of benefits which the property receives from the improvement.

Same—Same—Same.

A rule or standard of assessment sufficient to satisfy the constitutional guaranty of due process of law is furnished by Mich. Comp.

*See extensive note appended to Gleason *v.* Waukesha County, 3 Mun. Corp. Cas. 396.

Laws 1897, § 3406, which, as interpreted by the supreme court of the state, provides that a municipal council may assess the whole, or such part as it may deem just, of the cost of a local improvement, upon such lands in the vicinity thereof as are benefited thereby, and limits the amount of the assessment upon each lot to the amount of benefits.

In Error to the Supreme Court of the State of Michigan to review a decision of that court affirming a judgment sustaining a demurrer to a bill in equity for an injunction against the sale of lands for an assessment for a city improvement. Affirmed.

See same case below, 123 Mich. 547, 82 N. W. 253.

Statement by MR. JUSTICE McKENNA:

This is a bill in equity brought by plaintiff in error in the circuit court for Wayne county, Michigan, to restrain the sale of his lands for an assessment levied by the city of Detroit for city improvements, on the ground that the law under which the assessment was imposed is repugnant to the 14th Amendment of the Constitution of the United States, and that the assessment, therefore, puts a cloud upon plaintiff's title. A demurrer was filed to the bill by defendants, which was sustained, and the bill dismissed. That action was affirmed by the supreme court of the state. 123 Mich. 547, 82 N. W. 253. A writ of error was then allowed by the chief justice of the state, and the case brought here.

The bill alleged that plaintiff was the owner of certain lots (describing them), which were a part of the subdivision of the "Voigt Park Farm," a plat of which had been made and recorded by plaintiff. Upon the plat was designated a street called "Second avenue," and to extend that street proceedings were instituted, which resulted in a verdict opening the same as a public necessity. Damages were awarded for the property taken to the amount of $73,732.68.

The verdict was confirmed by the court, and the judgment of confirmation was transmitted to the common council of the city, and was referred to the committee on street openings. The committee reported, recommending that $49,155.12 of the award be assessed on a local assessment district and the balance be paid by the city. A resolution was then adopted by the common council fixing and determining the assessment district, and including therein the property of plaintiff. The resolution recited "that it is hereby determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement which should be paid by the owners" of the property included in said assessment district; and it was further resolved that said amount be assessed and levied upon the several parcels of said property by the board of assessors of the city. It was also alleged that plaintiff in error "had no notice of the intention of said common council to impose and have assessed upon a local assessment district a part of the damages awarded

by the jury in said condemnation proceedings, and no notice to appear before said council or any committee thereof in relation to the matter of determining the limits of such district and the amount to be assessed thereon, and that he was given no opportunity to appear and be heard before said common council or any committee thereof with reference thereto."

An assessment roll was subsequently prepared, "being street assessment roll No. 111," and confirmed by the common council. By the assessment roll the sums assessed against the property of plaintiff aggregated the sum of $9,957. The roll was placed in the hands of the defendant, Thomas M. Lucking, receiver of taxes of the city, for collection, and plaintiff notified of the assessment against his property, and payment of the amount assessed was demanded. And it is alleged that the receiver will, unless restrained, advertise and sell plaintiff's property for the amount assessed thereon.

The condemnation proceedings were instituted and conducted under the provisions of § 3406 of the Compiled Laws of the state of Michigan, and it is alleged those provisions violate the 14th Amendment of the Constitution of the United States, in that they deprive plaintiff of his property without due process of law, for the following reasons:

"1. Because said law does not provide for giving to the property owners interested any notice of the proceedings of the common council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon, and does not provide for the giving to the property owners interested notice of any hearing by such common council as to the amount of land to be included in such assessment district and as to the amount or proportion of such award to be assessed thereon.

"2. Because said law does not fix the basis upon which or the standard by which the common council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

"3. Because the said law does not require that the amount of the award of the jury which the common council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the land in said district from the improvement to pay the expense of which such award was made.

. . . . . .

"That the proceedings of said common council, hereinbefore set forth, in determining said assessment district and the amount to be assessed upon it are invalid for the reasons aforesaid, and for the further reason that it does not appear by the resolution fixing said district and determining the amount to be assessed thereon upon what basis or standard or by what method the council determined the proportion of the award to be assessed upon said district, or that the amount to be assessed did not exceed the total amount of benefits

derived by the property to be assessed from the improvement."

Mr. Hinton E. Spaulding for plaintiff in error.

Messrs. C. D. Joslyn and Timothy E. Tarsney for defendants in error.

MR. JUSTICE McKENNA, after stating the case, delivered the opinion of the court:

The proceedings in the case were had under the provisions of an act of the state of Michigan entitled "An Act to Authorize Cities and Villages to Take Private Property for the Use or Benefit of the Public, and to Repeal Act No. 26, Public Acts of 1882." This act is reproduced in the Compiled Laws of Michigan of 1897 as §§ 3392–3415.

The particular provisions attacked are contained in § 3406 (§ 15 of the original act), and are as follows:

"When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the supreme court affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees, or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any, of affirmance; and thereupon, the proper and necessary proceedings, in due course, shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees, or board of supervisors believe that a portion of the city, village, or county in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city [or] village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying, and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all

proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided shall be assessed, levied, and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village, or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for nonpayment of the amount assessed and levied thereon, the city [or] village or county may become a purchaser at the sale."

Plaintiff in error makes two objections to the law:

"First. That it does not afford to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, and therefore the maximum amount to be paid by the district.

"Second. That it does not require the amount imposed upon the district to be limited to the amount of special benefit."

The common council proceeded as required by the ordinance. They determined that a portion of the city was benefited by the improvement, created a district of the property benefited, determined also that $49,155.12 was a just proportion of the compensation awarded by the jury to be assessed upon the property owners of the district created, and directed the board of assessors to make the assessment. The assessment roll was subsequently made out and was ratified and confirmed by the council. The assessment against the property of plaintiff in error was nearly $10,000.

Passing on the ordinance the supreme court said: "No provision is made for a notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon." But the court observed that such notices were not necessary to vindicate the statute from the charge of being unconstitutional, because "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and the proper notice of this hearing was given." And further:

"When the proceeding has reached that stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question.

"There is no claim in the bill that complainant's property is not benefited by the proposed improvement, in excess of the amount assessed; nor is there any claim that he was not allowed to be heard in relation to the amount which should

be assessed against his property, thus avoiding the difficulties found in the cases cited by the counsel for complainant. We do not think it can be said that complainant's property is taken without due process of law. This statute has been construed in Beecher v. Detroit, 92 Mich. 268, 52 N. W. 731, and Smith v. Detroit, 120 Mich. 572, 79 N. W. 808, and the action taken by the common council thereunder upheld."

It was urged by plaintiff in error in the supreme court of the state, as it is now urged here, that—

"The act is bad because it does not fix any rule or standard by which the council are to determine the just proportion of the award of the jury to be assessed upon the district, nor limit the total assessment of the district to the amount of its benefits.

"The constitutional limit of the amount to be imposed upon the district is the total benefit to the district. The law might therefore permit the council, when, in their judgment, a portion of the city in the vicinity of the improvement is benefited thereby, to determine the amount of such benefit and to require a just proportion of the compensation awarded by the jury, not exceeding the total benefit, to be assessed upon such local district. This act contains no such limitation. The council are empowered, when they believe that a local district is benefited, to assess what in their judgment is a just proportion of the whole award upon the district, without requiring that proportion to be limited by the amount of benefit."

To the contention the supreme court of the state replied:

"We do not think this is a fair construction of the language of the statute. Before the council can create the district at all they must believe that a portion of the city in the vicinity of the proposed improvement will be benefited by such improvement, and then provide for an apportionment of the compensation awarded by the jury upon the property deemed to be benefited. 'The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement.' We think this language makes it clear that the amount of tax which may be assessed upon the district or upon any given parcel of land cannot exceed the benefit. Provision is then made for the assessment, levy, and collection of the tax."

The law, then, as we understand the decision of the supreme court of the state, provides for the formation of a district in the vicinity of the proposed improvement, the limits of the district to be determined by the benefits derived from that improvement, and further provides that the common council shall determine what proportion of the cost of the improvement ("compensation awarded by the jury") shall be assessed upon the owners of the real estate benefited. The

language of the statute is: "The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement."

It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The supreme court of the state decided, as we have seen, "that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits." On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax.

The contentions of plaintiff in error seem to be based on the assumption that a property owner must have notice of every step of the proceedings. Such assumption is untenable. Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. Ed. 583, 20 Sup. Ct. Rep. 485, and cases cited; King v. Portland, 184 U. S. —, ante, p. 290, 22 Sup. Ct. Rep. 290.

Judgment affirmed.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision.

DOW *et ux.* v. CITY OF BALLARD.

(*Supreme Court of Washington, March 22, 1902.*)

[68 Pac. Rep. 176.]

Special Assessments—Foreclosure of Lien—Liability of Land in Hands of Innocent Purchaser Where City Has Failed to File a Lis Pendens.

If a city commences suit against an owner of land to foreclose a street assessment lien, but fails to file a lis pendens, and prior to the judgment in the foreclosure suit the owner sells the land to a third party, who has no notice of the facts, the land will be liable in the latter's hands only for the amount of the tax, exclusive of the costs which afterwards accrue.

Same—Same—Same.

If the deed purports to have been delivered prior to the judgment, the fact that it was not so delivered, and that no part of the consideration was paid until after the judgment was rendered, will not make the land liable for costs in the hands of a purchaser from the first grantee, if he was ignorant of the facts.

Appeal from superior court, King county; Boyd J. Tallman, Judge.

Dow *et ux. v.* City of Ballard

Injunction by Alexander S. Dow and wife against the city of Ballard and another. Judgment for plaintiffs, and the city appeals. Affirmed.

John W. Peter and Preston & Embree, for appellant.
Fred H. Peterson, for respondents.

DUNBAR, J. In February, 1901, the appellant city commenced suit against one Boxmeyer and wife to foreclose a street assessment lien against the property in controversy, which was admittedly then owned by the Boxmeyers. No lis pendens was then or afterwards filed. On April 23, 1901, prior to the rendering of the judgment in the foreclosure suit, the Boxmeyers deeded the land in controversy to Charles C. Lee, and Lee afterwards deeded the same to the respondents, Alexander S. Dow and Jane Dow. The deed from the Boxmeyers to Lee was recorded June 6, 1901, and on June 24, 1901, the respondents purchased the said land from Lee. On June 5, 1901, Boxmeyer paid the assessment on said land, and received the following receipt: "No. 1,333. Ballard, Wash., June 5, 1901. City of Ballard. Total, $53.83. Received from C. F. Boxmeyer fifty-three and 83-100 dollars for street improvement tax of lot 5, block 20, Gilman Park addition, Post street. Ordinance No. 326. [Signed] F. M. De Moss, Treasurer of the City of Ballard." The $53.83 comprised the amount due on the tax, with the accrued penalty and interest. On the 13th of May a judgment was entered by default against said Boxmeyer and wife, foreclosing said assessment. This, of course, was prior to the payment of the assessment and the reception of the receipt by Boxmeyer. After the assessment had been paid, the city of Ballard proceeded to enforce the whole of the said judgment, and advertised to sell the said lot on July 13, 1901, for the full amount of said judgment, which included said street assessment, interest, penalty, costs, and attorney's fees in the sum of $25. This action was brought to enjoin the city and sheriff from selling said property; the complaint alleging the matters and things above stated, and, further, that the respondents, in purchasing the property, had no notice of the judgment in the foreclosure suit. A demurrer was interposed to the complaint on the ground that it did not state a cause of action, which demurrer was overruled; and, upon trial, judgment was rendered in favor of respondents.

We think the complaint states a cause of action. If the lot was sold by Boxmeyer prior to the judgment, and no lis pendens was filed, and the purchaser was without knowledge of the judgment, he could only be held for the amount of the tax which was a lien against the property, exclusive of the costs which afterwards accrued.

Upon the trial of the cause, appellant offered to prove that the deed from the Boxmeyers to Lee was not delivered, or any part of the consideration thereof paid, until after the

entry of the foreclosure decree against the Boxmeyers, which testimony was objected to on the ground that it was not admissible unless the respondent Dow had knowledge and notice of the fact that the deed was not delivered at the time it was presumed to have been delivered; it being admitted that no showing could be made that Dow knew of this, or had any knowledge whatever that the deed was delivered at a date subsequent to the entry of said judgment. We think this testimony was properly overruled. There is a difference between a voluntary sale and a sale by operation of law, or under an execution issued on a judgment. In the latter case only the interest of the judgment debtor passes by the sale, but in the former, in the case of an innocent purchaser, every thing passes by the sale that the grantor was apparently possessed of. In this case, the city not having protected itself by filing a lis pendens,—the constructive notice which the law provides,—and there being no constructive notice which could be imputed to the purchaser, he could not be bound by actual notice of his grantor, of which he was ignorant.

The testimony fully sustains the findings of fact, and the judgment will be affirmed.

REAVIS, C. J., and MOUNT, WHITE, HADLEY, FULLERTON, and ANDERS, JJ., concur.

PECK v. BOROUGH OF BRISTOL.

(*Supreme Court of Errors of Connecticut, March 5, 1902.*)

[51 Atl. Rep. 521.]

Public Improvements—Estimating Damages and Benefits*—Continuous Tract of Land Lying on Both Sides of Street May Be Treated as One Tract.

Where the same person owns a continuous tract of land, partly on one side and partly on the other side of a street, the whole tract may be treated as one parcel, in appraising the damages and assessing the benefits of an improvement of the street.

Same—Same—Delay in Completion of Work.

Where the damages and benefits to a tract of land occasioned by a change in the grade of an adjoining street have been appraised, the fact that, at the time of the application for a reappraisal, the work of changing the grade has not been completed, does not entitle the landowner to compensation to the extent of the cost of completing such work, or for delay in such completion.

---

*See State *v.* Mayor of Bayonne, 1 Mun. Corp. Cas. 299, and note; Philadelphia Ball Club *v.* City of Philadelphia, 2 Mun. Corp. Cas. 738, and note; New Haven Steam Sawmill Co. *v.* City of New Haven, 3 Mun. Corp. Cas. 65, and note; City of Henderson *v.* Winstead, 4 Mun. Corp. Cas. 677; Whittaker *v.* City of Deadwood, 4 Mun. Corp. Cas. 708; Schroeder *v.* City of Joliet, 5 Mun. Corp. Cas. 376; Kehoe *v.* City of Philadelphia, 5 Mun. Corp. Cas. 585; City of Louisville *v.* Bohlsen, 6 Mun. Corp. Cas. 786; City of Louisville *v.* Harbin, 6 Mun. Corp. Cas. 787; notes appended to Bickford *v.* Inhabitants of Hyde Park, 2 Mun. Corp. Cas. 641; Hornung *v.* McCarthy, 3 Mun. Corp. Cas. 262 et seq.

Peck *v.* Borough of Bristol

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Application by Miles L. Peck for a reappraisal of damages to lots adjoining a highway in the borough of Bristol caused by a change of grade. From a judgment for defendant, plaintiff appeals. Affirmed.

Epaphroditus Peck, for appellant.
Noble E. Pierce, for appellee.

PRENTICE, J. The appellant's brief opens with the statement that the principal question of law involved in the case is, "Can benefits received by one lot of land from a street alteration be set off against damages suffered by other and separate lots of the same owner, so as to make the benefited lot bear the entire burden of the damages done to other lots, while lots of other owners, equally benefited, entirely escape assessment for such benefit?" The brief asserts the negative of this proposition, and argues exhaustively in support of that contention. It will be observed that the appellant's inquiry and position adopt as their premise an assumption of fact as to the correctness of which it is pertinent to inquire. The appellant owns a considerable tract of land in the borough, through and adjoining which Goodman street runs. This land is the remnant of a still larger tract belonging to the appellant, through which, in the development of the borough, said street was constructed, and from which building lots have been from time to time sold. The remaining land lies upon both sides of the street. That upon the west side, being the smaller in quantity, lies directly opposite that upon the east side. That upon the east side extends back from the street to a considerable depth, and has an unbroken frontage upon the street, save that a single building lot, of ordinary depth, had, before the improvement in question, been sold to another person. Around the rear of this lot the appellant's land extends. The borough decided to change, and did change, the grade of said street adjacent to this land. The warden and burgesses, in attempting to comply with the requirements of law pursuant to the borough charter, and assess the benefits and appraise the damages resulting to adjoining property owners from said change of grade, treated the appellant's said land as one piece, and appraised the damages and assessed the benefits thereto by reason of said improvement as equal. The court below affirmed this action. We fail to discover the legal impropriety or error in so treating the appellant's land as one tract. One might walk over every inch of it, and never set foot on the land of any other owner. The existence of the highway through it did not break its continuity. The appellant owned the fee entirely across the street. The alienated lot served only to break the regularity of the lines of the whole, and the continuity of the street frontage. It did not break the chain of connection. The

tract was, even in the most literal and technical sense, a single, continuous piece of land. The warden and burgesses, to be sure, might, for the purposes of assessment and appraisal, have treated it in subdivisions; but we know of no rule of law or requirement of statutory contruction applicable to the authority which they were exercising which compelled them, upon the penalty of committing legal error, to treat it as any particular number of independent tracts. The appellant's premise thus failing, his argument upon this branch of the case, otherwise pertinent, requires no further attention.

When the work of changing the grade was done, the whole width of the highway was not reduced to the level of the new grade, in this: that a stone bowlder projecting into the sidewalk in front of the appellant's land was not blasted out. This bowlder remained at the time of the hearing before the committee. The cost of removing the bowlder, it is found, would be $100. The committee, in making the general finding that the benefits and damages were equal, did not take into account the cost of removal of this stone. The appellant claims that the committee's finding disclosed that he had been specially damaged by the change of grade to the extent of the cost of this removal, over and above all benefits assessed, and that he should have been awarded that sum, to wit, $100. We think this contention not well founded. The cost of removal, as such, could not have been properly awarded the appellant. There is no necessary or natural relation between such cost and the amount of damage accruing to the neighboring land from continuance. The theory upon which damages are appraised is that the condition which is the basis of the appraisal is to remain, not be changed. A landowner who has had damages awarded him has no right to thereafter alter the situation for and on account of which the award was made. The award, followed by payment, in effect buys the right to have the conditions upon which it is made continue. So in this case, if the appellant is given any sum as damage resulting from the grade being established with this bowlder left standing, the borough would have the right to have it remain. The appellant would be powerless to remove it. The inquiry in an appraisal is, what is the damage resulting from the change from the old to the new condition? It is not what will it cost to create another condition. A thing which it might cost little to remove, a situation which it might cost little to change, might easily be one decidedly harmful to the adjacent landowner. On the contrary, a condition which could only be changed at great expense might work little or no damage to him. These considerations are enough, without recounting others, to sufficiently emphasize the statement already made,—that there is no necessary or natural relation between cost of removal and damage resulting from continuance. They look to wholly different ends, and naturally lead to entirely distinct and unrelated results. It is clear,

therefore, that a finding that it would cost $100 to remove this rock, of itself, furnishes no aid to the appellant's claim to be allowed that sum upon his appeal. Lest, perchance, the appellant claim more from the finding upon this subject than a mere finding of cost of removal, as we think he cannot, let us go further. His claim for damage by reason of this improvement must be based upon the creation or proposed creation of a new and changed condition which the borough proposes to maintain to his damage as a landowner. He cannot, as we have seen, be awarded any sum as compensation for doing any part of the proposed work. It is in his relation to the work as landowner, and not as a contractor or constructer, that he is before the court. As a landowner, he has no voice in the nature of the work. An improvement in the nature of a change of grade has been determined upon and ordered. Whether merely ordered, partly executed, or wholly executed, whether upon paper or upon the ground, it is the basis for the appraisal of damages and the assessment of benefits, and nothing else can be. It follows, therefore, inevitably, that, in order to justify the bowlder in question being considered as an element in the award to be made, it must be treated as a feature of the scheme of improvement projected or executed. In other words, the new grade must be regarded as one with the rock in it as a continuing feature. Apart from the strangeness of such a hypothesis, we notice that the appellant, in his appeal, states the new grade with an utter disregard of the bowlder as forming a part of it. Without stopping to inquire whether by his appeal he has laid any foundation for damages arising from the rock, we turn to the report of the committee only to discover a finding in express terms inconsistent with such a view of the situation. The committee finds that the work of the change of grade is not complete, and that by reason of the bowlder it will cost $100 to complete it. Invariably he speaks of the borough's failure, on account of the nonremoval of the rock, to complete the change of grade as creating the existing condition, and as alone furnishing the occasion for the expenditure of $100 to complete the projected work. There is no contrary suggestion in the finding. There is no suggestion of any attempt to appraise the damages to the appellant's land upon the assumption of the continuance of the bowlder as a part of the new grade. The whole burden of the report, following the contention of the appellant, is change and removal, and the cost thereof. The report, therefore, entirely fails to supply the foundation for any other judgment than the one rendered. The finding of fact above referred to—that the bowlder was no part of the new established grade of the street, and that such grade was one not accomplished until the stone was removed—is conclusive of the appellant's right in this regard, unless it follows, as a conclusion of law from the fact of failure to remove it for a few months after the balance of

the work was executed, and the fact of its continuance in position at the time of the appraisal of damages, that it must be regarded, for the purposes of the appraisal, at least, as a permanent factor of the new grade. There might be some force to the latter's contention if the borough's appraisal of damages and assessment of betterments could be made only after an improvement was completed. Such, however, was not the case. The appraisal and assessment might, at the option of the municipality, have been made before or after the execution of the work, or during its progress. City of Meriden v. Camp, 46 Conn. 284; Platt v. Town of Milford, 66 Conn. 320, 34 Atl. 82. No presumption—at least, no conclusive presumption—could, therefore, arise as to the character of the improvement from its condition of progress at the time proceedings were taken to appraise the damages and assess the benefits therefor. In the present case the change of grade which the borough established and began to construct evidently was such as the appellant in his appeal described, and such as the committee and judge found it to have been; that is, one which embraced the removal of the bowlder to the general highway level. In that event the appellant is clearly not entitled to the award of $100 he asks for. He is, however, not therefore remediless, if the borough fails to complete the improvement upon the basis of which he has been assessed.

The appeal presents a question as to the power of the judge below to tax in the appellee's fees for its witnesses before the committee. As this question is not pursued in either brief or argument, it need not be considered.

There is no error. The other judges concurred.

BEATTIE *v.* CITY OF DETROIT.

(*Supreme Court of Michigan, Dec. 3, 1901.*)

[88 N. W. Rep. 71.]

Paving Contract—Temporary Street Crossings—Personal Injuries—Liability of City for Negligence of Independent Contractor.*

Where a paving contract provided that the work should be done so as to interrupt as little as practicable the free use of the street by the public, and that no portion of the street should be wholly obstructed without permission of the board of public works, under whose direct supervision the work was done, and temporary plank bridges were made by the contractor over excavations at various street crossings, the city was liable for injuries resulting from the negligent construction of one of such bridges.

Grant, J., dissenting.

Error to circuit court, Wayne county; William L. Carpenter, Judge.

---

*See Uppington *v.* City of New York, 5 Mun. Corp. Cas. 366, and note, 374.

Beattie *v.* City of Detroit

Action by Eva M. Beattie against the city of Detroit. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Rowland M. Connor, for appellant.

A. B. Hall and P. J. M. Hally (Timothy E. Tarsney, of counsel), for appellee.

HOOKER, J. In excavating for the setting of the curb the contractors had not found it necessary to wholly stop public travel across the street. It was only necessary to make a temporary walk, bridging the excavation at that point, which could be used at all times during the prosecution of the work of setting the curb, except when work was being done at that particular point. Had not the defendant provided a bridge at this point, the city might have complained of a breach of its contract, which provided that it "should do all work * * * in a manner to interrupt as little as practicable the free use of the street by the public." It provided that "even private drives and street crossings should be kept open so far as practicable," and expressly stipulated that "travel upon the street [being paved] or upon any intersecting street should not be hindered nor inconvenienced needlessly." Again, it was provided that "no portion of the roadway or street shall be wholly obstructed without the sanction of the board of public works." The foregoing quotations indicate that the city had every reason to suppose that the crossing would be kept open, so far as it was practicable, and as the excavation was somewhere between 18 and 48 inches in width only, the feasibility of a plank bridge would seem palpable; and such a bridge would, if apparently stable, justify a pedestrian in crossing the gutter upon it, instead of walking around the corner in the roadway, to avoid crossing the excavation. The law imposes upon the city the duty of keeping its ways in a condition reasonably safe for public travel. Necessarily, there must be times when they cannot be in good condition,—as when they are undergoing repairs,—and at such times travelers must heed the obvious dangers. But the city is not absolved from all care and responsibility at such times, nor can it absolve itself by turning the highway over to a contractor. As between it and the public, it must see that such portion of the way as is open for use—at least where it is so under the terms of its contract with the contractor—is kept in a condition reasonably safe under the circumstances; and if it should be kept open under the contract, it should see that the contract is performed in that respect. In other words, a city cannot, by merely contracting with somebody that he will keep the street in a condition reasonably safe (whether the contract specifies the method or not), relieve itself from the statutory liability, and impose it upon another. Thus a contractor may promise to keep a trench fenced, or signal lamps in it at night, and do neither. One injured in consequence is not

without remedy against the city, for the statutory responsibility rests there. Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. 574; Baker v. Same, 111 Mich. 447, 69 N. W. 740; Dill. Mun. Corp. § 1027, and note; City of Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Southwell v. City of Detroit, 74 Mich. 438, 42 N. W. 118. It is true that a temporary bridge need not be as well built and safe as a permanent one, and it may be that one or more planks loosely laid over an excavation, to be used for a few minutes, or an hour, day, or week, may be a reasonably safe substitute, for the pedestrian can see the character of the temporary structure, and must act accordingly, and will be held to a corresponding degree of care. The learned circuit judge construed the contract to mean that it was the duty of the contractor to interrupt travel for as short a time as possible at a particular point, but was of the opinion that it did not require or authorize him to substitute temporary structures for the more stable ones in common use, and, if he did so, and persons used them, they could only look to him for redress; and hence that, under the circumstances of the case, the contractor should have built no bridge, and that the public would not then have been justified in attempting to cross the gutter, and, if one chose to do so, he would assume the risk, so far as the city is concerned. This is a construction not without force, but we think it loses sight of the provisions of the contract requiring that the roadway should not be wholly obstructed at a given point without authority, and the fact that all of the work was done under the supervision of the city's board of public works, and also that these bridges were made at the different street crossings during the progress of the work, and the city must have known it. At the very least it would seem to be a question whether the parties did not place upon the contract the construction contended for by the plaintiff. When we take into consideration the fact that the usual, and perhaps necessary, method of setting curb is to complete the excavation for the given section, and follow it by setting the curb, commencing at one end and going to the other, and at a later time completing the gutter, thus necessarily preventing competition at one point in a short time, the construction of the contract contended for by the plaintiff's counsel does not seem to us unreasonable.

I am of the opinion that the judgment should be reversed, and a new trial ordered.

MONTGOMERY, C. J., and MOORE and LONG, JJ., concurred with HOOKER, J.

GRANT, J. (dissenting). The city of Detroit, through its board of public works, made a contract with one Julius Porath to repave National avenue "in conformity with the specifications and estimates hereto attached and made a part of this contract, * * * and according to all other conditions herein named." The other parts of the contract, so far

board of public works." (4) "Travel upon th
any intersecting street * * * shall not
inconvenienced needlessly." (5) "No portion
or street * * * shall be wholly obstruct
direction of the board of public works, in wh
plain and properly worded signs, 'Street Clos
such fact, to be placed with proper barricades
cross street upon each side of such obstruct
upon intersecting streets." The further conc
of facts is as follows: In July, 1899, the plaintif
in the city, visiting her aunt on Elm street. I
east and west, and crosses National avenue
The city was repaving National avenue. The
up the old pavement had been commenced
south of the Elm street crossing, and was prog
Elm street. A trench for the resetting of the
had been excavated along the easterly line o
avenue roadway to a point north of the sout
the Elm street intersection. There is a confli
as to the width of this trench, running from 1
4 feet. The depth of the trench was about 3
paving blocks in the roadway outside of the
not been disturbed. The roadway of Elm
National avenue had been left open for the use
Barricades bearing signs of "Street Closed" h
facing north and south, across the roadway on
at the Elm street intersection, to prevent
teams up or down National avenue. There we
or signs to prevent the passage either of teams
way of Elm street across National avenue, or
along the Elm street sidewalks across National
contrary, planks were placed across the trench

directed a verdict for the defendant, upon the ground that the contractor was acting outside of his contract in providing these planks for travelers to pass over; that the placing of the plank was not obligatory upon him, but was collateral to the contract which he undertook. Porath's contract obligated him to protect travelers against excavations he was authorized to make by putting up fences, railings, or barriers to warn travelers, and to keep them from attempting to cross the excavations. It contains not a sentence indicating any authority on his part to bridge these excavations, either for travelers on foot or in carriage. Such temporary bridging was not contemplated by the contract. The negligence of the contractor for which the city is responsible in the first instance must be an act either of omission or commission naturally incidental to the work agreed to be done. For acts of the contractor not thus incidental to the work the city cannot be held liable until it has knowledge, either express or implied, of such acts. Was it understood by this contract that Porath might place plank over the excavations in the street for teams to pass over, in order to interrupt as little as possible the free use of the street by the public? Clearly not, for the contract expressly contemplated the interruption of public travel by the excavations, and expressly provided means to prevent travelers from crossing. If Porath had obstructed the street or sidewalk by leaving a wagon or piece of machinery in or upon it at night, or by putting his tools or machinery upon the sidewalk or in the street near the excavation, would the city be liable until it had notice of such obstructions? These are not acts of negligence provided against by the contract. They are independent acts of negligence, for which the city is not liable without notice. Could Porath bind the city by his act in inviting travelers to pass over the excavation on two loose planks, while the contract required him to prevent such crossing by putting up barriers? No bridge was necessary in order to interrupt as little as possible public travel. A few feet would take the traveler around without any substantial delay or interruption. Besides, delays and interruptions are inevitable in such cases, and the public understand it. Plaintiff testified that "these boards were about four inches apart and about a yard long, and it occurred to me that at night it would be dangerous to walk across those boards on account of their being separated." No case is cited which involves this question. Cases of liability of municipalities for obstructions and defects in streets and sidewalks are numerous. All of them, so far as I have been able to examine, are cases where the contractor has failed to warn travelers by neglecting to put up signals, lights, or barriers, or to do something to warn travelers of the dangerous character of the situation. I find none where the contractor has assumed to make a temporary bridge for the passage of travelers.

The circuit court was right, and the judgment should be *affirmed.*

JOHNSON *v.* CITY OF SIOUX CITY.

(*Supreme Court of Iowa, May 20, 1901.*)

[86 N. W. Rep. 212.]

Excavation in Highway—Failure to Maintain Guard Rail*—Pers Injuries—Evidence.

In an action for injuries received from a fall into a cut in a st by reason of the failure to maintain a guard rail, evidence a buggy tracks at the place of the accident, observed 10 days after accident, was properly admitted, as the time goes only to the wei of the testimony.

Same—Same—Same—Horse Leaving Beaten Track—Evidence.

Where a street running southeast intersected another street runn north and south, just north of a cut through which the latter ran an action for injuries received by falling into the cut by reaso the horse getting out of the traveled track on the east side ther while being driven south on the street running north and south, dence that the horse had been previously driven over the road runn southeast was properly admitted, as tending to show why the h left the traveled track.

Appeal—Issues Submitted to Jury—Verdict Supported by Evidence

The supreme court will not disturb a verdict where the issues v fairly and plainly submitted to the jury, and the evidence suppo the same.

Instructions—Streets to Be Kept in Repair to Whole Width Thereof

Instructions that a city must maintain its streets in a reasona safe condition for those who traveled thereon, and not for those v leave the highway or approach the same from outside the limits, not objectionable, as requiring the city to keep its streets in re to the whole width thereof.

Same—Incorrect Enumeration of Instructions—Not Reversible Er

Under Code, § 3708, providing that the instructions given shall in consecutively numbered paragraphs, the incorrect enumeratio the instructions does not constitute reversible error, in the abse of proof of any prejudice to appellants.

Appeal from district court, Woodbury county; F. R. Gayn Judge.

Action to recover for personal injuries sustained, as alleged, by reason of the negligence of the defendant, a without fault or negligence on the part of the plaint Defendant answered, denying that it was negligent as charg denying that plaintiff was damaged in the sum claimed, a alleging that, whatever injury plaintiff received, he recei through his own fault and negligence. Verdict and judgm were rendered in favor of the plaintiff for $3,000. Defend appeals. Affirmed.

---

*See Bell *v.* Village of Wayne, 3 Mun. Corp. Cas. 294; Hungern *v.* City of Wheeling, 3 Mun. Corp. Cas. 92, and note; Cloney *v.* C of Kalamazoo, 4 Mun. Corp. Cas. 640; City of Goshen *v.* Alford Mun. Corp. Cas. 405; Foy *v.* City of Winston, 4 Mun. Corp. Cas. 3 Brown *v.* Town of Louisburg, 4 Mun. Corp. Cas. 121; Harvey *v.* C of Clarinda, 4 Mun. Corp. Cas. 66; Taylor *v.* City of Ballard, 6 M Corp. Cas. 755; Williams *v.* Mayor of Nashville, 6 Mun. Corp. Cas. 7

†See Lamb *v.* City of Cedar Rapids, 2 Mun. Corp. Cas. 28; Boltz Town of Sullivan, 1 Mun. Corp. Cas. 203, and note.

F. E. Gill, for appellant.
Argo & Middlekauff, for appellee.

GIVEN, C. J. 1. Second avenue, in the city of Sioux City, is a much traveled street, running south from the business part of the city, and three miles or more from the center of the city is intersected by Peters avenue. From about this intersection, Second avenue passes south through a cut for several hundred feet; the cut being about 18 feet wide at the bottom, about 24 at the top, and about 18 feet deep at the deepest point. The hill being a gradual rise, it was possible to drive up it for some distance on the east side of the cut. On the night of September 22, 1898,—a very dark night,—the plaintiff and his brother and brother-in-law were driving south on Second avenue in a single-seated, one-horse buggy. On reaching the north end of the cut, either of its own accord, or from the control of the plaintiff, who was driving, the horse left the traveled track on the east side thereof; and plaintiff, realizing that they were out of the traveled track, stopped the horse and got out of the buggy to search for the traveled track. He passed round the head of the horse and fell over the bank to the road, some 15 feet below, and was so injured as to necessitate amputation of one of his legs. The charges of negligence against the defendant are as follows: "That the said negligence consists in said city making and permitting to be made a deep cut or excavation within the limits of a much traveled public highway, and for a long time suffering and permitting said cut to be and remain without any fence, guard, railing, or other barricade along the side of said cut and excavation to prevent travelers along said highway from falling or driving into the same, and in not placing, keeping, and maintaining lights or other guards or visible objects at and near said cut to notify and warn travelers using due care of the proximity of said place of danger, and in constructing and maintaining said highway too narrow for safety, and not of sufficient width, and in constructing too narrow an entrance to said cut, and in causing and permitting the said entrance to be and to remain on a level with the surface of the ground adjacent to said cut; * * * and the said city of Sioux City was negligent in not erecting and maintaining a fence, railing, guard, light, or other warning at the entrance to said cut, so as to guide and confine plaintiff and other travelers along said highway in the nighttime into the traveled part of said highway at said point."

2. One Johnson was permitted to testify, over defendant's objection, that he saw buggy tracks east of the cut. This was competent, as tending to show where the plaintiff had driven out of the traveled way. The objection seems to be that it was not until 10 days after the accident that witness saw the tracks. He says in one place that it was the second day. The time goes to the weight of the testimony, and in either event it is not so great as to exclude it. A road known as the

"Morning Side Road," from the southeast, runs into Peters avenue near its intersection with Second avenue, and a little east of the north end of the cut. A witness was asked if the horse plaintiff was driving had been kept in Morning Side, and, over defendant's objection, he answered: "That I can't say. He had been drove out there and delivered out to people who wanted him." There was no error in this. The horse had been procured at a livery barn that night, and it was competent to show that the horse had been driven on the Morning Side road, as tending to show why he left the traveled track in Second avenue.

3. Counsel discuss at length and with numerous citations the issues of negligence. We should not consume space to follow these discussions of facts, as to do so will serve no desirable purpose. It is sufficient to say that the question whether the defendant was negligent as charged, and whether the plaintiff was free from negligence contributing to the injury complained of, were fully, fairly, and plainly submitted to the jury, and that the verdict has such support in the evidence as that we should not disturb it.

4. Appellant contends that the verdict is contrary to the seventh and fourteenth paragraphs of the instructions. The court instructed that it was the duty of the city to maintain its streets in a reasonably safe condition for those who traveled thereon, "And not for those who leave the highway or approach the road from outside the limits of the public highway." Appellant's contention is that plaintiff had left the highway; but that was disputed, and the jury was warranted in finding that he had not left the limits of the highway. It is said that these instructions do not state the law correctly, for that it is not the duty of the city to keep in repair its streets to the whole width thereof. The instructions are not to the contrary. These instructions refer in part to the charge that defendant was negligent in not fencing along the top of the cut to keep people from falling over,—a charge that was practically and properly eliminated by the seventh instruction. If the defendant was negligent, it was in not putting up some barrier at the entrance to the cut, that would direct those traveling in the dark into it, and prevent them from going unaware up the sides.

5. Appellant complains that the instructions were not numbered as required by section 3708 of the Code. They were plainly paragraphed, but not consecutively numbered. They are consecutively numbered to and including No. 12. Then by oversight the next is numbered 14 instead of 13, and the three that follow are each marked "Par.," but without numbers. Although this requirement has been the law for many years, it does not appear that an omission to number the instructions was thought to be prejudicial. In Goin v. Hess, 102 Iowa, 140, 71 N. W. 218, the court failed to number the paragraphs of the charge, but we did not determine

whether such failure was a sufficient ground for a new trial. When the omission is without prejudice, it is certainly no ground for reversal. Appellant fails to indicate wherein it was prejudiced in the least by this partial failure to number as required.

What we have said fully disposes of all questions raised on defendant's motion for a new trial. Our conclusion is that the judgment is correct. Affirmed.

BUTMAN v. CITY OF NEWTON.

(*Supreme Judicial Court of Massachusetts, Middlesex, May 22, 1901.*)

[60 N. E. Rep. 401.]

Construction of Highway—City Liable for Negligence of Workmen under Control of Its Officers.

Though a city is not liable for negligence in the construction of highways in the manner prescribed by general law, it is responsible for the negligence of its workmen in the construction of a highway, where the same is built under the direction of the city officers, and not those designated by general law to have charge of such improvements.

Same—Injury to Traveler—Negligence in Using Stone Crusher—Dumping Stone—Blowing Off Steam.*

Plaintiff's horse was frightened by a workman, employed in constructing a street in defendant city, dumping stone on the wooden platform of a stone crusher, and the escape of steam from the crusher, which caused a runaway, and the injuries for which plaintiff sued. The street on which the work was being done was laid out with two roadways, and the road on which plaintiff was driving was open to travel, though this fact was contradicted: *held* sufficient to justify refusal to direct verdict for defendant, requested on the ground of plaintiff's assumption of the risk.

Same—Same—Same—Same.

Dumping stone on the wooden platform of a stone crusher, and the letting off of steam from the crusher, just as a horse being driven along a roadway, 25 feet away, was opposite and in plain sight, is sufficient to support a finding of negligence.

Report from superior court, Middlesex county; Justin Dewey, Judge.

Action by Elmer E. Butman against the city of Newton. Verdict for plaintiff, and case reported. Judgment for plaintiff.

Geo. L. Mayberry, for plaintiff.
Winfield Sleeum, for defendant.

LORING, J. In this case the plaintiff's horse was frightened by some person or persons dumping a load of stone upon the wooden platform of a stone crusher, "the noise from which, together with escaping steam, frightened the plaintiff's horse, and he ran away," and caused the injury sued for. The employees who dumped the stone, and who

*See Taylor v. City of Ballard, 6 Mun. Corp. Cas. 755.

had charge of the steam engine by which the stone crusher was run, were acting under the superintendent of streets, and were engaged in constructing Commonwealth avenue.

1. The defendant's first contention is that the act complained of is that of a public officer, for which the city is not liable. It is established, on the one hand, that a town is not liable for injuries caused to a person by the negligence of those engaged in repairing a way within its boundaries, if the work is done by or under a surveyor of highways (Walcott v. Inhabitants of Swampscott, 1 Allen, 101; Hennessey v. City of New Bedford, 153 Mass. 260, 26 N. E. 999), or by a road commissioner (McManus v. Inhabitants of Weston, 164 Mass. 263, 41 N. E. 301); and, on the other hand, it is also established that if a town, in place of leaving the repair of its ways to the surveyor of highways, or to road commissioners, who are the public officers designated by the statutes to see that the highways are kept in a safe condition (Pub. St. c. 52, § 3; Nealley v. Bradford, 145 Mass. 561, 563, 568, 14 N. E. 652; Pratt v. Weymouth, 147 Mass. 245, 255, 17 N. E. 538; Blanchard v. Inhabitants of Ayer, 148 Mass. 174, 176, 19 N. E. 209), undertakes to make the repairs by its own agents, it is liable for injuries caused through their negligence (Hawks v. Inhabitants of Charlemont, 107 Mass. 414; Deane v. Inhabitants of Randolph, 132 Mass. 475; Tindley v. City of Salem, 137 Mass. 171–173, 50 Am. Rep. 289; Pratt v. Weymouth, 147 Mass. 245, 254, 17 N. E. 538; Brookfield v. Reed, 152 Mass. 568, 26 N. E. 138; Collins v. Inhabitants of Greenfield, 172 Mass. 81, 51 N. E. 454). The foundation of the general rule is that the duty of repairing the public highway is the performance of a public duty, imposed upon all towns alike, from the performance of which a town derives no special advantage in its corporate capacity. The exemption of the town in those cases where it is exempt under the general rule does not rest upon the fact that the town has no control over the highway surveyor or the road commissioner. The rule applies in many cases where the town has full control over the officials in question. For example, it has been held to include the case of an injury caused by the negligence of firemen in hauling a hose reel to extinguish a fire, where the fire department in question was established by the town under a special act, in place of leaving the matter to fire wards, and where the statute gave to the engineer and other officers of the fire department of the town the authority and duties of fire wards. Hafford v. City of New Bedford, 16 Gray, 297; Fisher v. City of Boston, 104 Mass. 87, 6 Am. Rep. 196. And see Buttrick v. City of Lowell, 1 Allen, 172, 79 Am. Dec. 721; Howard v. City of Worcester, 153 Mass. 426, 27 N. E. 11; Sampson v. City of Boston, 161 Mass. 288, 37 N. E. 177; Pettingell v. City of Chelsea, 161 Mass. 368, 37 N. E. 380. The general rule, as we have said, includes all cases where the town is performing a public duty, imposed upon all towns

alike, from the performance of which it derives no special advantage in its corporate capacity.

A town which undertakes to make repairs on ways within its limits, by its own agents, is an exception to the general rule. In that case it has a pecuniary interest in the matter by reason of its statutory liability for a defect in the way. This distinction is pointed out, and the whole subject is so exhaustively stated by C. Allen, J., in Tindley v. City of Salem, 137 Mass. 172, 173, 50 Am. Rep. 289, that it is not necessary to restate the reasons at length in this case. It may be added, however, to what was said there, that while a town has, by statute, a remedy over against the surveyor of highways, through whose fault or neglect the way came to be in a defective condition, in a case where it has been fined for allowing a way to be out of repair (Pub. St. c. 27, § 128), it has no remedy over to recover a judgment against it for injuries suffered by a traveler from a defect in the way caused by the negligence of the surveyor (White v. Inhabitants of Phillipston, 10 Metc. 108).

It appears from the report in the case at bar that Commonwealth avenue, including that part of it on which the plaintiff was driving when the accident complained of occurred, was laid out by the city of Newton. We assume, therefore, that it was a town way, and was laid out under section 24 of the charter of the defendant city. St. 1873, c. 326. The laying out of a public way is the performance of a public duty imposed upon all towns and cities alike, from the performance of which they derive no special advantage in their corporate capacity, and is not the institution by the city of work for its own particular use and benefit. The defendant city therefore, is not liable in this case, because it had directed work to be done for its benefit, in which case it might be, under some circumstances, liable for injury caused by negligence in carrying it into effect. The expense of constructing a town way is, by the provision of our laws, to be borne by the town in which it is laid out. Pub. St. c. 52, § 1; Id. c. 49, §§ 68, 75. The act of the defendant city in making due appropriations for the construction of the way did not make it liable for this accident. That act, also, is the performance of a public duty, within the rule. The making of public ways is not only committed to the surveyors of highways or road commissioners, as is the matter of repairing them, but both matters are covered by one and the same sections of the Public Statutes. See Pub. St. c. 52, §§ 3, 13. Where a city or town pursues the course thus provided for, it is not liable for injuries caused by the negligence of those engaged in constructing a way. Taggart v. City of Fall River, 170 Mass. 325, 49 N. E. 622. This rule was applied in Jensen v. City of Waltham, 166 Mass. 344, 44 N. E. 339, where a street was being constructed by a board of street commissioners, the existence of which was provided for in the charter of the defendant city (St. 1884, c.

309, § 23), and who were invested by an ordinance of the city with the duty of highway surveyors. See McCann v. City of Waltham, 163 Mass. 344, 345, 40 N. E. 20.

In the case at bar the city of Newton did not pursue the course set forth in the General Laws for making the highways within its limits, but, on the contrary, it provided by its ordinances that, "under the direction of the joint standing committee on highways, the superintendent of streets shall have * * * the making, widening, and altering of streets and ways." Newton, Munic. Ord. 1894, c. 11, § 3. A "joint standing committee" is a committee of the city council made up of the common council and the board of aldermen. See the charter of the defendant city (St. 1882, c. 210, § 2, amending St. 1873, c. 326, § 2). In other words, the defendant city, in place of leaving the ways within its limits to be constructed in accordance with the provisions of Pub. St. c. 52, § 3, has preferred, having regard to its liability to travelers for defects in the way, to leave the construction of them to its own superintendent of streets, acting under the direction of the joint committee of its aldermen and common council. That makes the superintendent of streets the agent of the defendant city in this connection, and the case falls within Hawks v. Inhabitants of Charlemont, 107 Mass. 414; Deane v. Inhabitants of Randolph, 132 Mass. 475; Tindley v. City of Salem, 137 Mass. 171, 173, 50 Am. Rep. 289; Pratt v. Weymouth, 147 Mass. 245, 254, 17 N. E. 538; Brookfield v. Reed, 152 Mass. 568, 26 N. E. 138; Collins v. Inhabitants of Greenfield, 172 Mass. 81, 51 N. E. 454, cited above.

The defendant particularly relies on the case of Barney v. Lowell. In that case the injury complained of was caused by the negligence of the driver of a cart in which stone was being hauled from a stone crusher for the purpose of macadamizing a street which was being repaired by the superintendent of streets. It appeared in the report in that case that the ordinances of the defendant city provided for the appointment of a superintendent of streets, who should have charge of the repairs of the streets, "under the direction of the highway surveyors or joint committee on streets." It also appeared that the repairs were being made "under the direction of the committee on streets of the board of aldermen." But a provision in an ordinance that the surveyor of highways should act under the direction of the mayor and aldermen does not make him the agent of the city (Prince v. City of Lynn, 149 Mass. 193, 21 N. E. 296), and it seems to have been assumed that the superintendent of streets in that case was in fact acting "under the direction of the highway surveyors," as it was provided in the ordinance of the defendant city he might do, and not under the direction "of the joint committee on streets," which it is also provided in that ordinance could be done.

2. The defendant's second contention is that the plaintiff

was driving on Commonwealth avenue at his peril, within the rule laid down in Jones v. Collins (Mass.) 59 N. E. 64. But the evidence on this point was conflicting. On the one hand, there was testimony that "Commonwealth avenue was laid out with two roadways and a reserved space between the roadways"; also that at the time of the accident "the part of the road" on which the plaintiff was driving "was open to travel." On the other hand, there was evidence that "there were piles of stone and material about, machines for construction, men, horses, and cars, and other evidence that the road was being constructed"; that "at the points of entrance of various streets to Commonwealth avenue, as constructed, wooden horses had been placed, upon which were signs stating, 'No Passing Through'"; that "at the time of the accident some of these signs had been placed at the side of the road lengthwise, so as not to obstruct travel, and some were in adjoining fields, but were plainly visible." We are unable to determine from these conflicting statements what the situation really was as to the part of the road on which the plaintiff was driving. If one of the two roadways had been thrown "open to travel," and the plaintiff was driving on it, he was there by right, and the defendant is liable for its negligence, if it was negligent in operating the stone crusher. On the other hand, if the plaintiff drove onto a roadway between wooden horses which had been placed across the way, and on which were signs stating, "No Passing Through," or even if he drove onto a roadway on which such signs had been placed, and which were temporarily standing at the side of the road, lengthwise, in such a position as plainly to indicate that it was not open for travel, he went at his own risk. The only exception covering this point is that to the refusal to order a verdict for the defendant. As there was evidence on which the jury, under proper instructions, could have found for the plaintiff, this exception is not well taken.

3. The defendant's third contention is that there was no evidence of negligence on the part of the defendant. But we think it might be found to be an act of negligence to dump a load of stone on the wooden platform of a stone crusher, and let off steam, just as a horse, which is being driven along a roadway, only 25 feet away, is opposite to it, and which is "in plain sight of the men who dumped the stone." The case does not come within the cases relied on by the defendant (Howard v. Railroad Co., 156 Mass. 159, 30 N. E. 479; Lamb v. Railroad Co., 140 Mass. 79, 2 N. E. 932), where horses have been frightened by the escape of steam incident to the prudent running of its trains by a steam railroad, which has been given the right to operate its road adjoining a highway. In accordance with the terms of the report, there must be judgment for the plaintiff.

COLWELL *v.* CITY OF WATERBURY.

(*Supreme Court of Errors of Connecticut, March 5, 1902.*)

[51 Atl. Rep. 530.]

Repairing Streets—A Governmental Duty*—Nature of Duty Not Changed by Acceptance of Charter Authorizing City to Repair.

A municipal corporation, in constructing and repairing its streets, is engaged in a governmental duty, and the fact that it has accepted a charter authorizing it to discharge such duty neither creates a contract between it and the state that the duty shall be performed nor renders its discharge the exercise of a special privilege, so as to make it liable for damages for the nonperformance or negligent performance thereof.

Same—Same—Nature of Duty Not Changed by Reason of Fact That Part or Whole of Expense Is Borne by Abutters.

The fact that a part of the expense for constructing or repairing a street will be paid for by those whose property is specially benefited thereby does not make the duty of repairing the streets any less a governmental one than if the entire expense were to be paid by a general city tax.

Same—Same—Stone Crusher Engaged in Breaking Rock for Street—Liability of City for Negligence of Servants.†

A municipal corporation, in breaking, by means of a stone crusher, stones for macadamizing a street, is performing part of its governmental duty of repairing the street, though the work is not done on the street itself, but at a stone quarry some 10 miles away, and therefore is not liable for the negligence of its servants engaged in the work.

Hamersley, J., dissenting.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action for personal injuries by Matthew Colwell, an employee, against the city of Waterbury. Verdict and judgment for plaintiff, and defendant appeals. Error, and new trial granted.

The complaint alleged that defendant was the owner of a stone crusher used to crush stone for macadamizing the streets of the city of Waterbury, and that defendant also sold stone crushed by such crusher at a profit; that on the 12th of July, 1894, plaintiff was in the employ of the defendant, feeding stone into said crusher, when, by reason of a broken tooth in said crusher, and of the want of a proper covering for said crusher, which defects were known to the defendant's superin-

*That a municipal corporation is not liable for the negligent exercise of governmental functions, see Nicholson *v.* City of Detroit, ante, p. 613, and foot-note.

†See Twist *v.* City of Rochester, 1 Mun. Corp. Cas. 20; Quill *v.* Mayor of New York, 1 Mun. Corp. Cas. 35, and note; Missano *v.* Mayor of New York, 2 Mun. Corp. Cas. 654; Afflick *v.* Bates, Treasurer, 3 Mun. Corp. Cas. 222; City Council of Augusta *v.* Owens, 4 Mun. Corp. Cas. 194; Little *v.* City of Holyoke, 5 Mun. Corp. Cas. 27, and note; Rhobidas *v.* City of Concord, 5 Mun. Corp. Cas. 91; Folk *v.* City of Milwaukee, 5 Mun. Corp. Cas. 335, and note; Town of Colorado City *v.* Liafe, 6 Mun. Corp. Cas. 620; McDougald *v.* Town of Lumberton, ante, p. 137.

tendent and foreman in charge of said machine, the latter of whom had promised the plaintiff that new teeth and a proper covering would be furnished for said machine, so as to make it safe, the plaintiff was injured by a stone thrown by said machine while he was feeding the same, which struck him in the right eye and wholly destroyed the sight thereof. As a second defense, the defendant alleged that at the time of the accident it was engaged in the performance of a public duty imposed upon it by statute, in repairing certain highways within its limits by macadamizing them, which work was being done in accordance with the provisions of its charter under the superintendence of the street inspector, who had employed a foreman to take charge of .the stone crusher and the crushing of the stone, which foreman, with authority from said inspector, had employed the plaintiff, who, at the time of the accident, was actually employed at such work in the town of Cheshire. The court having overruled the plaintiff's demurrer to this answer, these allegations were denied by the plaintiff's reply. Upon the trial it appeared that the stone crusher by reason of a defect in which the plaintiff was injured was owned by the defendant, and at the time of the accident was being used by the defendant in the town of Cheshire, 10 miles from Waterbury, in crushing stone to be transported by rail to Waterbury and by teams to a street which was being macadamized, and there used in macadamizing said street. The plaintiff, it appeared, was employed by the defendant's street inspector, called "Superintendent of Streets," who had the general superintendence of this work and the care and maintenance of streets, and was put to work on the stone crusher by the foreman, who, subject to the superintendent, had charge of the work of stone-crushing at Cheshire, and at the time he was injured was so employed in the work of crushing stone which the defendant intended to use, and did use, in the macadamizing of one of its streets. There seems to have been no evidence that the defendant, prior to the accident, ever sold the stone crushed by said machine, or used them for any other purpose than in macadamizing its streets. The defendant, in substance, requested the court to charge the jury that the city of Waterbury could not be held liable, by reason of any negligence on the part of its officers or servants who were in charge of the work of crushing the stone for the purpose of repairing its streets, because in doing said work the defendant was performing a public governmental duty imposed upon it by the state. The court charged the jury, in part, that the care and maintenance of its streets by the defendant was a governmental duty, and that, if the preparation of the stone used in the repair of the street was work done in the performance of such governmental duty, there could be no recovery; that "the crushing of stone intended to be used and subsequently used in macadamizing a street 10 miles away was not work done in the care

and maintenance of the street. Such work is confined to the work done on the street itself, or in bringing to the street the necessary materials and instrumentalities used in the work; it has no relation to the manufacture of material or instrumentality, or the use of machinery for that purpose." It is provided by an act of legislature, made a public act, that the city of Waterbury shall be a highway district; that its court of common council shall have the sole and exclusive authority and control over all streets within the limits of the city, and the sole and exclusive power to lay out and make new streets, and to alter and repair streets, and the like power to order the paving, macadamizing, or otherwise improving any street or highway within the city, and that said court of common council, upon the execution of any order for the paving, macadamizing, or otherwise improving any such street, may assess a reasonable part of the expense thereof upon the persons whose property is especially benefited thereby. The act further provides for the appointment by the board of aldermen and the court of common council of a board of street commissioners, who are to have the general superintendence and control over the streets, and to cause the same to be kept in good condition and repair, and to execute all orders of said court in reference to the streets, etc., and who are empowered to employ, in the name and behalf of the city, a street inspector, a street surveyor, and such other persons as may be necessary for the performance of the duties imposed upon said board. 7 Sp. Laws, pp. 217–219.

Lucien F. Burpee and John P. Kellogg, for appellant.
John O'Neill and George H. Cowell, for appellee.

HALL, J. (after stating the facts). The injury to the plaintiff was caused by the operating of a defective stone crusher upon which he was at work. The alleged ground of liability is the negligence of the city, or that of its street inspector, in placing the plaintiff, as an employee of the city, at work upon such defective machine. If the city, or its street inspector, in operating the stone crusher, was engaged in the performance of a public governmental duty, the defendant, in the absence of any statute making it so, is not responsible in damages to the plaintiff for the injury caused by such act of negligence, either upon the theory that the city failed to perform its duty toward an employee, to provide him a reasonably safe place in which to work or reasonably safe instrumentalities with which to work, or upon the theory that the plaintiff, if not a servant of the city, was injured by the carelessness of the defendant's agent while the latter was performing the defendant's work. If the city was negligent in furnishing its workmen with defective machinery with which to perform a public service, it is exempt from liability for such negligence for the reason that, in all that either the city or the plaintiff did in the performance of such public duty,

they acted as governmental agencies, and not in the exercise of any privilege or power for the immediate benefit of the municipality, and because, while so acting, although the city paid the plaintiff for his services, the relation between them was not the ordinary one of master and servant which exists between a city and its employees in the performance of strictly municipal duties. Jones v. City of New Haven, 34 Conn. 1–13; Jewett v. City of New Haven, 38 Conn. 368, 9 Am. Rep. 382; Daly v. Same, 69 Conn. 644–649, 38 Atl. 397; Bartram v. Town of Sharon, 71 Conn. 686–692, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225. On the other hand, if the street inspector, as an officer or agent of the city, and as the one having, by authority of the board of street commissioners, and in discharge of the duties imposed upon them by the city charter, the entire care and maintenance of the streets, was guilty of negligence in the performance of a public duty, in using a defective stone crusher, or in failing to provide a proper covering for it while it was in operation, the city of Waterbury is not liable for the consequences of his negligence, since the street inspector was so far a public agent that as to such acts of negligence the rule respondeat superior does not apply to the defendant. Judge v. City of Meriden, 38 Conn. 90–97; Daly v. City of New Haven, 69 Conn. 644–650, 38 Atl. 397. We have had occasion to state heretofore that the rule which thus exempts municipalities from liability when they or their servants are acting in the discharge of a public duty does not relieve them from responsibility for the negligent acts of their workmen which are not incident to and do not flow from the performance of the public work in which they are engaged, and in doing which acts such workmen are therefore not properly acting as agents of the law, nor from liability for the consequences of the particular acts which the municipality has directed to be performed, and which from their character, or the manner in which they are so ordered to be executed, will naturally work a direct injury to the property of others, or create a nuisance, or occasion a wanton injury to the property or rights of other persons. Judd v. City of Hartford, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312; Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32; Mootry v. Town of Danbury, 45 Conn. 550–556, 29 Am. Rep. 703; Weed v. Borough of Greenwich, 45 Conn. 170–183; Danbury & N. R. Co. v. Town of Norwalk, 37 Conn. 109–119. The trial court, while recognizing the rule of municipal immunity above stated, in effect instructed the jury that when the plaintiff was injured the defendant was not engaged in the performance of a governmental duty. That part of its charge was incorrect. In doing the work of constructing and repairing its highways, the city was clearly performing a governmental act. Jones v. City of New Haven, supra. The acceptance by the city of a charter authorizing it to discharge such governmental duty neither created a con-

tract between it and the state that such duty should be pe formed, nor rendered the discharge of such duty the exercis of a special privilege, for the nonperformance or negligei performance of which the city would become liable. Hewiso v. City of New Haven, 37 Conn. 475–482, 9 Am. Rep. 342 Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 33: Macadamizing its streets was one of the ways by which th city might perform its duty of maintaining and repairing it highways (City of New Haven v. Whitney, 36 Conn. 373–376, and it was for the city to decide whether that was the bes way of discharging that duty. Hoyt v. City of Danbury, 6 Conn. 341–352, 37 Atl. 1051; Healey v. City of New Haver 47 Conn. 305–314.

It was within the taxing power of the legislature to provid that a reasonable part of the expense of such repairs shoul be borne by those whose property was especially benefite thereby (City of New London v. Miller, 60 Conn. 112–116, 2 Atl. 499), and the fact that a part of such expense might be s paid did not make the duty of repairing the streets any th less a governmental one than if the entire expense were to b paid by a general city tax.

The work of breaking, by means of a stone crusher, th stone to be used in macadamizing the street, was a part of th work of macadamizing such street. It was necessary tha the stone used in macadamizing should be broken into smal pieces. If laborers had been employed to break the stone with hammers, upon the street to be macadamized, it woul hardly be said they were not performing a part of the work o macadamizing the street. But to become part of the work o macadamizing it is not necessary that the labor should b performed upon the street to be repaired. Part of the worl of macadamizing is necessarily performed elsewhere, as th carrying of the materials to the street. If the city could d the work of breaking the stone more economically and suc cessfully at the quarry than upon the street, and by the use o a machine than by breaking them by hand, it had the right t do the work at Cheshire by means of a stone crusher, and th fact that it did so did not change the character of the work o of the duty which it was performing. Whether or not th stone crusher, either before or after the accident, had beer used by the city for other purposes than in macadamizing it streets, was not decisive of the case. It was a question fo the jury whether, at the time of the accident, either the city or its street inspector, or its other agents in charge of the work were in fact engaged in operating the stone crusher for the purpose of macadamizing a city street, as claimed by the defendant. It seems to have been shown at the trial that when the plaintiff was injured the stone crusher was being operated to crush stone to be used, and which in fact were used, in macadamizing a certain street. For an injury sustained by the plaintiff under such circumstances the city has the same

immunity from liability as from one suffered by its employee in operating a defective street roller or fire engine. Municipal corporations are not liable unless made so by statute for injuries occasioned by negligence in using or failing to keep in repair the fire engines owned by them. 2 Dill. Mun. Corp. (4th Ed.) p. 976, note 1; Jewett v. City of New Haven, 38 Conn. 368–381, 9 Am. Rep. 382.

A very similar case in many of its aspects to the one at bar is that of Barney v. City of Lowell, 98 Mass. 570, cited in Jewett v. City of New Haven, in which it was held that the city was not liable for an injury caused by the negligence of a teamster, engaged in carting stone from a stone crusher to repair a highway, and employed in that work by the superintendent of streets, who had charge of the repairing of the streets and the crushing of the stone for that purpose.

In the case of Hughes v. Monroe Co., 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33, it was held that the county was not liable for an injury sustained by one of its employees in operating a steam mangle in a laundry which the servants of the defendant had failed to keep in proper repair; and in Wild v. Paterson, 47 N. J. Law, 406, 1 Atl. 490, that the defendant was not liable for an injury to a member of the fire department caused by a defective brake of the steam fire engine which he was assisting in taking to a fire. In the latter case it was held that, since such employees of the corporation were mere instruments in the execution of its public duties, the fact that the plaintiff was a paid employee of the city would not create between them the ordinary relation of master and servant, so as to render the city liable for its failure to keep the engine in good repair.

For the reasons given we think the trial court erred in not charging the jury substantially as requested by the defendant, and in charging that the crushing of stone intended to be used and subsequently used in macadamizing a street was not work done in the care and maintenance of the street.

The allegations in the complaint of a promise by the defendants' foreman to furnish new teeth and a proper covering for the stone crusher were, as stated in plaintiff's brief, not intended as a statement of liability upon a contract, but of facts affecting the question of contributory negligence. As bearing upon that question, the court properly charged the jury that information of such promises, if given to the inspector of streets, was sufficient information to the city.

There is error, and a new trial is granted.

The other judges concurred, except HAMERSLEY, J., who dissented.

CITY OF GLASGOW *v.* GILLENWATERS.

(*Court of Appeals of Kentucky, March 20, 1902.*)

[67 S. W. Rep. 381.]

Obstruction in Street—Barbed Wire across Street Undergoing Repair —A Nuisance Where No Light or Warning Is Given.

A barbed wire stretched across a street to prevent travel on a pa of the street undergoing repairs is a nuisance, and the city is liat for an injury to one who, in the absence of any light or other war ing, runs against the wire in the nighttime.

Same—Same—Same—City Liable though Same Was Act of Indepen ent Contractor †

The fact that a city has placed the work of repairing a street charge of an independent contractor does not relieve it of the du to see that proper precautions are taken to warn travelers of t danger.

Same—Same—Same—Contributory Negligence—Crossing Street Place Other Than Regular Crossing.‡

It is the duty of a city to see that all parts of a street are kept safe condition for pedestrians, and therefore a pedestrian is n chargeable with contributory negligence in unnecessarily leavi the sidewalk to cross the street at any point.

Same—Same—Damages.

A verdict for $220 for the cutting of plaintiff's lips and gums by barbed wire is not excessive.

Appeal from circuit court, Barren county.

"To be officially reported."

Action by E. P. Gillenwaters against the city of Glasgow recover damages for personal injuries. Judgment for plainti and defendant appeals. Affirmed.

W. L. Porter and Herman Morris, for appellant.

Basil Richardson, V. H. Baird, and J. A. Conyers, f appellee.

O'REAR, J. Appellant city, by ordinance, let the contra for the improvement of one of its streets. Plans and specific tions were included in the agreement executed between tl city and the contractor. In doing the work the street was torn up as to render it unsafe for travel. The contractor, his servants, caused a barbed wire to be strung from a tel phone pole standing at the edge of the pavement to the opp site side of the street, to prevent travel over the porti undergoing repairs. The wire was about five feet from tl ground. While the street and the wire were in this conditio appellee attempted to go across the street, and, in a cour

*See City Council of Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 5 and note.

†See Southworth *v.* Shea, ante, p. 611, and foot-note; Beattie City of Detroit, ante, p. 767.

‡See City Council of Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 5 and note; Bell *v.* Town of Clarion, 5 Mun. Corp. Cas. 510; no appended to City of Denver *v.* Hyatt, 5 Mun. Corp. Cas. at p. 149.

theretofore customarily used by pedestrians going to and from the railroad depot in that vicinity, ran into this wire, severely cutting his lips and gums. Had he kept to the sidewalk, he could have avoided the obstruction. The injury occurred in the nighttime. It is claimed for appellee that there was neither light nor other appropriate warning of this dangerous arrangement. In this suit by appellee against the city for damages for this injury, it pleaded, among other defenses, that it had let this contract to an independent contractor, and was not responsible for his negligence; that it had no control over the manner of his executing the work; that the contract, in or of itself, did not necessarily involve the dangerous situation by which appellee was injured. A demurrer was sustained to this plea. The correctness of this ruling is the principal question involved in this appeal.

The city is required by statute (section 3643, Ky. St.) to keep its streets in a reasonably safe condition for travel, and free from obstructions, and it would seem that such would be its duty independent of such statute. Fugate v. City of Somerset (Ky.) 29 S. W. 970; City of Covington v. Bryant, 7 Bush, 349. The question then arises, can a city dispense with this duty to the public by devesting itself of authority or control over its highways? In Storrs v. City of Utica, 17 N. Y. 109, 72 Am. Dec. 437, where the city had let out the building of a sewer by contract, and the work was left open in the nighttime without guards, lights, or warnings, and plaintiff drove into it, this same defense was attempted. The court said: "Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the improvement is plainly bound to take those precautions. The contractor may very properly be bound by his agreement not only to construct the sewer, but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way, either avoid indictment on behalf of the public, or its liability to individuals." This is followed and sustained by Mayor, etc., v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Dill. Mun. Corp. §§ 791–793; City of Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166. In the last-named case, in denying the defense involved in the plea of independent contractor, the supreme court of Indiana said: "It seems to us that in view of the exclusive power conferred, and of the correlative duty necessarily imposed upon the

appellant over the streets, alleys, and highways within it corporate limits, in and by the legislation of this state pro viding for the incorporation of cities, the appellant could no and ought not to be allowed to avoid the imperative dut which it owed to the public to keep its streets, alleys, an highways in a safe condition for use in the usual manner b travelers, nor to escape responsibility for its neglect or failur to perform such duty, upon the plea that it had entered int a contract with another person for the performance of th work, which rendered such use of the street, alley, or high way unsafe or dangerous to the traveling public. * * The appellant could not, by any contract it might make, avoi its liability to third persons for injury or death resulting fro a breach of its duty in the care and control of its streets." W are of opinion that the court properly sustained the demurre There was evidence sufficient to support the finding of th jury that there was no light nor other warning at the poin where this wire was placed. It of itself was a very dangerou obstruction, constituting a nuisance, and should not hav been allowed by the city.

Appellant asked the court to instruct the jury that if appelle unnecessarily left the sidewalk, which was safe, and, withou good or sufficient reason, walked or ran into the wire acros the street, and was injured, they must find for the defend ant. This instruction was refused, and the refusal is mad the basis of a complaint upon this appeal. It was said i the case of City of Lexington v. Auger, 4 Ky. Law Rep 24: "It is true, there was ample room on the sidewal for the traveler, and he would have to make a diversion fro the main path to reach the danger; still he had the right t use any part of the street for the purpose of traveling." Cit of Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep 308. In the last-named case it was said: "A divergence o departure from the crosswalks is not an evidence of want o care. Pedestrians have a right to cross a street at any point and it is a common practice to do so." In Brusso v. City o Buffalo, 90 N. Y. 679, it was held: "A person desiring t cross the street, either in the nighttime or in the daytime, i not confined to a crossing. He has a right to assume tha all parts of the street intended for travel are reasonably safe and if in the nighttime he desires to cross from one side to th other, and knows of no dangerous excavations in the street or other obstructions, he may cross at any point that suits hi convenience, without being liable to imputation of negli gence." This doctrine seems to be abundantly sustained an inherently sound. The instruction was properly refused.

The verdict of the jury and the judgment for appellee of $22 is not excessive, and is sustained by the law and the evidence

Judgment affirmed, with damages.

COLES *v.* REVERE.

(*Supreme Judicial Court of Massachusetts, Suffolk, April 2, 1902.*)

[63 N. E. Rep. 430.]

Defective Highway—Necessity for Guard Rail*—Due Care of Plaintiff—Questions for the Jury.

Plaintiff was driving along a street and by a high ledge, when men working on the ledge loosened a stone, which rolled into the street, and frightened the horse so that he shied over a wall the top of which was level with the street. There was no railing or other protection on the top of the wall: *held*, in an action against the town for injuries, the want of a railing being the negligence complained of, that the questions whether the horse was driven with due care, whether the way was defective, whether the loss of control of the horse would have been instantly regained if the vehicle had not reached the defective spot, and the accident, if there had been a proper barrier, would have been avoided, and whether the defect was the sole cause of the injury, were all for the jury.

Exceptions from superior court, Suffolk county; Elisha B. Maynard, Judge.

Action by Rebecca Coles against the inhabitants of the town of Revere. From a judgment for plaintiff, defendant brings exceptions. Exceptions overruled.

This was an action of tort, brought by Rebecca Coles against the inhabitants of the town of Revere to recover damages for injuries received on account of the alleged defective condition of Salem street, a public highway in said town. The pleadings may be referred to. On October 25, 1897, the plaintiff and her son were driving along Salem street, and reached a point on the street nearly opposite a large ledge about 100 feet high, where there was a stone crusher, and which was used for quarrying stone. The horse was traveling at a walk, or a pace a little faster than a walk,—six or seven miles an hour,—and as the team approached the ledge some men who were working on the top of the ledge, employed by Mr. Burnett, loosened a large stone, weighing several tons, and rolled it down from the top of the ledge towards the street. There was evidence from which the jury might infer that Burnett and his men saw the plaintiff and the horse before dislodging the stone as aforesaid, and that they gave no warning before dislodging said stone. The horse was frightened at the noise of the rolling of the stone and the loud report or noise it made when it struck another stone at the foot of the hill, about 15 feet from where the horse was, and shied, and went over the sidewalk and over the wall. At the point where the horse went over there was a bank wall about 2 feet 9 inches above the adjoining land, and there was no railing or other protection to keep horses from going over the wall. The top of the said wall was on a level with the surface of the street. The want of railing or fence constitutes the defect

*See Johnson *v.* City of Sioux City, ante, p. 772, and foot-note.

complained of by the plaintiff. At the close of the evidence and before the arguments of counsel, the defendant requested the following rulings: "(1) That on the whole evidence the plaintiff is not entitled to recover, and the verdict must be for the defendant. (2) That there is no evidence that the plaintiff was in the exercise of due care, and the verdict must be for the defendant. (3) There is no evidence that the defendant was negligent, and the verdict must be for the defendant. (4) If the accident was in any degree caused by the neglect of a third person, the verdict must be for the defendant. (5) If the injury was caused by the combined effect of the unsafe condition of the highway and the negligent or careless act of a third person, the plaintiff is not entitled to recover, and the verdict must be for the defendant. (6) If the plaintiff's horse, from fright or otherwise, while being driven with due care, became actually uncontrollable, so that the driver could not stop him or direct his movements, and in this condition came to a defect in the highway, the town is not liable, and the verdict must be for the defendant. (7) If the act of Mr. Burnett, in causing the stone to be thrown down in front of the team driven by the plaintiff, was careless or negligent and this act caused the injury complained of, the plaintiff can not recover, and the verdict must be for the defendant." The court refused to give the rulings numbered 1, 2, 3, and 7 in any form, and refused to give any of the other rulings requested except as they appear in the following portions of the charge to the jury: "A plaintiff cannot recover against a town unless he himself is in the exercise of due care. That is the first step in all damage cases, whether against a town an individual, or a corporation. In the case of towns, they must show that the defect was the sole cause of the injury. So far as a town is concerned, the negligence of the town must be the sole cause of the injury. And the same rule applies to barriers. The question is, taking the amount of travel in a place, where it is, and the probability of danger, whether or not a barrier is required where there is an embankment upon one side or the other. The courts say 'Cities and towns are required to provide ways that shall be reasonably safe and convenient for travelers. They are not bound to fence them so as to prevent travelers from straying outside of them, and they are not obliged to mark their limits. They are required to erect suitable barriers where there are dangerous places in such proximity to the highway as to render barriers necessary in order to make the way reasonably safe and convenient. But a railing or barrier is not to be erected because a traveler may meet with an accident if there is none. The question in each case is whether one is needed to make the highway reasonably safe and convenient for travelers who themselves are in the exercise of due care.' So that is just the point in this case, so far as the barrier is concerned. Was a barrier needed in this place to make the highway rea

sonably safe and convenient for a person who was in the exercise of due care passing along the road? The mere fact that a person gets injured does not make it necessary to have a barrier; but, taking the amount of travel, etc., if the evidence fails to satisfy you that a barrier was needed to make it reasonably safe,—not necessarily so that a party cannot get hurt, but fairly reasonable,—that would end the case. Taking the highway as it stood and the circumstances surrounding, had the officers of the town, acting as reasonable and prudent men,—had they any reason to anticipate that a person using proper care would come to any harm because there was no railing there? If they, acting as men of ordinary care and prudence, knowing this place and the travel upon it, if they had any reason to apprehend that a person coming along with a proper team, and exercising proper care, would come to harm because there was no railing there, then it would be a defect. But, on the other hand, if they had no reason to apprehend that a person in that situation would come to harm, then there would be no need of a railing there, and it wasn't a defect. Now comes the question of the care of the plaintiff, and, of course, you have to take all the surrounding circumstances in regard to that to determine his care. The plaintiff claims that he had a safe horse, and that when he saw that his horse was frightened he did his best to control him. Now, the mere fact that a horse shies, that of itself, if the horse was not vicious, provided it was a proper kind of a horse, and had no habit of shying,—the mere fact that the horse shied, that of itself, standing alone,—does not necessarily show that a plaintiff was not in the exercise of due care. Our supreme court has said: 'It is necessary, in order to enable the plaintiff to recover, that the defect in the highway should have been the sole cause of the accident, no other cause contributing thereto. If, before the accident, the horse, from any cause, became actually uncontrollable, and was so when the accident occurred, the plaintiff cannot recover. But if there was only a momentary loss of control, and the control for the animal would have been instantly regained if the vehicle had not come in contact with the defect in the way, then the plaintiff may recover.' There is where one of the contests is in this case. 'If there was only a momentary loss of control, and the control of the animal would have been instantly regained,' and the accident have been averted if there had been a proper barrier here, then that fact would not prevent the plaintiff from recovering. You have to determine on that point what was the fact about this horse, because there is very contradictory testimony in regard to it. I will say right here, it does not make any difference what caused the fright of the horse,—whether something in the road, or something outside of the road. That is not the question; but the question is whether or not, so far as the horse was concerned, it was simply momentary, and that this person would

have regained the control of the horse had it not been for th defect. It was this man's business, of course, to be drivin his horse and paying some attention to the way he was going A person is not obliged to have his whole attention confine to the way he is going or the way he is driving, but he mus conduct himself in those matters in the way you expect me of ordinary prudence to conduct themselves. Was this ma doing that under the circumstances,—what he knew about th road, and what he knew was going on up on the ledge? If h did, he was in the exercise of due care. If he did not, then h was not, and he cannot recover. These are the principle which govern this case. In the first place, taking the roa as it was, was there a defect? That depends upon all th conditions and the circumstances. Had the officers of th town, whose duty it is to look after the roads, had they—tak ing everything into account, what was going on there, and th surroundings, and the amount of travel—had they any reaso to apprehend that anybody in the exercise of due care woul come to any harm? If they had not, then there was no defect If they had, there was a defect. In the next place, abou this horse. Was this horse out of the control of the drive that is, more than momentarily? If this horse was out of th control of the driver more than momentarily, so that he woul not have regained the control of it, so that a barrier woul not have stopped him, then he cannot recover. But, on th other hand, if the horse was momentarily out of his contro and he would have regained his control, and would hav avoided an accident if there had been a barrier, then he ca recover. Then, in the next place, was he conducting himse in the way that you would expect men of ordinary prudenc would do? If he was, then he was in the exercise of du care; and, if he was not, he was negligent, and the plainti cannot recover. I stated to you, gentlemen, that the defe in the way must have been the sole cause of the injury; tha is, if any other outside thing was the cause of the injury,- helped to cause it,—then the plaintiff could not recover; an that is what this request means, as I understand it: 'If th injury was caused by the combined effect of the unsafe con dition of the highway and the negligent or careless act of a thir person, the plaintiff is not entitled to recover, and the verdi must be for the defendant.' It makes no difference wheth the horse got frightened by something in the highway c something outside."

Jas. H. Sisk, for plaintiff.
Cutler & James, for defendant.

HAMMOND, J. Upon the evidence, the questions whethe the horse was driven with due care, whether the way wa defective by reason of the absence of a barrier, whether th loss of control of the horse was only momentary, and woul have been instantly regained if the vehicle had not reache

the defective spot, and the accident, if there had been a proper barrier, would have been avoided, and whether the defect was the sole cause of the injury, were all for the jury. There was no error in the manner in which the court dealt with the rulings requested by the defendant. The instructions under which the case was submitted to the jury were full and correct. Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166; Tisdale v. Inhabitants of Bridgewater, 167 Mass. 250, 45 N. E. 730.

Exceptions overruled.

HIRSCH *et al. v.* MAYOR, ETC., OF CITY OF BRUNSWICK.

(*Supreme Court of Georgia, Feb. 7, 1902.*)

[40 S. E. Rep. 786.]

City Streets—Water Terminals—Power to Lease as Public Property.

The municipal authorities of Brunswick have power to lease as public property the water terminations of the streets of that city.

(Syllabus by the Court.)

Error from superior court, Glynn county; Jos. W. Bennet, Judge.

Action between B. Hirsch and others and the mayor and council of city of Brunswick. From the judgment, Hirsch and others bring error. Affirmed.

Crovatt & Whitfield, for plaintiffs in error.

F. E. Twitty, W. G. Brantley, and W. E. Kay, for defendant in error.

LUMPKIN, P. J. The only question in this case is whether or not the municipal authorities of the city of Brunswick have the power to lease the water terminations of its streets, and thus prevent access through the same by the public generally, to the water's edge. The court below held that these authorities had such power, and if this ruling was correct the judgment excepted to should be affirmed. On December 22, 1857, the general assembly passed an act entitled "An act additional to An act to incorporate the town of Brunswick, in the county of Glynn, to define its jurisdictional limits," etc., "approved February 22, 1856, to amend said charter, to confirm the doings of the mayor and council, to mark the boundary lines of the town and common used for other municipal purposes therein specified." Acts 1857, p. 167. By the second section of this act of 1857, the mayor and council of the city were authorized "to adopt any measures which may appear to them to be necessary or proper to secure and protect the interests of the city, and the property thereof, and to lease the balance of the town commons, and other public squares, and public trust lots, water terminations of the streets, and all other public property belonging to the city, on such terms and for such periods and considerations as they

may deem for the interest of the city, and the well-being of its citizens." In 1866 another act was passed giving to the mayor and council of Brunswick authority "to lease all or any portion of the common or any other public property appertaining to said city for such term of years as may seem to them advantageous to said city." Acts 1866, p. 184. The only qualification upon the power thus conferred was that no lease should exceed a term of 99 years, unless assented to by a majority of all the legal voters of the city. In 1872 an act was passed entitled "An act to consolidate and amend the several acts incorporating the city of Brunswick, and for other purposes therein mentioned." Acts 1872, p. 151. By the forty-second section (page 160) it was declared that "the said mayor and council shall have the authority and power to adopt and execute any measures which may appear to them necessary and proper to secure and protect the interests of said city, in all and every portion of said commons, and in all other property thereof." Again, in 1889, another act relating to the city of Brunswick was passed. Acts 1889, p. 1010. This, however, was not an act purporting to consolidate the several previous acts incorporating this city, but, as its title clearly indicates, its purpose was to amend the consolidating act of 1872, mentioned above, and also an act amendatory thereof, which was approved February 25, 1876. The act of 1872 did not expressly purport to repeal the act of 1857 or the act of 1866, but merely contained a general section repealing all conflicting laws.

It was insisted in the brief for the plaintiffs in error that in passing the act of 1872 the general assembly intended to sweep out of existence and do away with all previous acts with relation to the incorporation of the city of Brunswick, and that accordingly the power conferred by the act of 1857 to lease the water terminations of the streets, and the power conferred by the act of 1866 to lease "the common or any other public property appertaining to said city," if applicable to the water terminations of the streets, no longer existed after the approval of the act of 1872. It is not clear whether or not the consolidating act of 1872 had, or was designed to have, the effect thus claimed for it. We do not, however, deem it necessary to rule definitely upon this precise question; for, as will have been noted, the act of 1872 itself confers upon the municipal authorities of Brunswick the power to adopt and execute any measure which they may consider necessary to secure and protect the interests of the city, not only in the commons, but "in all other property thereof." So the real question is, are the water terminations of the streets of Brunswick "property" in the sense in which this word is used in the quotation last made? Undoubtedly they were so regarded when the act of 1857 was passed. That act, like that of 1872, authorized the mayor and council to adopt measures to secure and protect the interests of the city and "the property thereof,"

and in enumerating the items of the city's property is expressly included the "water terminations of the streets." Even if, then, the act of 1857 has been annulled by the act of 1872, there is nothing in the latter which, either in express terms or by necessary implication, does away with the proposition that these water terminations should be treated as "property," and subject to such disposition as the mayor and council, under the broad power conferred upon them by the act of 1872, should see proper to make of the same in order to secure and protect the best interests of the city. On the same line it may, we think, be safely asserted that the act of 1866, in referring to the public property of the city, was intended to apply to the water terminations of the streets. It is true that the leasing power conferred by this act expressly mentions "the common," but it can scarcely be doubted that at the date of its enactment the water terminations were still, in legislative contemplation, property of the city. As will have been seen, the act of 1866 limited the terms of leases to 99 years, unless by popular vote a longer term was assented to by a majority of the legal voters. The lease involved in the present case does not exceed 99 years.

We do not think the forty-second section of the act of 1872 was in any wise affected by the act of 1889. It was not mentioned in that act, and, as has been seen, the act of 1889 was not an act to create an entirely new charter for Brunswick, but only one to amend two acts previously enacted with reference thereto. Our conclusion, therefore, is that the water terminations of the streets of the city are property, and, as such, the same may be leased by the municipal authorities, with the limitation on their power above pointed out.

It was urged in behalf of the plaintiffs in error that the act of 1857 was unconstitutional in so far as it declared these water terminations to be property. The objection to the act in this respect was that it contained matter not embraced in its title. We do not think this position well taken; for it seems to us that the title, which is quoted above, is broad enough to cover this particular matter. But, even were it otherwise, a careful reading of the act of 1872 will show that in passing it the general assembly recognized and dealt with the act of 1857 as a valid law. This is deducible from the fact that in the act of 1872 many of the provisions of the act of 1857 are repeated either in terms or in substance, and we are fully satisfied that in passing the act last mentioned it was clearly within the mind of the law-making power to deal with and treat as property of the city the water terminations of its streets, though such terminations were nowhere in the act expressly mentioned. There was no error in refusing to grant a mandamus compelling the city authorities to remove the obstructions complained of in the petition filed by the plaintiffs in error.

Judgment affirmed. All the justices concurring.

COAN *v.* BROWNSTOWN TP.

(*Supreme Court of Michigan, May 21, 1901.*)

[86 N. W. Rep. 130.]

Defective Bridge—Injury to Traction Engine*—Negligence—Instructions.

Where plaintiff's engine was injured by a bridge giving way after plaintiff had placed boards lengthwise across it for additional safety, a charge, in an action against the township, that there was something that the jury could remember: That the engine went down and was injured, and that the bridge gave way, and that they were starting to use considerable caution, by putting planks across; how the engine went off, and how the bridge gave way, and all about it, was something that must be left to the judgment of the jury,—was erroneous, as conveying a wrong impression as to what would establish defendant's negligence.

Conduct of Counsel—Prejudicial Remarks.

Plaintiff sued the township for injuries to his engine by a bridge giving way. One of the defendant's witnesses testified that the piston rod was not injured, because it was protected by the cylinder: *held*, that the question by plaintiff's counsel, asking if the witness had face enough to sit there and swear to the jury that, without putting steam on the engine, he could tell anything about it, and a remark that the witness should be committed, tended to prejudice the jury, and the attorney should have been reprimanded by the court.

Damages—Interest.

Where plaintiff's engine was thrown into a ditch by a defective bridge giving way, and the jury did not allow him anything for the loss of the use of it, he was entitled to recover interest on its value from the date of the accident.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by Amos A. Coan against the township of Brownstown. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Samuel W. Burroughs, for appellant.

James H. Pound, for appellee.

LONG, J. This action was brought under the statute to recover damages for injuries occasioned to plaintiff's threshing engine by the falling of a bridge over which the engine was passing. It appears that the bridge was built some 18 or 20 years before the accident, but that it had been overhauled and rebuilt in 1894. It spanned what was called the "Blakely Ditch," and was about 30 feet long and 16 feet wide. As originally built, it had a long stringer, 30 feet in length, on each side, reaching from one abutment to the other. These stringers were heavy, square, continuous timbers; the ends resting upon abutments about 8 feet high. Braces were mortised in the stringers some distance from each end, meeting in the center about 5 feet above the center of the stringers. Through the top or apex of these braces an iron rod extended down through the stringers on each side, and through a sup

*See next case.

porting beam under the stringers. This beam was a heavy timber, and for years acted as a support to the center of the stringers. The center pieces upon which the plank floor of the bridge was laid extended from each abutment to the center beam. Heavy planking for the floor was then laid across the bridge from stringer to stringer, resting upon these center pieces. The evidence is conflicting as to how the repairs were made in 1894. Plaintiff's testimony tended to show that at that time the east stringer had become rotten, and was taken out and a new stringer put in, which, instead of extending from abutment to abutment in one continuous piece, as it had formerly done, was put in in two pieces, each piece extending only from its abutment to the center beam, and the center ends of the stringer resting upon the cross beam; that, to strengthen the center of this east stringer, a heavy plank had been nailed on each side of the stringer, extending out some distance on either side of the cross beam. The defendant introduced testimony tending to show that the new stringer put in was a continuous piece, extending from one abutment to the other. The accident occurred in August, 1896. The engine was a selfpropeller, and weighed 7,000 pounds. When the plaintiff approached the bridge that day, he stopped his engine and examined the bridge. The pathmaster of the district was there, and the plaintiff asked him if he thought the bridge was as safe as it had been the year before, when he crossed it with his engine. The pathmaster said he thought it was. They then took some heavy planks and laid them down lengthwise of the bridge, for the wheels of the engine to run on. The claim of the plaintiff is that when this was done the pathmaster said there would be no danger then in taking his engine over it. He attempted to do so, and when near the center the east stringer gave way, and the engine fell or went off the east side into the ditch, occasioning the damage for which suit was brought. The claim of the defendant is that the engineer was careless and negligent in driving his engine over the bridge, in that he lost control of it, and that it ran too near the east side, thus causing the east stringer to break.

The court charged the jury upon the various claims of the parties. He said to the jury: "If you find that the bridge, as built, and as repaired two years previous, was reasonably safe and suitable for ordinary travel, including the bearing up of an engine like the one in question, and that the township used due diligence in the construction and in the repairs, and in its watchfulness over the condition of the bridge, and that the accident occurred without any fault of its officers, or in the construction of the bridge or in its repairs, the plaintiff cannot recover." The court fairly submitted the issues to the jury, but, in concluding his charge, said: "If, with all the words that have crept into the case, I leave it to you, for there is something left, at least, that you can remember: That the engine went down and was injured; that the bridge gave way;

that they were starting to use considerable caution, by puttii planks across, making a double-plank floor; how the engi went off; how the bridge gave way; and all about it. Th is something that we must leave to the judgment of eleve men." It is the claim of the defendant that this last part the charge was misleading to the jury, and prejudicial defendant. We think that this part of the charge was mislea ing, and may have conveyed a wrong impression to the ju as to what facts would establish the negligence of the defen ant.

One Mr. Wager was called as a witness by the defendan He testified on his cross-examination, in relation to the co dition of the engine when found in the ditch, that the pisto was not injured, as it was protected by the cylinder, and th the cylinder was not broken. He was asked by plaintiff counsel: "Maybe I did not catch you exactly. Have yc got face enough to sit there and swear to the jury that, witl out putting steam on that engine, you could tell anythin about it,—whether that piston was right, straight or not,- until you took and used it?" This language was objected to b defendant's counsel, when plaintiff's counsel stated: "I thin this witness should be pretty near committed." Counsel fc defendant excepted to these remarks, and the court compelle the witness to answer the question. There is nothing in th testimony of the witness which called for these remarks fro counsel, and the tendency was to prejudice the jury. Th court should have then and there reprimanded counsel fc such uncalled-for and prejudicial statements.

There was great contradiction among the witnesses as t the value of the engine; some of plaintiff's witnesses placin its value at $1,200 and over, and the defendant's witnesse testifying that it was an old engine, and not worth over $15(The jury returned a verdict for the value of the engine a $800, and interest of $166.99; being interest from August 1 1896, the date of the injury. The court charged the jury o the question of interest on plaintiff's claim as follows: "Th total claim of plaintiff is $1,210. If the jury find he is entitle to recover, his damages will be fixed by the jury. This i modified, under the testimony of the case, to which they ma add interest from the time they have been already told t compute the interest for." It is the claim of defendant tha no interest can be allowed on this class of cases prior to judg ment. The declaration avers, substantially, that after th accident the plaintiff delivered up the engine to the townshi officers upon their promise to have the same repaired and the returned to him; that they never had it repaired and neve returned it, but left it out in the field, where it became ruste and worthless; that by reason thereof the plaintiff lost th engine, which was of the value of $1,200. Plaintiff's proof tended to show that the engine was delivered to the townshi officers for repairs. The case was tried by the plaintiff a

though the engine were a total loss. The defendant gave evidence tending to show that no arrangement was ever made with plaintiff to do anything more than pay for the costs of repair, and that the costs of such repair would not exceed $80. The supervisor of the township testified that he directed the plaintiff to take the engine to the shop, and that, if he would do so, the township would pay for the repairs, which he estimated would be about $80. This phase of the case was not submitted to the jury. The question submitted was as to the total value of the engine. There was nothing allowed for the value of the loss of the use of the engine, and, that being so, the plaintiff was certainly entitled to the interest on the value of the property. Interest may be recovered as a legal compensation for lost use. McGuire v. Galligan, 53 Mich. 453, 19 N. W. 142. We think, therefore, that the court was not in error in this part of the charge as to interest. For the errors pointed out, the judgment must be reversed, and a new trial granted. The other justices concurred.

STAUFFACHER *v.* TOWN OF SYLVESTER.

(*Supreme Court of Wisconsin, March 11, 1902.*)

[89 N. W. Rep. 495.]

Defective Highway—Gully—Injury to Traction Engine*—Sufficiency of Complaint.

Where a complaint alleges that plaintiff was injured while propelling a traction engine, on which he was riding, along the traveled track of a highway, by the ground giving way at a point where there was a "ditch or gully four or five feet deep close up to, and partly under, the traveled track, obscured from view by the presence of a rank growth of weeds," the complaint sufficiently shows that the highway was defective, and is not subject to the objection that it shows that the highway was sufficient for ordinary travel.

Appeal from circuit court, Green county; B. F. Dunwiddie, Judge.

Action by John Stauffacher against the town of Sylvester. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Colin W. Wright, for appellant.
J. L. Sherron, for respondent.

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint in an action for damages for personal injuries sustained by reason of a defect in the public highway October 13, 1899. In addition to allegations of a formal character, and the giving of the requisite statutory notices, and the disallowance of the plaintiff's claim for damages, the complaint alleges, in effect, that at a point in the highway, described, about 13 feet north of a certain bridge thereon,

*See preceding case.

there was on the day mentioned, and had been for a long time previous thereto, a ditch or gully, 4 or 5 feet deep, close up to, and partially under, the traveled track, on the east side thereof, and which on the day mentioned was obscured from view by the presence of a rank growth of weeds; that the insufficiency and want of repair and the gully or ditch had existed previous to the day mentioned for at least three months, and were well known to the town, its supervisors, and the overseer of the road district in which the highway at that place was situated, and through their negligence, and failure to repair the same by the construction of culverts for the passage of the surface water, and the erection of barriers along the east side of the traveled track, the highway near the gully constituted and was a dangerous defect therein; that on the day named the plaintiff was traveling along the highway in a northerly direction, and at the time was riding on the rear end of a steam thresher engine, which he then and there was assisting in propelling along the highway, and was then and there in the exercise of due care and diligence, and when the right hind wheel of the engine, which was then and there in the traveled track of the highway, came opposite the gully or ditch at that point, the ground underneath and to the east of the hind wheel of the engine broke away, by reason entirely of insufficiency and want of repair of the highway at that place, and the engine and the plaintiff, in consequence thereof, and in consequence wholly of the insufficiency and want of repair of the highway at that place, were, with great force, precipitated into the gully or ditch, and the plaintiff sustained great injury and damage to his person, and particularly in that his left lower limb was greatly and severely wrenched and twisted, and his left knee thrown out of joint, and he sustained other and serious bruises and injuries, for which he demanded $500 damages.

Counsel for the defendant contends that it appears from the facts alleged that the highway was sufficient for ordinary travel, and that the defendant was not bound to provide a highway which would support the great and extraordinary weight of a steam thresher engine, like the one in question. But there is nothing in the complaint to warrant an inference that the injury was the result of the breaking down of a reasonably safe highway. "A ditch or gully four or five feet deep, close up to, and partially under, the traveled track, on the east side thereof, * * * obscured from view by the presence of a rank growth of weeds," was certainly a very serious defect in the highway. The allegation is that when the hind wheel of the "engine, which was then and there on the traveled track," came opposite the gully or ditch, "the ground underneath and to the east of the hind wheel" broke away, by reason entirely of the insufficiency and want of repair of the highway at that place, and that there were no guards

or barriers. This court has held that an excavation two feet deep, and only two feet from the traveled track, without being guarded, might be held to be defective, as a matter of law. Seymer v. Town of Lake, 66 Wis. 651, 29 N. W. 554. See Hein v. Village of Fairchild, 87 Wis. 258, 58 N. W. 413; Prahl v. Town of Waupaca, 109 Wis. 299, 85 N. W. 350. Such ruling is in harmony with a Massachusetts case cited by counsel for the defendant. Hinckley v. Inhabitants of Barnstable, 109 Mass. 126. In another case in that state, cited by counsel for the defendant, it is held that "a town is liable for an injury occasioned by a defect in a highway, which the town is bound to repair, to an elephant driven over it with due care, if, in the opinion of the jury, an elephant, at the time and place and under the circumstances of the accident, was an animal which it was reasonably proper to take over a highway kept for the reasonable use of the public." Gregory v. Inhabitants of Adams, 14 Gray, 242. Counsel for the defendant refers to section 1347b, as amended by chapter 197, Laws 1899. These statutes have recently been considered and construed by this court. Welch v. Town of Geneva, 110 Wis. 388, 85 N. W. 970; Walker v. Village of Ontario, 111 Wis. 113, 86 N. W. 566. In the first of these cases it was held that "in such case, there being a direct causal connection between the excessive weight of the engine and the accident, and the act done contributing to the result which followed, the person doing it takes the risk of injury, and is without remedy if it occurs." In the other case it was held that the statute last cited "impliedly justifies the use of highways and bridges by traction engines, without liability on the part of owners, if they comply with its requirements; and it would seem that the proper authorities are under obligation to keep up their highways and bridges to a standard of usefulness and safety sufficient for such use." In that case it was also held that, "where the defective and rotten condition of the stringers and braces of a bridge was not so obvious as to be discoverable by ordinary observation, there was no conclusive inference of contributory negligence on the part of a person who was injured by the breaking of the bridge while he was attempting to cross it with a traction engine weighing 9,500 pounds, although he had passed over the bridge daily, knew it was twelve or thirteen years old, and did not test the structure by boring into the timbers." We must hold that the complaint in the case at bar states a good cause of action. Certainly it states facts sufficient to take the case to the jury.

The order of the circuit court is affirmed.

BOGUE *et al. v.* BENNETT.

(*Supreme Court of Indiana, April 18, 1901.*)

[60 N. E. Rep. 143.]

Traction Engines—Validity of Ordinance Prohibiting Use on Streets

Burns' Rev. St. 1894, § 3541, giving a city power to regulate t ordinance the use of coaches, hacks, drays, and other vehicles for tl transportation of passengers and freight or other articles for hir gives no authority to prohibit the running of traction engines c the streets, but is limited to a regulation of vehicles in use.

Same—Same.

Burns' Rev. St. 1894, § 3623, giving the common council of a ci exclusive power of streets, does not confer power to prohibit the ru ning of a traction engine on the streets, and an ordinance to th effect is void.

Appeal from circuit court, Grant county; H. J. Paulu Judge.

Action by Claude M. Bennett, by his next friend, again Edward Bogue and another. From a judgment in plaintiff favor, defendants appeal. Reversed.

Orlo L. Cline and Blacklidge, Shirley & Wolf, for appe lants.

Kirkpatrick, Morrison & McReynolds, for appellee.

MONKS, J. Appellee, Claude Bennett, was injured in 189 while riding a bicycle on a public street in the city of Kokomc by colliding with a traction engine owned by appellant Gwin and operated by his employee, Bogue. The complaint is i four paragraphs. The first, second, and fourth paragraph are predicated upon the alleged negligence of appellants an the want of contributory negligence on the part of the injure party. The second paragraph charges a willful injury. It i alleged in said first paragraph that said traction engine wa run on said street of said city without right, and without hav ing any person in advance of said engine, not less than 5 yards, to warn all persons approaching said engine, who migh be in charge of horses, of the proximity of said engine, an in violation of City Ordinance No. 383 of the city of Kokomc which prohibited the running of traction engines and othe vehicles propelled by steam on and over the streets and alley of said city. The third paragraph contains substantially th same allegations concerning the violation of section 2044 Burns' Rev. St. 1894 (Acts 1889, p. 428), and the violation c said city ordinance. The trial of the cause resulted in verdict and judgment against appellants. The errors assigned and not waived by a failure to argue the same, call in questio the action of the court in overruling appellants' motion for new trial.

*See as to the validity of ordinances regulating the weight of vehi cles, width of ties, etc., State *v.* Boardman, 2 Mun. Corp. Cas. 576 State *v.* Rohart, 6 Mun. Corp. Cas. 846.

It is insisted by appellants that the court erred in admitting in evidence Ordinance No. 383 of the city of Kokomo, which prohibits the running of traction engines or other vehicles propelled by steam on the streets and alleys of said city, for the reason that the city council had no power to enact such ordinance, and therefore the same was invalid. The question of the validity of said ordinance is presented by instruction 9 given by the court to the jury. Said instruction 9 reads as follows: "If you find from the evidence that, at the time of the injury complained of, that there was a city ordinance in full force and effect in the city of Kokomo which provided that the running of traction engines and other similar vehicles propelled by steam over and upon the streets and alleys of such city was prohibited, and affixed a penalty for the violation thereof, and if you further find that the defendant Bogue, in violation of such ordinance, was running a traction engine propelled by steam over and upon a public street in such city at the time of the alleged injury, and that the defendant Bogue was at such time in the service and employment of the defendant Gwinn, and acting within the line and scope of such duty and employment, as charged in the complaint, then the court instructs you that the running of such engine in violation of said ordinance would be an unlawful act, and would constitute negligence per se on the part of the defendant; and if you further find from the evidence that such negligence (that is, the propulsion of said traction engine upon and along such street by steam, instead of horses or other power permitted by said ordinance) was the proximate cause of the injury to plaintiff, without which the injury of which plaintiff complains would not have resulted, and further find that plaintiff was not guilty of negligence contributing to said injury, then it would be your duty to find for the plaintiff." If the ordinance prohibiting the running of traction engines or other vehicles propelled by steam on the streets and alleys of the city of Kokomo is invalid, for the reason that the city had no power to pass the same, said instruction is clearly erroneous. In this state municipal corporations possess and can exercise only such powers as are granted by the legislature in express words, and those necessary or fairly implied or incident to the powers expressly granted, and those essential to the declared purposes and objects of the corporation. No incidental powers can be implied, except such as are essential to the accomplishment of the purposes of their creation and for their continued existence. Doubtful claims to power, or any doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. It is also settled law that where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified nature and character, and with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitu-

tion, an ordinance within the powers granted, prescribin penalties within the designated limits, cannot be set aside b the courts, even if they deem it unreasonable or against pub lic policy. But where the power to legislate upon a give subject and the details of such legislation are not prescribed then the ordinance passed pursuant thereto must be a reason able exercise of the power, or it will be pronounced invalid In other words, an ordinance expressly authorized by specifi and definite legislative authority will be upheld, unless it con flicts with the constitution, while an ordinance which it i sought to uphold by virtue of the incidental powers of such municipal corporation, or under a general grant of authority will be declared invalid, unless it be reasonable and fair, an not arbitrary and oppressive. Pittsburg, C., C. & St. L. R Co. v. Town of Crown Point, 146 Ind. 421, 45 N. E. 587, 3 L. R. A. 684, and cases cited.

It is contended by appellee that the power to pass sai ordinance was granted by the following provisions of section 3541, 3623, Burns' Rev. St. 1894: Section 3541 provides tha the common council "shall have the additional powers herei permitted and may make and publish by-laws and ordinance necessary to enforce the same. * * * Twelfth. To reg ulate the use of coaches, hacks, drays, and other vehicles fo the transportation of passengers, freight or other articles, t and from points within the city for hire or pay." Sectio 3623, supra, provides that "the common council shall hav exclusive power over the streets, highways, alleys, and bridges within such city." The provisions of the twelfth clause o section 3541, supra, give no authority to pass an ordinanc prohibiting the running on the streets and alleys of said city of all vehicles propelled by steam. That clause only grant authority to regulate the vehicles described when used for th purposes mentioned therein. There is no statute to which ou attention has been called, and we know of none, which i express words confers upon the common council of a city th power to pass an ordinance prohibiting the running upon th streets and alleys of vehicles propelled by steam. It is not necessary, therefore, to decide as to the power of the legisla ture to grant such authority to municipal corporations. Can the power to pass such an ordinance be fairly implied from those expressly granted, or is such power essential to th declared objects and purposes of the corporation, or can such ordinance be sustained under the general grant of authority over the "streets, highways and alleys"? It is evident that the power to pass such ordinance was not essential to th accomplishment of the purposes for which such municipal corporations were created, nor for their continued existence. Said ordinance was not, therefore, authorized by any of the implied powers possessed by said city. Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 146 Ind. 422, 45 N. E. 587, 35 L. R. A. 684. Does the general grant of authority

over the streets, highways, alleys, and bridges, given by section 3623, supra, authorize the enactment of such an ordinance? To be valid under such general grant of power, the ordinance must be a reasonable exercise thereof. Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 146 Ind. 422, 423, 45 N. E. 587, 35 L. R. A. 684. Highways and streets are not for the exlusive use of vehicles propelled by animal power, nor are travelers confined to the use of such power and ordinary carriages upon highways. The use of any new and improved means of locomotion must be deemed to have been contemplated when the highways and streets were laid out or dedicated, whenever it is found that the general benefit requires it; and such new means of locomotion cannot be excluded therefrom merely because their use may tend to the inconvenience, or even to the injury, of those who continue to use the highways and streets by former methods. This was clearly recognized by the supreme court of Illinois, in 1859, in the case of Moses v. Railroad Co., 21 Ill. 515. The court said: "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place to any extent of animal power for land transportation, and for that reason alone shall it be expelled from the streets? For the same reason, camels must be kept out, though they might be profitably introduced." In 1876 the same rule was declared in Macomber v. Nichols, 34 Mich. 212, which was an action to recover for an injury occasioned by the plaintiff's horse being frightened by a traction engine on the public highway. The court, by Cooley, J., said: "Persons making use of horses as a means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with present methods. A highway is a public way for the use of the public in general for passage and traffic, without distinction. Starr v. Railroad Co., 24 N. J. Law, 592. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in the dedication to some particular mode of use, it is open to all suitable methods; and it cannot be

assumed that these will be the same from age to age, or tha new means of making the way useful must be excluded merel because their introduction may tend to the inconvenience, c even to the injury, of those who continue to use the road after the same manner as formerly. A highway establishe for the general benefit of passage and traffic must admit c new methods of use whenever it is found that the gener benefit requires them; and, if the law should preclude th adaptions of the use to the new methods, it would defeat, i greater or less degree, the purposes for which highways ar established. * * * Horses may be, and often are, frighi ened by locomotives in both town and country; but it woul be as reasonable to treat the horse as a public nuisance, fro his tendency to shy and be frightened by unaccustome objects, as to regard the locomotive as a public nuisance, fro its tendency to frighten horses. The use of the one may im pose upon the manager of the other the obligation of add tional care and vigilance beyond what would otherwise b essential. If one in making use of his own means of locomc tion is injured by the act or omission of the other, the que tion is not one of superior privilege, but it is a questio whether, under all the circumstances, there is negligence im putable to some one, and, if so, who should be accountabl for it." In Railway Co. v. Farver, 111 Ind. 195, 199, 12 N E. 296 (decided in 1887), this court, by Mitchell, J., said "Road engines propelled by steam and portable engine operated by steam have become familiar in every agricultura community. To declare that their use near or their passag over a highway constitutes a nuisance would be practically t prohibit their use in the manner in which they are customaril employed and moved from place to place. It must be suppose that horses of ordinary gentleness have become so familia with these objects as to be safe, when under careful guidance." See, also, Cooley, Torts (2d Ed.) 734-736. That highways an streets were not for the exclusive use of vehicles propelled b animal power, and that steam power might be used to prope vehicles thereon, was clearly recognized by the court in th case last cited, and by the legislature in the act of 1889 (Act 1889, p. 428, being sections 2044, 2045, 2046, Burns' Rev. St 1894) regulating the manner of running traction or roa engines on the public highways, streets, and alleys of inco porated towns and cities. Said act reads as follows:

"Section 1. That any person or owner of a traction or roa engine, shall, while using the said engine on any public high way, street, or alley of any incorporated town or city, sen some person in advance of said engine, not less than fift yards, to warn all persons approaching, who are in charge o horse, team, or teams, of the proximity to such engine.

"Sec. 2. And it shall be the duty of the engineer in charg of said engine, or the owner thereof, upon the approach c said horse, team or teams, to drive said engine to one side

the road or street when practicable, and to stop said engine until said horse, team or teams, have passed said engine, and the whistle of said engine shall not be sounded while said horse, team or teams are passing.

"Sec. 3. Any person or persons violating any provision of this act, shall be deemed to be guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than five dollars and not exceeding fifty dollars."

Incorporated cities and towns in this state have the power to regulate public travel upon the streets, so as to make them reasonably safe for those who go upon them on foot or on vehicles, and to enact ordinances for the protection of life, health, and property, and may have the power to prohibit the use of certain streets for certain purposes and by certain classes of vehicles; yet it is evident that they have no authority, under their implied powers, or under the general grant of power over the streets and alleys, to prohibit traction engines or other vehicles not propelled by animal power from using all the streets. Such an ordinance is not a reasonable exercise of such power over the streets. Appellee cites cases which hold that a municipal corporation has power to "prescribe the motive power to be used in moving street cars in such corporations, and that when it prescribes one kind of power the company cannot use another." This power results from the fact that a street railroad cannot be constructed on the streets of a town or city without the consent of the governing body thereof, which may, in its discretion, refuse such request, or grant it on such conditions as it deems proper, one of which may be that it shall only use a designated motive power. Elliott, Roads & S. (2d Ed.) §§ 736, 743. But vehicles, whether moved by animal, steam, or other power, which do not require a specially constructed track, may be run upon the streets and alleys of a municipal corporation without first obtaining the consent of the governing body thereof. See Cooley, Torts (2d Ed.) 734, 735. It is manifest, therefore, that the cases holding that municipal corporation may prescribe the motive power to be used in moving street cars are not applicable here. It is true, as insisted by appellee, that when the evidence is not in the record this court will not reverse a judgment on an instruction given, unless it would not be correct under any evidence that could be given under the issues. Wenning v. Teeple, 144 Ind. 189, 194, 41 N. E. 600. From what we have already said, it is evident that said instruction would not have been correct under any evidence that might have been given under the issues. It follows that the court erred in overruling the motion for a new trial. Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

WEST CHICAGO MASONIC ASS'N *v.* COHN.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 439.]

Vault under Sidewalk—Degree of Care Required of Owner.*

Where the owner of a building on a sidewalk of a public street occupies, by permission of the city, the space under the walk for the storage of coal and other purposes, he is bound to use only ordinary and reasonable care and precaution for the safety of the people lawfully on the sidewalk.

Same—Failure to Cover Coal Hole*—Personal Injuries—Who Liable—Landlord or Tenant.

A portion of certain premises were leased, the tenant to keep the demised premises and appurtenances thereto in good repair. The portion so leased included a vault under the sidewalk, and a coal hole opened into the vault; the vault and coal hole having been constructed with consent of the city. The vault into which the coal hole opened had no connection with any other part of the building other than the basement leased to the tenant, and the tenant, as against the owner, was entitled to have exclusive possession and control of the basement, coal hole, and vault: *held*, that the tenant, and not the owner, of the premises, was liable for injuries received by a foot passenger on the sidewalk in consequence of a failure to properly cover the coal hole.

Appeal from appellate court, First district.

Action by Charles Cohn against the West Chicago Masonic Association. From a judgment of the appellate court (94 Ill. App. 333) affirming a judgment in favor of the plaintiff, defendant appeals. Reversed.

Francis W. Walker, for appellant.

Smith, Helmer, Moulton & Price, for appellee.

BOGGS, J. This is an appeal from the judgment of the appellate court for the First district affirming a judgment in the sum of $1,000, entered in the circuit court of Cook county in favor of appellee and against the appellant company. The declaration was in case, and, as finally amended, contained but a single count. The substance of the allegations of this count was that the appellant company was the owner of a certain building and premises and appurtenances in Cook county, abutting on Randolph street, in Chicago, and was then and there receiving rents, issues, and profits from the said building and premises, and that in said street, before and on the day aforesaid, there was a certain hole opening into a certain cellar and vault connected with the said building and premises of the defendant, which said cellar and vault, by consent of the said city of Chicago, extended into and under the said public highway, and was connected with and appurtenant to a certain portion of said building and premises

*See Rushton *v.* City of Allegheny, 3 Mun. Corp. Cas. 29, and note; Brown *v.* Town of Louisburg, 4 Mun. Corp. Cas. 121, and note; Sullivan *v.* City National Bank, 6 Mun. Corp. Cas. 745, and note.

occupied by a tenant of the said defendant, from whom the defendant was then and there receiving rent therefor, yet the defendant, well knowing the matters aforesaid, while it was so the owner of the said building and premises, with the appurtenances, and was so receiving the rents, issues, and profits thereof, as aforesaid, and while there was such a hole, as aforesaid, there wrongfully and unjustly permitted the said hole to be and continue, and the same was then and there so badly, insufficiently, and defectively covered that by means of the premises, and for want of a sufficient covering on said hole, the plaintiff, who was then and there passing in and along the said highway, then and there necessarily and unavoidably slipped and fell into said hole, and thereby the right leg of the plaintiff was injured at the knee, and the right knee of the plaintiff was badly bruised, torn, and injured, etc. The cause was submitted to a jury for decision, and judgment was rendered against the appellant company, as before stated.

It appeared that the appellee, Cohn, on the 12th day of November, 1895, stepped or fell into a coal hole in the sidewalk in front of No. 200 West Randolph street, in the city of Chicago, and thereby received the injuries for which the action was brought. The appellant company was then, and had for many years before that been, the owner of the four-story and basement building at the corner of Halsted and West Randolph streets, known as "Nos. 200, 202, and 204 West Randolph Street." The coal hole in the sidewalk into which the appellee fell opened into a vault under the walk, which was connected with and constituted an appurtenance to the basement of No. 200 of said building. This basement, and the appurtenance thereto (the vault under the sidewalk into which the coal hole opened), was then in the possession of one Henry Wilkers, as tenant of the appellant company. Said Wilker had occupied the basement proper as a saloon, and used the vault under the walk for water-closets and to receive and store coal, for about six years. There was evidence tending to show that neither the appellant company nor any of its tenants in the building other than Wilker had access to said vault containing said water-closets and coal bin, but said Wilker had entire control thereof, the only entrance thereto being from the saloon occupied by him; and that the vault was not appurtenant to any other part of the building. The first lease to Wilker bore date May 1, 1889, and ran for three years,—to April 30, 1892. The second lease ran from May 1, 1892, to April 30, 1894,—two years. The third lease ran from May 1, 1894, to April 30, 1896. The leases contained covenants to the effect that the lessee had received said demised premises in good order and condition, and at the expiration of the time in the leases mentioned, or a sooner determination thereof by forfeiture, he would yield up the said premises to lessor in as good a condition as when the same were entered upon by the lessee, loss by fire or inevitable accident or ordi-

nary wear excepted, "and also will keep said premises i good repair during this lease, at his own expense," and kee said premises in a clean and wholesome condition, in accor ance with the ordinances of the city and directions of th health officers. He further agreed that all plumbing, wat pipes, gas pipes, and sewerage should be at the risk of th lessee; that he would make all repairs required to the wall ceiling, paint, plastering, plumbing work, paper, and fixtur belonging to said apartments or used in connection therewit whenever damage or injury to the same shall have result from misuse or neglect. It was during the period of the latt lease that the appellee slipped, stepped, or fell into the co hole. The evidence tended to show that under such lea said Wilker then had exclusive control of the basement an vault in question under the sidewalk into which the coal ho opened, and that the appellant company provided a janit for the building, but did not occupy any of the rooms offices in the building, except that the janitor used one roo as his office; that he had no duties in connection with th saloon in the basement or with the vault under the sidewal There was no proof tending to show that the injury w occasioned by any defect in the original construction of th coal hole or of the cover thereto. It was clearly made t appear that, as between the appellant company and sa Wilker, the duty of exercising care to the end that the cove ing of the coal hole should be kept safe rested on Wilker.

The court, on its own motion, instructed the jury as fo lows: "The court instructs the jury that public proper cannot be taken or used, without compensation, for priva use, with or without the consent of the public corpora authorities owning the same, without subjecting the priva person or corporation using the same to a duty to use it i such manner as will not entail injury to or upon a citize rightfully entering upon same, and using reasonable and ord nary care in so doing; and this duty the person or priva corporation using such property cannot, as a matter of publ policy, escape by leasing the same for compensation to tenant." This instruction is erroneous in at least two r spects:

1. Municipal authorities hold the streets of a city in tru for the use of the public, and cannot divert a street, or a portion thereof, to any purpose inconsistent with the full a free right of the public to use the same. But the city Chicago had ample power to authorize the construction of t vault in question under the sidewalk, and the coal hole in t walk to connect with the vault thereunder, provided the pa mount right of the public to the full, free, and safe use of t street in all of its parts was not thereby infringed. Gridl v. City of Bloomington, 68 Ill. 47; Gregsten v. City Chicago, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496. T declaration averred the city authorized the construction of t

vault and coal hole here in question. When an abutting owner or other persons makes an excavation in or under the sidewalk of a street without license from the municipal authorities, he is a trespasser, and the excavation a nuisance, and he becomes liable to any one who may be injured thereby without contributory negligence on the part of such injured person. If, however, such abutting property owner or other person so making the excavation in or under the sidewalk of a public street has authority or license from the proper city authorities so to do, and the work is not inherently, in nature and character, a nuisance, the licensee is liable only in the event he fails to use ordinary care and diligence in constructing the excavation and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk. Elliott, Roads & S. p. 772, and authorities cited in note 3; Congreve v. Morgan, 18 N. Y. 84, 72 Am. Dec. 495; McGuire v. Spence, 91 Ill. 303, 43 Am. Rep. 668; Shear. & R. Neg. (5th Ed.) § 703; Trustees v. Foster, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575. Counsel for the appellee concede the appellant company was a licensee, and not a trespasser, and that the duty devolving upon it was no greater than to exercise ordinary care. In their brief counsel say: "We do not charge it as trespasser, as maintaining a nuisance. We merely charge it with the obligation of exercise due care and diligence in the maintenance of the sidewalk." The instruction charged it upon the appellant company as an absolute duty to keep the sidewalk safe, and excluded from consideration as a defense every circumstance of care, prudence, or diligence on its part to make and keep it safe, in determining as to its liability for the injury to the appellee. Having license from the city to construct the vault and coal hole, only reasonable and ordinary care and precaution for the public safety were, in any event, required by law of the appellant.

2. It was error to advise the jury, as was done by the instruction, that out of considerations of public policy the appellant company, being the owner of the premises, must be held to the duty of keeping the coal hole in question in such condition that it would not entail injury upon any one who should attempt, while exercising ordinary care, to use the sidewalk; and that this duty was in no wise affected by the fact that the basement, including the vault and coal hole, had been leased for compensation to and was in the possession of a tenant. There was no evidence tending to show that the injury was occasioned by reason of any defect or fault in the original construction of the vault, the coal hole, or the cover to the hole. The negligence on which the right to recover rested was that the cover of the coal hole had become insufficient and defective through a failure to keep it in repair. There was evidence tending to show the vault and coal hole were appurtenant to the basement, only, of the building, and

that the basement, including the vault and the coal hole, wa and for some years prior thereto had been, in the exclusi possession of a tenant of the appellant company, who he the same under a lease, wherein he had covenanted that h had received the premises "in good order and condition, and would keep the same in "good repair during the perio of the lease." The tendency of this testimony was to esta lish that the negligence (if any) which caused the injury appellee was not that of the appellant company. The gener rule is that the occupant of premises is responsible for injuri inflicted upon another by reason of the neglect or failure keep the premises in repair. City of Chicago v. O'Brenna 65 Ill. 160; Gridley v. City of Bloomington, supra; City Boston v. Gray (Mass.) 10 N. E. 509. This court has reco nized exceptions to this general rule, as follows: The own of leased premises may be made liable for such injuries: (If the covenants of the lease require that he shall keep th premises in repair; (b) if the dangerous or defective cond tion by which the injury was occasioned existed when th premises were leased; (c) if that which occasioned the inju was a nuisance, and was upon the premises when the lea was executed. Gridley v. City of Bloomington, supra; Ci of Chicago v. O'Brennan, supra; City of Peoria v. Simpso 110 Ill. 294, 51 Am. Rep. 683. In the case at bar the co hole was placed in the sidewalk, and the vault underneath constructed, with the consent of the city authorities. The is no proof or claim that the work of construction was in properly or unskilfully done, or of other grounds upon whi to base an insistence that the premises were let with nuisance upon them, or that the coal hole, or the cov thereto, was in a dangerous or defective condition when th appellant company parted with the possession and contr thereof. The tenant expressly covenanted that he would ke the same in good repair, and was in full and exclusive posse sion of the basement and of the vault under the sidewalk, an so far as the appellant company is concerned, of the "hol in the sidewalk leading to the vault. Hence the liability the appellant company cannot be predicated upon any of th exceptions to the general rule which this court has heretofo recognized.

It is contended, however, that another exception should declared in cases such as this, where the owner of a buildi is granted the privilege of excavating a vault under the sid walk of a public street and opening a coal hole in such sid walk for the benefit of his premises; that in such instance t owner of the premises assumes, by implication, the duty keeping the sidewalk where he has opened it in as good con tion and as safe for the public use as if the opening had n been made; that such duty is imposed by law for the pub safety; and, while it is conceded that this duty runs with t land, and that the alienation of the entire premises, eit

permanently, by deed, or temporarily, as by a lease, would transfer the duty to the grantee or tenant, still it is urged that the conveyance of an undivided interest, or demise of a part, only, of the premises, should not be held to relieve the owner of the duty he owes to the public, and to cast the same upon the tenant of a part, only, of the premises, though the opening in the sidewalk has no relation to any other portion of the building than that in possession of the tenant. Public safety and sound public policy, it is urged, demand that nothing less than the alienation or parting with the possession of the entire premises should operate to relieve the owner of such premises from the duty which was originally imposed upon and impliedly accepted by him. The view seems to have obtained the sanction of the court of appeals of the state of New York in the case of Trustees v. Foster, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575. We do not regard the case of Irvin v. Fowler, 5 Rob. 482, as also authority for the view. In that case Fowler, the landlord, and his tenant, were held liable to a stranger for injuries received by falling through a coal hole in the sidewalk. Fowler, the owner and landlord, was not in possession, but the coal hole has been constructed without the consent of the city, and constituted a nuisance, and Fowler let the premises with the nuisance upon them. His case fell within one of the exceptions to the general rule hereinbefore mentioned as recognized in this jurisdiction.

It will be observed that the argument and contention of appellee on this point do not go far enough to uphold and sustain the instruction. The instruction, in substance, declares, as a proposition of law, that the owner of property who has obtained a license from the city to excavate a vault under the sidewalk and a scuttle hole in the sidewalk has the duty imposed upon him to answer for all injuries which may be occasioned thereby to any one who is injured while attempting, with due care, to pass along the sidewalk, and this liability remains in full force though the owner has leased the property for compensation to a tenant, and delivered over the possession thereof to such tenant. The view of the instruction is that the duty is a continuing duty, and remains in full force as long as the owner of the property is deriving benefits, by way of rent or compensation, from a tenant for the use thereof. This view is clearly erroneous. In the case so much relied upon by counsel for appellee, viz. Trustees v. Foster, supra, where an injury had been occasioned by a fall into a grate over a coal hole in the sidewalk of a public street, it was said: "Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lease of the entire premises, and possession thereof to the tenant, would doubtless throw the burden upon the latter. Shear. & R. Neg. (5th

Ed.) §§ 710, 713. The conveyance of an undivided interes however, would not have that effect, and the demise of a pa of the premises should not. The obligation goes with th land, and cannot be discharged by a partial alienation of th land,—at least unless the alienation, if for a fixed ter carries with it the exclusive possession of the premises f that term. Entire possession by a tenant from foundation roof doubtless involves the duty of keeping a grate in front the premises in repair, which otherwise rests on the own of the fee. * * * If he parts with the premises, or par with the possession thereof for a period, the burden falls o his successor in title or possession. If he transfers either tit or possession in part only, he does not escape the burde The implied duty assumed when the hole was cut and th grate placed over it requires reasonable precaution on th part of the owner to protect the public as long as he remai the owner and is in possession of any part of the building o the abutting land." We are advised of no authority for th view announced in the instruction that in such cases th owner must answer to any one injured as long as the own derives "compensation" for the use of the premises, wheth such owner has the control and possession, or the possessio and right of control are in another. The instruction convey an erroneous proposition to the jury, and we cannot say b that such error contributed to the verdict and judgme against the appellant company.

As the judgment must be reversed, and the cause aga tried, it is necessary that we should declare whether the li bility is that of the owner or the occupant in a case whe the occupant is a tenant, and has leased a portion, only, of th premises, under covenants which, as between the owner an the tenant, make it the duty of the latter to keep the demise premises and the appurtenances thereto in good repai and the portion so leased includes a vault under the sidewal of a public street and a coal hole opening into the vault, th vault and coal hole having been constructed with the conse of the city. If the coal hole and vault were constructed an are used for the benefit of the entire premises, the leasing o a portion, only, of the premises would not absolve the own from his duty to use ordinary care to keep the coal hole an the covering thereto in a good and safe condition; but if th vault into which the coal hole opens has no connection wit any other part of the building than the basement leased t the tenant, and no benefit inures from it to any other portio of the premises, and the tenant, as against the owner, ha and is entitled to have, exclusive possession and control of th basement, coal hole, and vault, and has covenanted to kee the same in good repair, then the case should be regarded a within the operation of the general rule that the occupant o the premises, and not the owner thereof, is responsible fo

injuries received in consequence of a failure to keep the premises in repair.

The judgment of the appellate court and that of the circuit court must be and are each reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with the views here announced. Reversed and remanded.

BISHOFF, Tax Collector, *v.* STATE *ex rel.* TAMPA WATERWORKS CO.

(*Supreme Court of Florida, April 30, 1901.*)

[30 So. Rep. 808.]

Mandamus—Not Granted Where Rights Have Ceased to Exist.

The remedy of mandamus cannot be employed to accomplish a useless purpose, and courts should not proceed with a cause in such proceedings which involves only rights that have ceased to exist.

License Tax—Nature of—Not Contractual.*

A license tax, as a tax, confers no right upon the party whose duty it is to pay it. It simply lays a burden upon an occupation, and creates the duty to pay it; and an ordinance that imposes such a tax does not create any contract right.

Double License Tax*—Construction of Tampa, Fla., City Ordinances.

The ordinances of the city of Tampa passed September 28, 1900, numbered 245, and October 1, 1900, numbered 246, do not embrace a scheme to impose double license taxes for the same fiscal year.

Ordinances—Power to Repeal or Modify.

The right to pass an ordinance includes the power to repeal or modify it, provided no rights secured by constitutional provision are thereby violated.

Trial—Argument of Counsel—Assuming Inconsistent Positions.

A party to a cause should not be permitted to assume in argument inconsistent and contradictory positions.

Privilege License Ordinance—Objections—Will Not Be Considered, When.

It would be useless to consider an objection to a privilege license ordinance, construed distributively, on the ground that the amount required to be paid by the party objecting was unreasonable, when no benefit would result to him in the maintenance of his cause if such objection should be sustained.

(Syllabus by the Court.)

Error to circuit court, Hillsboro county; Joseph B. Wall, Judge.

Application by the state, on the relation of the Tampa Waterworks Company, for writ of mandamus against N. P. Bishoff, as tax collector and assessor of the city of Tampa. From a judgment granting the writ, defendant brings error. Reversed.

On the 1st day of October, 1900, the defendant in error filed a petition for an alternative writ of mandamus against plaintiff in error, and thereupon an alternative writ issued, alleging that the Tampa Waterworks Company was then, and had been for the last two years past, engaged in business

*See notes at end of case.

within the corporate limits of the said city, and that the city of Tampa on the 22d day of September, 1899, passed an ordinance providing, among other things, that after the 1st day of October, 1899, every person, firm, corporation, or association engaged in or managing any business, profession, or occupation, and having a fixed place of business in said city, should obtain a city license on or before the 1st day of October, 1899, and annually thereafter, and always, before engaging in any business, profession, or occupation, should register in a book, to be kept for that purpose by the city tax assessor and collector, their names, profession, or occupation, and places of business, and that no person, firm, corporation, or association should engage in or manage any business, profession, or occupation before such registration; that after the 1st day of October, 1899, no person should engage in or manage any business, profession, or occupation thereinafter required to be licensed by the city without having first paid the amount of license tax required therefor to the city tax assessor and collector, for the use of the city, and obtained a license therefor, which was to be made out by the city tax assessor and collector upon the receipt of the amount of license tax required to be paid; that no license should issue for more than one year, to expire on the 30th day of September of each year, and for licenses obtained between October 1st and April 1st the full tax for one year should be paid, and that the licenses should be signed by the mayor and tax assessor and collector, and countersigned by the city auditor; that the amount of the license tax imposed by said ordinance upon petitioner, Tampa Waterworks Company, was $150, and that on the 1st day of October, 1900, while said ordinance was in full force, in no way amended or repealed, said company applied to the plaintiff in error, who was tax assessor and collector of said city, and requested to be registered in the book required to be kept for that purpose, and this request was denied on the ground that the city had prepared no such book, and on said date said company tendered to said assessor and collector, in legal tender money of the United States of America, the sum of $150, being the amount of the license tax due by said company to obtain a license from the city, and demanded of him a city license to conduct its said business, and said assessor and collector received the money, but refused to issue a license to petitioner. Said ordinance provided that any person violating the same shall be punished by fine not exceeding $500, or imprisonment not exceeding 60 days. Further, that said company was entitled to receive a license from the city to conduct its business from the 1st day of October, 1900, to the 30th day of September, 1901, and that said license should have been issued by the said assessor and collector, and signed by the mayor and auditor of said city, but that, by reason of the refusal of said tax assessor and collector to make out the license, said company was not able to demand the signatures

of the mayor and auditor; and, upon information, it is stated that, if the assessor and collector had issued the license, the mayor and auditor would have refused to sign the same.

The defendant (now plaintiff in error) was commanded to allow the said Tampa Waterworks Company to register its name, business, and place of business in the book required to be kept by said city, and to issue to said company a city license to engage in and conduct its business in said city for the year beginning October 1, 1900, and ending September 30, 1901, or show cause why he did not do so.

The ordinance referred to, and filed with the alternative writ, passed September 22, 1899, prescribed a license tax on certain businesses, professions, or occupations, and was numbered 232.

The first, second, third, and fourth sections provided:

"Section 1. That from and after the first day of October, 1899, every person, firm or corporation and association engaged in or managing any business, profession or occupation, and having a fixed place of business in the city of Tampa, and required to have a city license, shall, on or before October 1, 1899, and annually thereafter and always before engaging in any business, profession, or occupation, register in a book to be kept for that purpose by the city tax assessor and collector, their names, profession or occupation, and their place of business, and no person, firm or corporation or association shall engage in or manage any such business, profession or occupation until after having been so registered in the office of the city tax assessor and collector.

"Sec. 2. That from and after the first day of October, 1899, no person shall engage or manage the business, profession, occupation or occupations hereinafter mentioned, and required to be licensed by the city, without having first paid the amount of license tax required therefor to the city tax assessor and collector for the use of the city, and obtained a license therefor. The license shall be made out by the city tax assessor and collector upon the receipt of the amount of the license tax required to be paid.

"Sec. 3. Licenses shall expire on the 30th day of September each year. No license shall be issued for more than one year, and for each license obtained between October 1st, and April 1st, the full tax for one year shall be paid, and for each license obtained from April 1st, to September 30th, one-half the full tax for one year shall be paid. Any license may be transferred, with the approval of the mayor, with the business for which it was taken out when there is a bona fide sale and transfer of the property used and employed in the business as stock in trade.

"Sec. 4. No person, firm, corporation or association shall engage in or manage any business, profession or occupation in this section mentioned, without first obtaining from the

city a license therefor, and the assessment of such taxes ar hereby fixed as follows."

In Schedule W the amount of tax imposed upon water com panies is $150.

The fifth and sixth sections provided:

"Sec. 5. All licenses shall be signed by the mayor and ta assessor and collector and countersigned by the city auditor and a list of all licenses issued shall be kept, to whom issue date of issuing, and number of certificate and for what bus ness or occupation; and the tax assessor and collector sha receive all monies for taxation and shall account for the sam through the auditor's office and pay the same into the cit treasury.

"Sec. 6. All person or persons, firm or firms or corporatio violating any provision of this ordinance shall, upon convi tion, be punished by fine not exceeding $500.00 or imprison ment not exceeding sixty days."

The respondent, Bishoff, as tax assessor and collecto answered the alternative writ on the 16th day of Octobe 1900, admitting the relator to have been engaged in the bus ness alleged and that the city of Tampa passed the ordinanc with the provisions set forth in the alternative writ, and tha on the 1st day of October, 1900, relator tendered to responde the sum of $150, the amount of license tax due under sai ordinance and requested to be permitted to register as pr vided in said ordinance, and also demanded from responde a license to conduct its said business in said city. It alleged that the city of Tampa had never provided responde with any book, and he had never kept one, for registering th businesses or occupations of parties doing business in sai city, and relator was so informed when the application fo registration was made, and that at the time of the paymen of the $150 relator accepted a receipt for the same from r spondent, set out as an exhibit, the substance of which is th acknowledgment of the receipt of $150, the amount fixed b ordinance number 232 for a water company to pay for doin business for one year from the 1st day of October, 1900, wit notice on part of relator that an ordinance had been dul passed by the city council, and approved by the mayor, an not then published, but would, under the city charter, tak effect after publication for five days, repealing Ordinance No 232, and fixing the amount of the license tax payable by wate companies at $750 from the date when the ordinance too effect until the 1st day of October, 1901.

It is further alleged that the city council of the city o Tampa at the same session passed two ordinances, one date the 28th September, 1900, numbered 245, which was dul approved by the mayor on the 29th of that month, and th other was passed on the 1st of October, 1900, numbered 24 and approved on the 2d of October, both of which ordinance are referred to and made part of the return. Further, tha

said ordinances numbered 243 and 246 had been duly published, and were at the time of filing the return in full force and effect, and binding upon relator, and that they repealed said Ordinance No. 232, making it the duty of respondent to issue to relator a license for the period mentioned in the alternative writ; that when relator paid to respondent the $150, the amount of license fixed by Ordinance No. 232 for it to pay, it well knew that the city had passed ordinance No. 245, and it would take effect, under the city charter, after being published for five days in some newspaper published in the city, and that a license issued by respondent would thereafter be ineffectual.

It is denied that relator is entitled to a license from the city to conduct its business from the 1st day of October, 1900, to the 30th day of September, 1901; and it is alleged that respondent, as tax assessor and collector of the city of Tampa, was ready and willing to issue to relator a license to do business in said city for the period between the taking effect of Ordinance No. 245 to the 1st day of October, 1901, upon relator complying with the terms of said ordinance, in which event a credit of the $150 paid will be allowed.

Ordinance No. 245 is to "license privileges, businesses and occupations carried on and engaged in within the city limits of the city of Tampa, to fix the amount of license taxes and to regulate certain businesses." Sections 1 and 2 are as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation to carry on or engage in any of the businesses or occupations hereinafter specifically enumerated, within the corporate limits of the city of Tampa, without first having obtained a license from the city of Tampa, as hereinafter provided.

"Sec. 2. That a license tax shall be collected from every person, firm or corporation carrying on or engaging in any of the businesses or occupations, hereinafter specifically enumerated, which is hereby fixed at the respective amounts set opposite each business, or occupation hereunder, each of said amounts, unless otherwise specifically stated, being the amount payable as a license tax for carrying on or engaging in the business, or occupation mentioned until the 30th day of September, A. D. 1901, viz." In Schedule W, following the sections quoted, the amount fixed for waterworks or waterworks companies supplying or distributing water for a charge is $750.

Section 3 limits the license tax solely to businesses or occupations carried on within the city of Tampa, and the fourth section provides that each provision and license tax prescribed in the ordinance shall be separate and independent, and the ordinance intended to be construed distributively.

The fifth, sixth, thirteenth, and fifteenth sections read as follows:

"Sec. 5. All licenses including the period from and after this ordinance goes into effect until the thirtieth day of September, A. D. 1901, shall be procured on or before the fifteenth day of October, A. D. 1900, and thereafter all licenses shall be obtained on or before the first day of October in each year, and the respective amounts fixed by section 2 of this ordinance, except when otherwise specifically stated, shall be payable annually as a license tax for carrying on or engaging in the respective businesses, and occupations therein enumerated, during each year from and after September 30, A. D. 1901.

"Sec. 6. No license shall be issued for a less period than six months, except as otherwise specifically provided in section 2 of this ordinance, and for each license issued between October 1st and April 1st of each year the full amount of the license tax hereby imposed shall be paid; for each license issued after April 1st, of each year, one-half of the total amount of the license tax shall be paid, but this shall not apply to licenses authorized by section 2 to be issued for a period of one week or for a less period."

"Sec. 13. Any person or persons, and members of any firm and any corporation, violating any provision of this ordinance shall, upon conviction, be punished by a fine not to exceed two hundred dollars, or by imprisonment for a period not to exceed ninety days for each offense."

"Sec. 15. All ordinances and parts of ordinances in conflict with the provisions of this ordinance are hereby repealed."

This ordinance was passed on the 28th and approved on the 29th of September, 1900.

Ordinance No. 246 is "in relation to license taxes paid on or after October 1st, A. D. 1900, under Ordinance No. 232 of the city of Tampa," and is as follows:

"Section 1. That the amounts of all license taxes paid by any persons, firms or corporations, under Ordinance No. 232 of the city of Tampa, on or after October 1st, A. D. 1900, and prior to the time that Ordinance No. 245 of the city of Tampa shall take effect by the publication thereof for five days in some newspaper published in the city of Tampa, shall be credited by the tax assessor and collector of the city of Tampa upon the respective amounts payable by such persons, firms or corporations for engaging in their respective businesses or occupations during the period between the time said Ordinance No. 245 takes effect and October 1st, 1901, and the license shall be issued to such persons, firms or corporations under the said Ordinance No. 245 upon payment of the difference between the amount fixed as a license tax thereunder for engaging in any business or occupation, and the amount paid for engaging in such business or occupation on and after October 1st, A. D. 1900, under the aforesaid Ordinance No. 232 of the city.

"Sec. 2. If any person, firm or corporation shall pay a

license tax under the said ordinance No. 232 prior to the time that the said Ordinance No. 245 shall take effect, and the amount of the license tax payable under the latter ordinance shall be the same as the amount of the license tax payable under the former, it shall be unnecessary for such person, firm or corporation to procure a license under the said Ordinance No. 245, but the license issued under Ordinance No. 232 shall be deemed as valid and effectual as if issued under the said Ordinance No. 245.

"Sec. 3. If any person, firm or corporation shall pay a license tax under the said Ordinance No. 232 prior to the time that the said Ordinance No. 245 shall take effect, and the amount of the license tax payable under the latter ordinance shall be less than that payable under the former, a license shall be issued to such person, firm or corporation under the latter ordinance upon the surrender of the license issued under the former, and in such event the difference shall be paid by the city tax assessor and collector to the holder of such license.

"Sec. 4. If any person, firm or corporation shall pay a license tax under the said Ordinance No. 232 prior to the time that said Ordinance No. 245 shall take effect, for engaging in any business or occupation for which a license tax is not required under the latter ordinance, the amount so paid shall be refunded upon surrender of the license issued under the former ordinance."

This ordinance was passed on the 1st and approved on the 2d day of October, 1900.

Relator demurred to the return on the following grounds:

(1) The return shows no reason why the peremptory writ should not issue.

(2) That ordinances numbered 245 and 246 do not affect the rights of relator.

(3) Said Ordinances 245 and 246, as to the rights of relator, are retroactive and void.

(4) Said Ordinances 245 and 246, as to relator, impair the obligation of a contract between it and the city of Tampa, created by Ordinance No. 232.

(5) Said Ordinance No. 245 purports to impose a tax upon relator, and not a license, and the city of Tampa has no power to impose such tax.

(6) Ordinance No. 245 is void because it is in violation of the constitution of the state of Florida and the charter of the city.

(7) Ordinance No. 245 is void because it provides an illegal method of collecting the tax sought to be imposed.

(8) The said Ordinance No. 245 is void because the amount required to be paid by relator is unreasonable.

This demurrer was sustained, and a peremptory writ awarded, commanding respondent to issue a license to relator to carry on its business in the city of Tampa for the year beginning October 1, 1900, and ending September 30, 1901. This decision is before us for review on writ of error.

Hugh C. Macfarlane, Thomas M. Shackleford, and James F. Glen, for plaintiff in error.

Sparkman & Carter and P. O. Knight, for defendant in error.

MABRY, J. (after stating the facts). In this, a mandamus proceeding, the circuit court decided, on the alternative writ and return thereto, shown by the statement of the case, that it was the duty of plaintiff in error, as tax assessor and collector of the city of Tampa, to issue to defendant in error license to conduct its business in said city from the 1st day of October, 1900, to and including the 30th day of September 1901. The duty to issue the license exists, it is claimed, under the ordinance of the city passed in 1899, and numbered 232. Ordinance No. 245, approved September 29, 1900, provided for the issuance of licenses from the time it went into effect which was subsequent to the 1st of October, 1900; and for periods of time prior to this ordinance No. 232 is the only one called to our attention which imposes any duty to issue the license demanded by the defendant in error, and awarded by the circuit court. If Ordinance No. 232 was not in force, and imposed no duty upon plaintiff in error, as tax assessor and collector of the city of Tampa, to issue to defendant in error the license demanded when the alternative writ was awarded the decision rendered cannot be sustained. Though defendant in error may have been entitled to a license when it was demanded and when suit was instituted to obtain it, yet, if the ordinance was repealed, and the duty to issue the license under it ceased, before the cause was heard, the peremptory writ should not have been awarded. Courts do not determine mere abstract questions, and in mandamus proceedings will not proceed in a cause which involves only a right that has ceased to exist. This remedy cannot be employed to accomplish a useless thing. This court has announced this rule and it is generally sustained. State v. Commissioners of Marion Co., 27 Fla. 438, 8 South. 749; State v. Inspectors of Election of Precinct No. 4 of Madison Co., 17 Fla. 26; Cincomp v. Utt, 60 Iowa, 156, 14 N. W. 214; 13 Enc. Pl. & Prac. p. 493, § 2. This general rule is not questioned by counsel for defendant in error, but it is insisted that it does not apply in this case, for several reasons. One is that Ordinance No. 232 was in full force on the 1st day of October, 1900, when defendant in error tendered and paid to the city tax assessor and collector the sum of $150, the amount of the annual license tax thereby imposed, and that a contract right to the license was thereby acquired, that no subsequent ordinance could impair. We cannot accept this as a correct legal proposition. It is evident that the ordinances in question undertook to impose a tax in pursuance of a taxing power, and not simply as a police regulation. A license tax, as such, does not create any contract right. In his treatise on State and Federal Control of Persons and Property, Tiedeman says

(volume 1, p. 502) that: "A license tax, as a tax, confers no right of any kind. It simply lays a burden upon an occupation, and creates the duty to pay the tax." See License Tax Cases, 5 Wall. 462, 18 L. Ed. 497; Home Ins. Co. v. Augusta City Council, 93 U. S. 116, 23 L. Ed. 825. This is the correct rule in reference to the imposition of a tax as such, and we are unable to find authority to sustain the contention that defendant in error acquired a contract right to have a license issued under Ordinance No. 232.

It is further contended that Ordinance No. 245 is void because the city of Tampa had no power to levy a license tax, as a tax, and in this respect the ordinance violates the constitution of the state and the city charter of Tampa; and, further, that it provides an illegal method of collecting the tax sought to be imposed, in that it is made a criminal offense not to pay it. Defendant in error based its right to the license upon ordinance No. 232, and proceeded upon the assumption of its validity. The judgment of the court has no basis of support upon any other theory than that said ordinance was legally enacted, and imposed the corresponding duty upon defendant in error to pay the tax imposed, and the issuance or preparation of the license by plaintiff in error. Ordinance No. 232 contains the same penal clause, and was enacted in pursuance of and by virtue of the same powers conferred upon the city that the subsequent ordinances numbered 245 and 246 contain, and under which they were enacted; and, if it be true that the latter ordinances are void for the reasons stated, it would necessarily follow that Ordinance No. 232 is also void for the same reasons. The result would be (accepting the position of defendant in error here to be correct) that the judgment of the court was erroneous, and must be reversed. Objections to ordinances numbered 245 and 246 on the grounds for a want of power in the city to pass them, and the mode of their enforcement, are inconsistent and in conflict with the assumption that Ordinance No. 232 was valid; and we will assume, for the purposes of this decision, as, no doubt, the circuit judge decided, that the city of Tampa had the power to pass ordinances imposing a privilege tax on occupations and businesses, and enforce them in the manner provided in the ordinances in question.

It is argued on behalf of defendant in error that ordinances numbered 245 and 246 are void because they imposed an additional license tax, or two license taxes on the same business in one year. Assuming that the city of Tampa had the power to impose a privilege tax on businesses, occupations, and professions, we do not find it necessary to decide whether this power would authorize the imposition of more than one tax in the same year, for the reason that ordinances numbered 245 and 246 do not, in our judgment, undertake to impose such taxes. These ordinances were passed at the same session of the city council, though on different days, relate to the same

subject-matter, and must be construed together. It is eviden that the city council just prior to the expiration of the fisca year ending September 30, 1900, determined to substitute new license tax ordinance, to go into effect as soon as possi ble after its enactment. For this purpose Ordinance No. 24 was passed on the 28th and approved on the 29th of Septem ber, 1900; but as the city charter provides (amendment i 1899) that "all ordinances of the city of Tampa, before the shall become a law or take effect, must be published at leas five days in some newspaper published in the city of Tampa' (Laws 1899, c. 4883, § 15), it could not go into operation unti after the 5th day of the following October. When operativ it would, if valid, control the amounts of license taxes there after to be paid. During an adjourned session of the council extending at least to the 1st day of October, it became know that parties engaged in business in the city, and affected b the new ordinance, were paying the taxes provided by th former Ordinance No. 232, and demanding licenses thereunder and thereupon Ordinance No. 246 was passed, which, togethe with No. 245, became law after due publication as required b the charter. The latter ordinances are inconsistent with an repeal Ordinance No. 232, except in the cases where th amounts of the license taxes fixed under both ordinances ar the same; and then it was provided that, if the tax had bee paid and license obtained under Ordinance No. 232 prior t the taking effect of No. 245, no further license should b secured under the latter ordinance. Such was not the cas with the amount that defendant in error was required to pa to secure a license. If taxes had been paid during the tim mentioned under Ordinance No. 232, and none were require by the subsequent ordinance, they were to be refunded; an where there was an increase in amounts to be paid, and pay ments had been made prior to the taking effect of Ordinanc No. 245, credits were to be allowed of what had been paid It was not a scheme to impose double license taxes for th same fiscal year, but to modify and change the former ta ordinance on the subject of license taxes; and the right t pass an ordinance includes the power to repeal or modify it provided no rights secured by constitutional provisions ar thereby violated. We cannot see that defendant in error ha acquired any such right. After the taking effect of the sub sequent ordinances, 245 and 246, there was no duty left unde Ordinance No. 232 to issue any license to any person, an without such duty mandamus does not lie.

Again, it is contended that Ordinance No. 245 is void be cause the amount required to be paid by defendant in error i unreasonable. It is not claimed, as we understand it, tha the entire ordinance is void because of the amount required t be paid by defendant in error. Other amounts thereby re quired may be reasonable, and it is expressly stated in th ordinance to be the sense of the council that it was to be con

Notes

strued distributively. In this case it is entirely unnecessary and useless for us to undertake to decide anything in reference to the reasonableness of Ordinance No. 245 in respect to the amount required from defendant in error. If we were to decide that the amount was unreasonable, and eliminate it entirely from the ordinance, it would not make it the duty of plaintiff in error to issue a license under Ordinance No. 232. No valid attack is made on Ordinance No. 246, and it clearly provides that as to payments made under 232, prior to the time when 245 shall take effect, for engaging in a business for which no license is required under the latter, the amount so paid shall be refunded upon surrender of the license issued. If the tax required from defendant in error be struck out as unreasonable, then no license would be required as to it by Ordinance No. 245, and no duty would devolve upon plaintiff in error under any ordinance to issue the license which has been directed to be issued. In the case supposed, defendant in error might be entitled to have its money refunded, but certainly not to a license to engage in its business.

Under no view we have been able to take of the case can the proceeding by mandamus be sustained, and it is our judgment that the decision directing plaintiff in error to issue the license is erroneous.

No point is presented here in reference to the right of defendant in error to register in a book to be kept by the assessor and collector for that purpose. The city, it seems, provided no such book, and the peremptory writ awarded nothing in reference to the registration. As no question on this point is presented, no further reference is made to it.

The judgment is reversed, with directions to overrule the demurrer to the return, and for further proceedings in accordance with this opinion. Ordered accordingly.

NOTES.

PRIVILEGE LICENSES—NOT CONTRACTS—REVOCATION.

General Rule.

It is well settled that business and professional licenses are not contracts within the meaning of the contract clause of the federal constitution; hence they may be revoked or modified at any time by statute or duly authorized ordinance.

Attorney's License.

A license to practice law is not a contract nor does it confer any vested right; hence the licensee may be compelled to pay a privilege tax or the license may be modified or revoked. As said by the supreme court of Ohio in an early case: "Although the effect of the license gives to members of these professions something of an exclusive character, and incidentally confers valuable privileges, yet the design of the license is to protect the community from the consequences of a want of professional qualifications, and to benefit the public by enabling the profession to acquire professional merits; consequently the license cannot be holden to confer any vested privileges, but is liable to be modified in any manner which the public welfare may demand." State *v.* Gazlay, 5 Ohio 14.

So it has been held that a statute which requires a duly licensed

Notes

attorney to take a prescribed oath of allegiance as a condition precedent to practicing in the courts of the state is not invalid as an interference with contract or property rights. Ex parte Hunter, 2 W. Va. 122; Ex parte Quarrier, 4 W. Va. 210; State *v.* Garesche, 36 Mo. 256.

But an attorney's license cannot be revoked because of offenses committed in the past where the offenses in question had no bearing upon his qualifications as a proper person to practice law. Cummings *v.* Missouri, 4 Wall. 277, 18 L. Ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. Such a provision is invalid as making the offense punishable in a manner in which it was not punishable at the time of its commission. But where the offense was such as to render the attorney infamous and unfit to continue in the profession, the court may strike his name from its list of attorneys, not as a punishment for the offense committed, but as being an improper person to hold a license. Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569.

Physician's License.

So the license of a physician confers no contract or property right; and the practice of medicine being a matter closely connected with the lives and health of the community, the state may, in the exercise of its police power, revoke all existing licenses, and provide new qualifications to the exclusion of many who formerly held licenses. State *v.* Dent, 25 W. Va. 1, affirmed, 129 U. S. 114, 9 Sup. Ct. Rep. 231; Hawker *v.* New York, 170 U. S. 189, 42 L. Ed. 1002, 18 Sup. Ct. Rep. 573. In this last case a practitioner of many years standing was excluded by an ex post facto law which eradicated from the profession all who had at any time been convicted of certain crimes. Just as in the case of the attorney mentioned above, the statute was upheld as not being a law which inflicted punishment for past crime, but which acted upon the offender, stamping him as unfit to continue longer in the profession.

Auctioneer's License.

So the license of an auctioneer confers no contract or property right. People, Schwab *v.* Grant, 126 N. Y. 473, 27 N. E. Rep. 964; City of New Orleans *v.* Turpin, 14 La. Ann. 56. But where an ordinance requires an auctioneer to execute a bond as a condition precedent to the obtaining of a license, a subsequent ordinance repealing the license cannot destroy or impair any right acquired under the bond given in pursuance of the first ordinance. McMechen *v.* City of Baltimore, 2 Har. & J. 41.

Butcher's License—Private Market.

In Newson *v.* City of Galveston, 76 Tex. 559, 7 L. R. A. 797, 13 S. W. Rep. 368, the plaintiff sought to restrain the city from interfering with him in the maintenance of a private market for the sale of fresh meats, claiming that inasmuch as he had gone to great expense in fitting up his place with refrigerators and other fixtures necessary for the carrying on of the business, the city ordinance prohibiting the continued existence of markets in the locality in which plaintiff's was situated, and forbidding a renewal of his license, was invalid as prohibiting a lawful and useful business and as impairing his vested rights. But it was held that not only was it no impairment or denial of any of the plaintiff's rights to refuse a renewal of his license, but that it would have been perfectly competent for the city, in the exercise of its police power, to have revoked the license before its expiration.

Pool Room License.

See Commonwealth *v.* Kinsley, 133 Mass. 578.

License to Sell Lottery Tickets or Conduct a Lottery.

In the License Tax Cases, 20 Iowa 82, 72 U. S. (5 Wall.) 462, 480, 18 L. Ed. 497, 675, the facts were that under the laws of certain of the states the selling of lottery tickets or intoxicating liquors was made an indictable offense. Certain parties having been indicted under the state laws for dealing in these commodities, pleaded in

Notes

defence that they held licenses to sell under the federal internal revenue law, and that the state laws were unconstitutional as impairing the obligation of their contracts under those licenses; but it was held that the licenses were not contracts or permits guaranteeing to the licensees the right to engage in the business taxed, but were mere receipts for the tax money exacted from those who might lawfully engage therein under the laws of the several states.

Lotteries are peculiarly subject to the police power, and any license to conduct a lottery or to sell the tickets of such an institution is held subject to the right of the state to revoke under that power; no vested or irrevocable right to act under such a license can be acquired even though it be in the form of the most express contract or solemn grant. Mississippi Society of Arts and Sciences *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723; Moore *v.* State, 48 Miss. 147, 12 Am. Rep. 367; State *v.* Woodward, 89 Ind. 110, 46 Am. Rep. 160; Boyd *v.* Alabama, 94 U. S. 645, 24 L. Ed. 302; Stone *v.* Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

Licenses to Insurance Companies.

See Home Insurance Company *v.* City Council of Augusta, 93 U. S. 116, 23 L. Ed. 825; Hartford Fire Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. Rep. 474; American Insurance Company *v.* Stoy, 41 Mich. 385.

But while a state may impose conditions upon foreign insurance companies doing business within its limits, or exclude them altogether, yet if it elects to admit them under conditions, the conditions must be such as are not repugnant to the constitution or laws of the United States. Hence a statute requiring foreign insurance companies to waive their right to remove cases to the federal courts, under penalty of having their licenses revoked in case of failure to comply with its requirements, is unconstitutional and void. Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Home Ins. Co. *v.* Morse, 87 U. S. (20 Wall.) 445, 22 L. Ed. 365.

Liquor Licenses.

Not only is a license to sell liquor not a contract, but it is not competent for the state or municipality by any words, howsoever express they may be, to preclude itself from revoking such licenses or from annulling the franchise of any corporation chartered for the purpose of manufacturing and selling intoxicating liquors. It has been well said that the regulation of the liquor traffic is an exercise of the police power for the prevention of intemperance, pauperism, and crime, and that since the state cannot barter away or in any manner abridge any of those inherent powers of government, the complete and untrammeled exercise of which is essential to the welfare of organized society, it cannot, through any agency or means whatsoever, enter into a contract hampering future action looking to the regulation, restriction, or prohibition of the liquor traffic; and contracts to that end are void upon general principles. Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Boyd *v.* Alabama, 94 U. S. 645, 24 L. Ed. 302; Stone *v.* Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

In one case the plaintiff had paid a fee of $200 for the privilege of selling liquors for a period of one year. At the end of six months the license was revoked by a general statute which put the plaintiff, and all others in like situation, to their election, either to go out of the business, or to pay a fee of $500 each for licenses under the new law. It was held that none of their constitutional rights had been taken or denied. Kresser *v.* Lyman, 74 Fed. Rep. 765. See also, Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. Rep. 425; Melton *v.* Mayor, etc., of City of Moultrie (Ga.), 40 S. E. Rep. 302.

Speaking of the constitutionality of such statutes, Judge Cooley uses the following language: "Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in

Notes

alcoholic drinks being lawful, and the capital employed in it being fu protected by law, the legislature then steps in, and by an enactme based on general reasons of public utility, annihilates the traf destroys altogether the employment, and reduces to a nominal val the property on hand. Even the keeping of that for the purposes sale becomes a criminal offense; and, without any change whate in his own conduct or employment, the merchant of yesterday becor the criminal of today, and the very building in which he lives a conducts the business which to that moment was lawful becomes t subject of legal proceedings, if the statutes shall so declare, and li ble to be proceeded against for a forfeiture. A statute which can this must be justified upon the highest reasons of public benefit; b whether satisfactory or not, the reasons address themselves exclusive to the legislative wisdom." Cooley, Const. Limns. 120.

That licenses to sell liquor are neither property nor contract, but a revocable at the pleasure of the state, or by duly authorized or nance, at any and all times, see the following cases: Beer Co. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Kresser *v.* Lyman, 74 Fe Rep. 765; Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. Rep. 42 License Tax Cases, 20 Iowa 82, 72 U. S. (5 Wall.) 462, 480, 18 L. E 497, 675; Plumb *v.* Christie, 103 Ga. 686, 42 L. R. A. 181, 30 S. Rep. 759; Ison *v.* Mayor, etc., of Griffin, 98 Ga. 623, 25 S. E. Re 611; McGehee *v.* State (Ga.), 40 S. E. Rep. 1004; Brown *v.* State, Ga. 224, 7 S. E. Rep. 915; Brock *v.* State, 65 Ga. 437; Sprayberry City of Atlanta, 87 Ga. 120, 13 S. E. Rep. 197; Whaley *v.* Mayor, et of Columbus, 89 Ga. 781, 15 S. E. Rep. 694; Voight *v.* Board of Exci Com'rs of Newark, 59 N. J. L. 358, 37 L. R. A. 292, 36 Atl. Rep. 68 State, Lantz *v.* Hightstown, 46 N. J. L. 107; Black *v.* Jacksonvill 36 Ill. 301; La Croix *v.* Commissioners, 50 Conn. 328; Board Excise *v.* Barrie, 34 N. Y. 667; McKinney *v.* Town of Salem, 77 In 213; Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83; Calder *v.* Kurby, Gray 597; Commonwealth *v.* Brennan, 103 Mass. 70; La Croix County Commissioners, 49 Conn. 591; Powell *v.* State, 69 Ala. 1 Columbus *v.* City of Cutcomp, 61 Iowa 672; Kellum *v.* State, 66 In 588; State *v.* Holmes, 38 N. H. 225; People *v.* Wright, 3 Hun (N. Y 306; Richland Co. *v.* Richland Centre, 59 Wis. 591, 18 N. W. Re 497; Schwuchow *v.* City of Chicago, 68 Ill. 444; Reed *v.* Beall, Miss. 472; Coulson *v.* Harris, 43 Miss. 728; Prohibitory Amendme Cases, 24 Kan. 700; Hurber *v.* Baugh, 43 Iowa 514; City of Ottum *v.* Schaub, 52 Iowa 515, 3 N. W. Rep. 529; Martin *v.* State, 23 Ne 371, 36 N. W. Rep. 554 (on rehearing, 27 Neb. 325, 43 N. W. Re 108); Pleuler *v.* State, 11 Neb. 547, 10 N. W. Rep. 481; State *v.* Bo 31 La. Ann. 663, 33 Am. Rep. 224; Menken *v.* City of Atlanta, 78 G 668, 2 S. E. Rep. 559; Moran *v.* Goodwin, 130 Mass. 158, 39 Am. Re 443; Baker *v.* Pope, 2 Hun (N. Y.) 556; Franklin *v.* Schermerhor 8 Hun (N. Y.) 112; Smith *v.* Knoxville, 40 Tenn. (3 Head) 245.

And it makes no difference that the licensee has expended lar sums in laying in a stock of liquors and in fitting up a place in whi to conduct the business. Melton *v.* Mayor, etc., of Moultrie (Ga. 40 S. E. Rep. 302; Ison *v.* Mayor, etc., of Griffin, 98 Ga. 623, 25 E. Rep. 611.

Same--Civil Damage Law.

So after a license has been issued the state may impose as a furth condition to the continued enjoyment of the privilege conferred, statutory provision to the effect that the licensee shall be liable damages for injuries caused by persons intoxicated by the liquor s by him. Moran *v.* Goodwin, 130 Mass. 158, 39 Am. Rep. 443; Bak *v.* Pope, 2 Hun (N. Y.) 556; Franklin *v.* Schermerhorn, 8 Hun 1

Same--Cases Apparently Contra.

In Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376, the questi arose incidentally in an action upon a promissory note given in s tlement for certain intoxicating liquors purchased of the plaintiff the defendant. The facts were that the plaintiff had, in due comp ance with law, procured and paid for a license to sell intoxicat

Notes

liquors for a period of one year. In a few months after the issuance of the license it was revoked by a statute repealing the law under which it was issued. A part of the consideration of the note sued upon was for liquors sold between the time of the revocation of the license and the end of the year for which it was issued. Upon defence being made that so much of the face of the note as represented the price of liquors sold during this period was for an illegal consideration, it was held that the right to sell liquor under the license was a vested right; and hence so much of the repealing statute as sought to impair that right was retrospective and invalid. But in the case of State *v.* Holmes, 38 N. H. 225, the constitutionality of the repealing statute came directly before the court, and it was held that a license to sell liquor gave no vested rights; and the court commenting upon the ruling in the former case, said: "This question arose incidentally in Adams *v.* Hackett, but the point does not appear to have been material to the decision of that case, and we do not feel pressed by that authority."

In Plummer *v.* Com., 1 Bush (Ky.) 26, one Shepherd was licensed by the county court to keep a tavern. Before the expiration of the license, the county court, without any notice, suspended the same until the next term of the court. During this period Plummer assisted Shepherd in retailing liquors, and was indicted therefor. He justified under Shepherd's license. The action of the county court was had under a statute which provided, in substance, that it should be the duty of every trustee of a town, when informed that an offense had been committed by a tavern keeper of his town, to make the same known to the judge of the county court, who should cause the alleged offender to be summoned to appear before him, at a time and place designated, to show cause why his license should not be suspended until the next term of the county court, when the judge should hear and decide the cause. As the judge had failed to cause Shepherd to be summoned and appear before him, it was properly held that the trial court erred in admitting the order of suspension in evidence.

Under the Georgia local option act of Sept. 1885, the privilege of selling under existing licenses was, by express provision of the statute, deemed a vested right; but this provision was held not to include breweries doing business under charters which were granted with the express reservation that they were subject to repeal or modification. Menken *v.* City of Atlanta, 78 Ga. 668, 2 S. E. Rep. 559.

In State *v.* Baker, 32 Mo. App. 98, it was held that a liquor license is so far within the protection of the law, and to that extent equivalent to a contract right, that it cannot be revoked without cause.

The case of Heise *v.* Town Council, 6 Rich. (S. Car.) 404, was where the town council of Columbia had enacted an ordinance providing that the selling of liquor to a slave by a retailer of spirituous liquors should work a forfeiture of the license, and although it was held that a license granted and paid for was essentially property, yet the ordinance was held to be invalid because under the charter the council had authority to inflict no other penalties than fines; hence, the ordinance providing for the forfeiture was void as being beyond the charter powers.

In general it may be said that in any case where the statute provides that there shall be no revocation until the licensee has had notice and an opportunity for a hearing, such notice and hearing, or other prescribed condition, is essential to a valid revocation. Com. *v.* Moylan, 119 Mass. 109; Gaertner *v.* City of Fond du Lac, 34 Wis. 504.

Same—Where License Is Accepted Subject to Conditions.

Since a license to sell liquor is revocable at any time, irrespective of the question whether or not the licensee has done any overt or unlawful act which would of itself afford cause for revocation, a fortiori is it revocable where it is accepted under a statute or ordinance which provides that it shall be revocable at the pleasure of the mayor and council, or that any violation of the liquor laws shall work a for-

feiture thereof. Sprayberry *v.* City of Atlanta, 87 Ga. 120, 13 S. Rep. 197; Whaley *v.* Mayor, etc., of Columbus, 89 Ga. 781, 15 S. Rep. 694; Sullivan *v.* Borden, 163 Mass. 470, 40 N. E. Rep. 8 People, Presmeyer *v.* Com'rs of Excise, 59 N. Y. 92; La Croix County Com'rs, 50 Conn. 321, 47 Am. Rep. 648; State *v.* Woodwa 89 Ind. 110, 46 Am. Rep. 160; Columbus City *v.* Cutcomp, 61 Io 672, 17 N. W. Rep. 47; Richland Co. *v.* Richland Centre, 59 Wis. 5 18 N. W. Rep. 497; Commonwealth *v.* Moylan, 119 Mass. 109; Co monwealth *v.* Hainer, 128 Mass. 76; Hogan *v.* Guigon, 29 Gra (Va.) 705.

Licenses Accepted Subject to Conditions—Generally.

What has been said in regard to liquor licenses accepted subject conditions applies with equal force to other business licenses; as the case of a pharmacist who held a license under a statute wh provided for the immediate forfeiture thereof upon the licensee's v lating the law against pharmacists selling intoxicating liquors: E dreth *v.* Crawford, 65 Iowa 339, 21 N. W. Rep. 667; and in the case one who accepted a license to operate scavenger carts and engage the business of a scavenger under an ordinance which provided t such license should be summarily revoked upon the complaint of city health officer: Vogt *v.* Mayor, etc., of Baltimore, 4 Am. & E Corp. Cas. 329; and so where a license to conduct a meat market w accepted under an ordinance which provided that a dissolution of partnership should operate as a revocation of the license: City of Charles *v.* Hackman, 133 Mo. 634, 34 S. W. Rep. 878.

Double Taxation—Imposing Additional License Fee.

A license tax, as a tax, confers no right upon the party whose d it is to pay it; it simply lays a burden upon an occupation a creates a duty to pay it. The right to pass an ordinance includes power to repeal or modify it, provided no contract or property rig are thereby violated; and as we have just seen that a license d not confer contract or property rights, it follows that an ordina imposing a license tax upon an occupation may be repealed and additional tax imposed upon such occupation or business during t term for which the license was originally granted. We have alrea seen that this is so in the case of licenses to sell intoxicating liquo Supra, p. 827. The following cases may be added to those there cit Rowland *v.* State, 12 Tex. App. 418; Ex parte Lawrence, 69 Cal. 6 11 Pac. Rep. 217; Hadnter *v.* City of Williamsport (Pa.), 15 Wk Notes Cas. 138; Sights *v.* Yarnalls, 12 Gratt. (Va.) 292; Hoover Town Council of Chester, 39 S. Car. 307, 17 S. E. Rep. 752; Melt *v.* Mayor, etc., of City of Moultrie (Ga.), 40 S. E. Rep. 302.

But this principle applies generally to other licenses as well. leading case upon the subject is that of Home Insurance Co. *v.* Ci Council of Augusta, 93 U. S. 116, 23 L. Ed. 825. The facts were follows: Under an act of the legislature of Georgia the insura company procured the requisite authority to transact by itself agents the business of insurance for one year from the first of Ja uary, 1874. The company thereupon established an office and agen in the city of Augusta, and proceeded to transact business at th place. A general law of the state imposed a tax of one per ce upon the gross amount of premiums received. An ordinance of t city of Augusta imposed a tax of one and a quarter per cent. up such receipts. These taxes were paid by the company without obj tion. But on the 5th of January, 1874, the city council passed ordinance which imposed, further, a license tax of $250, on each a every fire, marine, or accidental insurance company located, havi an office, or doing business within the city of Augusta. The co pany sought to enjoin the collection of this tax upon the ground th it was an impairment of their vested rights under the license auth izing them to do business for one year from the first of Janua 1874; but it was held that such a license was a mere receipt for t license money, and not a contract exempting the company from a

Notes

further taxation for the space of one year; and hence, notwithstanding the existence of the license, the state or city or both might impose additional taxes during the life thereof.

So it has been held that in addition to the tax imposed upon foreign insurance companies they may be required to pay a license fee equal to two per cent. of their gross receipts for the support of a city fire department. Walker *v.* City of Springfield, 94 Ill. 364.

So where a state law requires every foreign corporation, other than banking and insurance companies, to procure a certificate that it has complied with the law, and pay a fee therefor proportioned according to the amount of its capital stock, as a condition precedent to doing business in the state, such certificate is a mere license, and not a contract, and a subsequent statute requiring an additional license fee is not invalid as impairing the obligation of a contract. Ætna Standard Iron & Steel Co. *v.* Taylor (Com. Pl.), 4 Ohio Dec. 180, 1 O. C. D. 242, 1 O. L. D. 180, 3 Ohio N. P. 152. And the fact that a bank has paid a license tax imposed by the state for state purposes does not prevent the city in which it is located from requiring it to take out a municipal license and pay a fee therefor. State *v.* City of Columbia, 6 S. Car. (6 Rich.) 1.

So a broker may be compelled to pay an additional license tax during the term for which the first license was granted: Drexel *v.* Commonwealth, 46 Pa. St. (10 Wright) 31; and an auctioneer: City of New Orleans *v.* Turpin, 13 La. Ann. 56; and an attorney: Simmons *v.* State, 12 Mo. 268, 49 Am. Dec. 131; City of St. Louis *v.* Sternberg, 69 Mo. 289.

So an ordinance requiring one who has paid a privilege tax as a confectioner to pay an additional license fee on his soda fountain, is not invalid as imposing double taxation. First Municipality *v.* Manuel, 4 La. Ann. 323.

And under a constitutional provision authorizing the taxation of merchants, peddlers, and privileges in such manner as the legislature shall from time to time direct, the legislature may authorize the imposition of a license tax upon merchants equal to their ad valorem tax. Jenkins *v.* Ewin, 55 Tenn. (8 Heisk.) 456.

And where a city had authority to license and tax all meat packing and rendering establishments within the city limits or within one mile thereof, it was held that an establishment of that nature which was situated within one mile of the city limits, and also within the limits of a town which under its charter had power to exact a license tax, could be compelled to pay license taxes both to the town and to the city. Chicago Packing and Provision Company *v.* City of Chicago, 88 Ill. 221, 30 Am. Rep. 545.

Under a charter power to impose license taxes upon occupations and upon vehicles used or let for hire, the city may impose a license tax upon such vehicles in addition to their ad valorem tax. City of Covington *v.* Woods, 98 Ky. 344, 33 S. W. Rep. 84; Walker *v.* City of New Orleans, 31 La. Ann. 828. But an ordinance purporting to derive its validity from such a charter provision and which imposes a license tax upon vehicles plying the streets regardless of whether they are used or let for hire, is invalid as to those not so used. City of Covington *v.* Woods, 98 Ky. 344, 33 S. W. Rep. 84. Moreover, a tax on a wagon not employed in any hauling business for persons other than the owner is not a license tax, but a tax on property, and cannot be upheld where the owner has already paid an ad valorem tax. Livingston *v.* City of Paducah, 80 Ky. 656; Johnston *v.* City of Macon, 62 Ga. 645.

And an ordinance requiring the owners of vehicles kept for hire, who have paid their city license tax on such vehicles, to pay an additional and exorbitant fee to the city for a plate which the city has prescribed shall be placed upon such vehicles for their more convenient identification, is a mere subterfuge for the imposition of another license tax, and is unreasonable and invalid. Walker *v.* City of New Orleans, 31 La. Ann. 828.

Notes

Estoppel of City to Revoke License.

As a general rule the doctrine of estoppel cannot be invoked again a statute or ordinance looking to the revocation of privilege licens This is illustrated in the cases above cited where persons engaged various businesses and occupations were compelled to pay addition fees under penalty of having existing licenses revoked; and it especially true as regards licenses to conduct businesses comi within the scope of the police power, as, for example, meat mark and liquor saloons; the incurring of expense for stocks and fixtu necessary for the conduct of the business affording no ground defence against the revocation of the license. Ison *v.* Mayor, et of Griffin, 98 Ga. 623, 25 S. E. Rep. 611; Melton *v.* Mayor, etc., Moultrie (Ga.), 40 S. E. Rep. 302; Newson *v.* City of Galveston, Tex. 559, 7 L. R. A. 797, 13 S. W. Rep. 368.

Same—Licenses to Erect Particular Structures.

As regards the permitting of encroachments on streets and sid walks, or the erection of wooden buildings within the fire limits, is obvious that these matters have to do with the police power, whi neither the city nor state can barter away or surrender. Thus it h been held that where a turnout connecting private property with certain railway was constructed in a city street under a license fro the city, for which license the plaintiff paid a valuable considerati the same could be removed whenever the interest of the public requir it. Branson *v.* City of Philadelphia, 47 Pa. St. (11 Wright) 329.

And so where the plaintiff, under a license from the city, had co structed a large refrigerator fish box in the street as a necessa adjunct to his business of fish dealer, he was held to have sustain no injury upon which to base a cause of action when the city revok the license and removed the box forcibly and against his will. Lai *v.* Mayor, etc., of Americus, 86 Ga. 756, 13 S. E. Rep. 107.

In Augusta *v.* Burum, 93 Ga. 68, 26 L. R. A. 340, 19 S. E. Re 820, it was held that, while the municipality could not bargain aw its power of control over its streets and sidewalks by granting irre ocable licenses for the erection of awnings extending over the sam yet where under its charter power it had authorized such awning and the licensees had expended money in erecting the same, the would be an equitable estoppel against a needless or capricious revoc tion of the permission granted until after a sufficient lapse of time allow the parties to realize, in the use and enjoyment of their aw ings, a fair return for their outlay.

And in City of Buffalo *v.* Chadeayne, 134 N. Y. 163, 31 N. E. Re 443, it was held that a charter power to define the fire limits of t city and prevent the erection of wooden buildings therein, had refe ence solely to the future, and not to existing structures or to such might thereafter be erected under license from the city council; henc where the council had granted a license for the erection of a wood building within the fire limits, and the licensee had expended mon and incurred liability in excavating for the foundation, and in c lecting material, entering into contracts, etc., it was held that had acquired a property right which the council was estopped fro destroying by revoking the license.

Mandamus to Compel Issuance of License.

After what has been said in the foregoing portion of this note would seem that mandamus would not lie to compel the issuance a business or occupation license; but this is to be decided in ea case according to the rules applicable to the issuing of such writ and not solely upon the theory that such licenses are neither contra nor property. Thus if the licensing board or body is vested wi any discretion as to whom they may license, such discretion canno of course, be controlled by mandamus. For example, where the sta ute required all auctioneers in a certain city to give bond and obta a license, and empowered the mayor to issue the licenses to su persons as he deemed fit, it was held that one who had made applic tion for a license and tendered the necessary bond could not maint

Abstracts

mandamus to compel the issuance of a license to himself. People, Schwab *v.* Grant, 126 N. Y. 473, 27 N. E. Rep. 964.

So where the state had created a state board of agriculture and committed to its discretion the issuing of licenses to mine phosphate from the beds of its navigable streams, and the board, in the exercise of its discretion, had refused a license to a company which had complied with all the requisites for obtaining a license, on the ground that it proposed not only to mine the rock but to manufacture it into the salable article, it being, in the judgment of the board, contrary to the best interests of the state to license such companies, it was held that the company could not compel the issuance of the license by mandamus. Port Royal Min. Co. *v.* Hagood, 30 S. Car. 519, 3 L. R. A. 841, 9 S. E. Rep. 686. And, of course, where the city, in the exercise of its power to revoke existing licenses, has passed an ordinance repealing the existing ordinance upon the subject, but the plaintiff has demanded a license under the old law before the new can go into effect, a mandamus will not issue, since the law will not do so vain a thing as to compel the issuance of a license which will be rendered null and of no effect by the operation of the ordinance which is so soon to go into effect. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292; Bishoff *v.* State (Fla.), 30 So. Rep. 808; Melton *v.* Mayor, etc., of Moultrie (Ga.), 40 S. E. Rep. 302; Plumb *v.* Christie, 103 Ga. 686, 42 L. R. A. 181, 30 S. E. Rep. 759; State, Hoover *v.* Town Council of Chester, 39 S. Car. 307, 17 S. E. Rep. 752.

But where no discretion is vested in the council, and the law is plain that licenses shall be issued to all who apply and are willing to pay the license tax, as in the case of ordinary mercantile pursuits, trades, and occupations, in which any one may engage as of common right, any one who is refused a license may resort to a writ of mandamus to compel the issuance of the same. East St. Louis *v.* Wilder, 46 Ill. 351; People, Hall *v.* Sup'rs of San Francisco, 20 Cal. 591; Braconier *v.* Packard, 136 Mass. 50; Amperse *v.* Kalamazoo Council, 59 Mich. 78.

TERRITORY *ex rel.* ATTORNEY GENERAL *v.* TOWN OF JEROME.

(*Supreme Court of Arizona, March 22, 1901.*)

[64 Pac. Rep. 417.]

Incorporation—Want of Notice to Inhabitants—Constitutional Law.

Laws 1893, Act No. 72, providing that on petition by two-thirds of the taxable inhabitants of any town to the supervisors of the county, praying the incorporation of the town, the board may order such incorporation, is not unconstitutional, as authorizing the taking of property without due process of law, in that it requires no notice to be given those interested.

Same—Failure to Include Whole Town—Validity.

Laws 1893, Act No. 72, declares that whenever two-thirds of the taxable inhabitants of any town shall petition the supervisors of the county for the incorporation of the town, setting forth the metes and bounds of the same, the board may order such town incorporated: *held*, that the action of the supervisors incorporating a town bounded as described in the petition was not invalid because the whole town was not included; it being only necessary that the board should ascertain whether the petitioners are two-thirds of the taxable inhabitants of the described territory.

Appeal from district court, Yavapai county; before Justice R. E. Sloan.

Quo warranto by the territory, on the relation of the attorney general, against the town of Jerome, to test the validity

of the incorporation of the town. From a judgment denyi the writ, relator appeals. Affirmed.

C. F. Ainsworth, Atty. Gen. (E. M. Sanford, of counse for appellant.

Reese M. Ling and H. M. Gibbes, for appellee.

STATE *ex rel.* PERRIN *v.* HOARD *et al.*

(*Supreme Court of Texas, May 20, 1901.*)

[62 S. W. Rep. 1054.]

Incorporation—Compliance with Statutory Requirements—Failure File Plat.

Under Sayles' Ann. Civ. St. art. 580, prescribing the procedure incorporation of towns, and directing that a plat of the proposed to be furnished to the county court with the petition for election, failure, in petitioning for an order for an election to determine incorporation, to file therewith a plat of the proposed town, is such a noncompliance with the statute as to render invalid the atten to incorporate.

Same—Same—Including Land Not Intended for Town Purposes.

Under Sayles' Ann. Civ. St. art. 580, prescribing the procedure incorporation of certain towns, and directing that the plat furnis with the petition for an election to decide on incorporation sh include no territory except what is intended to be used for stric town purposes, the inclusion of 205 acres of cultivated land wit the territory of a proposed town did not render the incorporati thereof invalid; the trial court having found as a fact that the la was intended for town purposes, and the intent bringing it wit the law.

Certified questions from court of civil appeals of Fif supreme judicial district.

Action by the state, on the relation of L. C. Perrin, agai J. M. Hoard and others. Certified questions from the cou of civil appeals.

D. W. Huffar, Dist. Atty., and Perkins, Gilbert & Perki for appellant.

Craddock & Looney, for appellees.

MAYOR, ETC., OF TOWN OF SOUTH MORGANTOWN *v.* CITY MORGANTOWN *et al.*

(*Supreme Court of Appeals of West Virginia, Sept. 7, 1901.*)

[40 S. E. Rep. 15.]

Consolidation of Municipalities — Repeal of Charter—Constitutio Provision—Construction.

The constitution, in article 6, § 39, does not prohibit the legislatu from passing a special law repealing the charter of a municipal c poration, or uniting the territory of several municipal corporatio in one municipal corporation, and thus repealing their former charte

Same—Act of Incorporation—Validity.

Chapter 144, Acts 1901, incorporating the city of Morgantown, not in violation of section 39, art. 6, of the constitution.

Statute—Constitutionality—Rule of Construction.

Courts will not hold an act of the legislature to be contrary to

constitution without great caution, and unless it be manifestly and beyond doubt unconstitutional.
(Syllabus by the Court.)

Application by the mayor and councilmen of South Morgantown for a writ of mandamus against the city of Morgantown and others. Writ denied, and rule for writ of mandamus awarded by judgment of the supreme court. Rule discharged.

R. E. L. Allen, for petitioners.
Cox & Baker, for respondents.

PEOPLE *ex rel.* BONDURANT *v.* MARQUISS *et al.*
(*Supreme Court of Illinois, Oct. 24, 1901.*)
[61 N. E. Rep. 352.]

Incorporation—Proceeding to Test Validity—Franchise—Jurisdiction of Supreme Court.

A proceeding by quo warranto against the officers of a village to contest the validity of the village organization involves a franchise, and a writ of error to review the judgment of the circuit court thereon is properly issued directly by the supreme court.

Same—Statute Authorizing—Whether Special or General—Repeal.

The city and village act, providing that on a petition the county judge may call an election to vote on the question of the organization of a village, and prescribing the conduct of such election, is a special act applying to a particular class of elections, and was not repealed by the ballot law passed in 1891.

Same—Whether Territory to Be Incorporated Must Be Platted—Illinois Statute.

Under Hurd's Rev. St. 1899, c. 24, par. 182, providing that any area of contiguous territory not exceeding two square miles, having a population of at least 300, and not within the limits of any incorporated town, village, or city, may become an incorporated village, the territory so incorporated need not be platted into lots or blocks.

Same—Area of Territory to Be Incorporated—Illinois Statute.

Under Hurd's Rev. St. 1899, c. 24, par. 182, providing that an area of contiguous territory not exceeding two square miles may be incorporated as a village, the area so incorporated may be less than, but cannot exceed, two square miles.

Error to circuit court, Piatt county; W. G. Cochran, Judge.

Quo warranto by the people, on relation of Thomas E. Bondurant, against Seymour Marquiss and others, officers of the village of Deland. From a judgment for respondents, relator brings error. Affirmed.

C. F. Mansfield, State's Atty., and J. L. Ray, for plaintiff in error.
Reed & Edie, for defendants in error.

VILLAGE OF OSMOND *v.* SMATHERS.
(*Supreme Court of Nebraska, Sept. 18, 1901.*)
[87 N. W. Rep. 310.]

Detachment of Territory—Statute—To Whom Available—Voters.

Section 101, art. 1, c. 14, Comp. St., relating to the detachment of

territory from a city or village by petition, is available only to leg voters of the territory sought to be disconnected.

Agricultural Lands—Right of Nonresident to Maintain Suit for Detac ment.

The owner of agricultural lands included within the boundaries a city or village, although not a voter therein, may maintain a su to have such lands detached from the municipality.

(Syllabus by the Court.)

Error to district court, Pierce county; Robinson, Judg

Action by James R. Smathers against the village of Osmon Judgment for plaintiff, and defendant brings error. Affirme

C. B. Willey, for plaintiff in error.

Berryman & Stewart, for defendant in error.

VILLAGE OF OSMOND *v.* MATTESON *et al.*

(Supreme Court of Nebraska, Sept. 18, 1901.)

[87 N. W. Rep. 311.]

Detachment of Territory—Statute—To Whom Available—Voters.

The provisions of section 101, art. 1, c. 14, Comp. St., for t detachment of territory from a city or village, are available only legal voters of the territory sought to be disconnected. Village Osmond *v.* Smathers (decided herewith) 87 N. W. 310, followed.

Agricultural Lands—Right of Nonresident to Maintain Suit for Detac ment.

The owner of agricultural lands included within the boundaries a city or village, although not a voter therein, may maintain a su to have such lands detached from the municipality.

(Syllabus by the Court.)

Error to district court, Pierce county; Robinson, Judg

Action by Hancy L. Matteson and others against the villa of Osmond. Judgment for plaintiffs, and defendant brin error. Affirmed.

C. B. Willey, for plaintiff in error.

Berryman & Stewart, for defendants in error.

PEOPLE *ex rel.* GLENN *et al. v.* BINNS *et al.*

(Supreme Court of Illinois, Oct. 24, 1901.)

[61 N. E. Rep. 376.]

Detachment of Territory—Proceedings—Petition—Ordinance.

Under Laws 1879, p. 77, "An act in relation to the disconnectio of territory from villages," declaring that, on the filing by lan owners of a petition containing certain allegations, the village tru tees should disconnect such land from the village by ordinance, t mere filing of the petition did not complete the disconnection, b the passing and filing of the ordinance were the consummation the act.

Same—Repeal of Statute Pending Proceedings—Vested Rights—Co stitutional Law.

Laws 1879, p. 77, providing that, on petition to village trustees b landowners, the trustees should pass an ordinance disconnecting sai land from the village, was repealed by Laws 1901, p. 96, making th action of the trustees discretionary, and declaring that the repe should apply to all cases, whether or not petition for disconnectio

had been made: *held*, that the act of 1901 was within the power of the legislature; owners who had filed petitions not having acquired any vested right thereby.

Mandamus by the people, on the relation of James A. Glenn, and others, against Hugh A. Binns and others, trustees of the village of Middletown, to compel said trustees to pass an ordinance disconnecting land of said relators from said village. Denied.

Blinn & Harris, for petitioners.
King & Miller, for respondents.

STATE (MCCULLEY, Prosecutor) *v.* CITY OF ELIZABETH.
(*Supreme Court of New Jersey, June 10, 1901.*)
[49 Atl. Rep. 686.]

Ward Lines—Change—Must Be by Ordinance.

A resolution of a city changing ward lines is without force, as such changes can only be made by ordinance, under the statute.

Same—Change by Resolution—Repeal of Statute Authorizing.

The act of April 25, 1894, authorizing such change by resolution, is repealed by the act of March 14, 1895, which requires such action to be taken by ordinance.

Division of City into Wards—New Jersey Statute.

The act of 1895 is general, covering the whole subject, and must be taken as the declaration of a legislative policy for the division of cities into wards, or the changing of lines of existing wards as well as the creation of new wards.

Certiorari by the state, on prosecution of William McCulley, against the city of Elizabeth, to review a resolution. Resolution set aside.

Argued February term, 1901, before GUMMERE and FORT, JJ.

Frank Bergen, for prosecutor.
James C. Connolly, for defendant.

STATE *ex rel.* BARNETT *v.* CITY OF NOBLESVILLE *et al.*
(*Supreme Court of Indiana, May 15, 1901.*)
[60 N. E. Rep. 453.]

City Marshals—Mandamus to Compel Council to Fix Reasonable Salary—Discretion of Council.

Burns' Rev. St. 1894, § 3462 et seq., provides for the election of a city marshal, and the length of his term, and prescribes his powers and duties. It also requires that the common council shall within one month after the annual election in each year fix the salary of all city officers, and provide for their payment. Acts 1881, p. 109, amending the preceding act, gives city marshals the jurisdiction and powers of constables, and declares them to be entitled to the same fees: *held*, that mandamus will not lie to compel the city council to increase the city marshal's salary, though grossly inadequate.

Appeal from circuit court, Hamilton county; Theo. P. Davis, Special Judge.

Mandamus proceedings by the state, on the relation of

Frank Barnett, against the city of Noblesville and other From orders sustaining demurrers to the complaint and t the alternative writ, plaintiff appeals. Affirmed.

Shirts & Fertig, for appellant.

Christian, Christian & Cloe, for appellees.

DOWLING, C. J. The salary to be allowed the marsh rested entirely in the discretion of the common council, an that body having fixed its amount, they could not be con pelled by writ of mandate to change or increase it. Th duties of the office may have been light and unimportant, an the fees allowed by the statute may have been considered sufficient compensation. But with the motives of the counc in fixing the amount of the salary the court has nothing to d In all such cases it has been held that mandamus does not li People v. Johnson, 17 Cal. 306; High, Extr. Rem. (3d Ed §§ 325, 345; People v. French, 24 Hun, 263; Mos. Mand. 5 1 Dill. Mun. Corp. p. 288, § 170; Lilly v. City of Indianapoli 149 Ind. 665, 49 N. E. 887; City of Brazil v. McBride, 6 Ind. 244. The case presented falls within the rule that, whe municipal officers are by law intrusted with jurisdiction ov certain matters, the decision of which rests in their soun discretion, and requires the exercise of their judgment, ma damus will not lie to control or in any manner interfere wi their decision. We find no error. Judgment affirmed.

BYBEE *et al. v.* SMITH.

(*Court of Appeals of Kentucky, March 1, 1901.*)

[61 S. W. Rep. 15.]

City Council—Quorum—What Constitutes—Kentucky Statute.

Under Ky. St. § 3616, part of charter of cities of the fifth cla providing that "the government of said cities shall be vested in mayor and city council, to consist of six members," and Id. § 363 providing that "a majority of the members shall constitute a quoru for the transaction of business," and that "the mayor shall presi at all meetings of the council, and may vote in case of a tie vote the council," the mayor and three members of the council do n constitute a quorum.

Same—Same—Same—Effect of Change from Old to New Charter.

Under Const. § 166, providing that existing charters of towns a cities shall continue in force until the general assembly shall provi by general law for the governing of towns and cities, except th officers in office shall hold until their successors are elected and qua ified, the "trustees" of a town assigned to the fifth class became t "city council," under the general charter of cities of that class, once upon its adoption, except that the chairman elected from t board, consisting of seven members, became the mayor, and therefo he and three of the members did not thereafter constitute a quoru though they had done so under the old charter.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by J. N. Smith against F. G. Bybee and others

test the validity of a city ordinance. Judgment for plaintiff, and defendants appeal. Affirmed.

Basil Richardson and Herman Morris, for appellants.

V. Baird, for appellee.

POLLASKY *v.* SCHMID, City Clerk.

(*Supreme Court of Michigan, Dec. 3, 1901.*)

[87 N. W. Rep. 1030.]

Common Council—Passage of Ordinance over Veto—Death of Member—Resignation—Two-Thirds Vote.

Under Detroit City Charter, § 103, providing that two-thirds of all the members elected of the common council shall be necessary to pass an ordinance over a veto, where one of the aldermen had died and one resigned, and their places were vacant, a two-thirds vote of the remaining aldermen was not sufficient to pass an ordinance over a veto.

Certiorari to circuit court, Wayne county; William L. Carpenter, Judge.

Certiorari by Marcus Pollasky against John A. Schmid, city clerk of the city of Detroit, to review the action of the Wayne circuit judge denying an application for mandamus to compel respondent to publish a certain ordinance claimed to have been adopted. Affirmed.

Groesbeck & Turner, for appellant.

John W. McGrath and P. J. M. Hally, for appellee.

RAY *v.* DE BUTTS *et al.*

(*Supreme Judicial Court of Massachusetts, Suffolk, Nov. 26, 1901.*)

[61 N. E. Rep. 887.]

Towns—Annual Meeting—Acceptance of Statute.

Under St. 1901, c. 78, relating to the police and fire departments in towns, and providing that such statute may be accepted at any annual town meeting, where a town is divided into precincts the acceptance must be had at the meeting authorized by St. 1894, c. 132, and St. 1898, c. 548, § 349, subsequent to the annual election at which the general business of the town is transacted, and not at the precinct meetings.

Exceptions from superior court, Suffolk county.

Action by one Ray against De Butts and others. From a judgment for defendants, plaintiff brings exceptions. Overruled.

D. F. Kimball and H. R. Bailey, for petitioner.

S. R. Cutler, H. W. James, R. W. Nason, and T. W. Proctor, for respondents.

MULDOON *v.* CITY OF LOWELL.

(*Supreme Judicial Court of Massachusetts, Middlesex, March 1, 1901.*)

[59 N. E. Rep. 637.]

Purchase of Supplies—Power of Supply Department to Appoint Inspector—Massachusetts Statute.

St. 1896, c. 415, § 3, provides that all supplies for the city shall be purchased by the chief of the department of supplies, and that all

bills for supplies shall show the date of purchase and delivery, th unit of price, the quality and quantity of the articles purchased, an the number and date of the order for purchase. Plaintiff was ap pointed by the chief of the supply department to inspect goods fu nished the city, to see that goods purchased were delivered an corresponded in quantity and quality with contracts, to weigh co and measure lumber purchased by the city, and to make reports t the chief: *held*, that plaintiff's appointment was not invalid on th ground that these services were not within the scope of the supp department.

Department of Supplies—Power of Chief of Department to Appoi Inspector—Massachusetts Statute.

St. 1896, c. 415, § 3, establishes a department of supplies, and pr vides that all material and supplies for the city shall be purchased b the head of such department, and requires the election of the chi of the department by the voters at the annual municipal electio Sections 5 and 8 give the heads of the several city departments pow to appoint and discharge all subordinate officers, within the limi of the appropriations made to their departments: *held*, that the chi of the supply department had power to appoint an inspector of su plies.

Report from superior court, Middlesex county; Charles S Lilley, Judge.

Action by one Muldoon against the city of Lowell to recov for services. On report of the trial judge. Judgment f plaintiff.

Daniel J. Donahue, for plaintiff.

F. W. Qua, for defendant.

CROWLEY *v.* FREUD *et al.*

(Supreme Court of California, April 6, 1901.)

[64 Pac. Rep. 696.]

Officers—Deputies of County Officers—Appointment under Consol dated Government of City and County of San Francisco.

Under Const. art. 11, § 8½, empowering consolidated city and count governments to provide for the number of deputies that each coun officer shall have, and for the compensation payable to each of suc deputies, the consolidated municipal government of the city an county of San Francisco, through its civil service commission, cou not prescribe the qualifications of the deputies of the county sherif clerk, recorder, etc., and compel those officers to select deputies fro persons named by such commission.

Consolidated City and County Governments—Whether Officers of San Are County Officers.

Under Const. art. 11, § 8½, empowering consolidated city and count governments to provide for the manner in which "county officers should be elected, etc., the contention that there were no county off cers in such consolidated governments, was idle.

Beatty, C. J., and Van Dyke and Temple, JJ., dissenting.

In bank. Appeal from superior court, city and county o San Francisco; J. C. B. Hebbard, Judge.

Action by Timothy O. Crowley against J. Richard Freu and others. From a judgment for plaintiff, defendant appeal. Affirmed.

F. K. Lane, City Atty., and G. W. McEnerney, for appe lants.

Garber, Creswell & Garber and Campbell, Metson & Camp bell (Geo. D. Squires, of counsel), for respondents.

Abstracts

WOOD *v.* CITY OF KANSAS CITY.

(Supreme Court of Missouri, Division No. 2, March 26, 1901.)

[62 S. W. Rep. 433.]

Notary in City Clerk's Office—Right to Fees—Ordinance Conflicting with Statute.

Plaintiff had been employed by defendant as an extra clerk in the treasurer's office, at a fixed compensation, and, as a notary public, he had taken a large number of acknowledgments for the city. Ordinance No. 3910, passed February 4, 1892, provided that no fees shall be received by the notary employed in the treasurer's office, except such as are turned into the city treasury. Rev. St. 1889, § 5001, fixes the fees which notaries shall be allowed for their services: *held*, that the ordinance was invalid, as contravening the statute, and hence the plaintiff was entitled to recover from the city his fees for the services rendered as a notary during the time of his employment, which were collected and appropriated by the defendant.

Same—Not Estopped to Recover Fees of City Because of Salary Received.

A clerk in a municipal office is not estopped from claiming fees for services rendered as a notary public by having received his compensation in his employment as clerk.

Same—City Not Entitled to Fees of Notary in City Clerk's Office.

In the absence of any agreement to the contrary, a city is not entitled to fees for services rendered by its employee as a notary public during the city's office hours.

Appeal from circuit court, Jackson county; John W. Henry, Judge.

Action by Frederick Wood against the city of Kansas City to recover notary fees collected by the defendant for the plaintiff's services. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

R. B. Middlebrook, for appellant.

Chas. B. Adams, Wash Adams, and N. F. Heitman, for respondent.

GORDON *v.* MOORES *et al.*

(Supreme Court of Nebraska, Feb. 20, 1901.)

[85 N. W. Rep. 298.]

Police Magistrates—Removal by District Courts—Constitutionality of Statute Authorizing.

Section 103 of the charter of metropolitan cities (chapter 10, Sess. Laws 1897), to the extent that it assumes to confer upon the district courts authority to remove police magistrates for misconduct in office, is legislation prohibited by the constitution, and therefore void.

Officers—Power of Removal—Concurrent Exercise of, by Two Departments—Constitutionality.

Whether the power to remove an officer for official misconduct can be concurrently exercised by two departments of the government without violating the provision of the constitution relating to the distribution of powers, quære.

(Syllabus by the Court.)

Error to district court, Douglas county; Dickinson, Judge.

Quo warranto by the state, on the relation of Frank E. Moores and others, against Samuel I. Gordon. Judgment for relators, and respondent brings error. Reversed.

Wright & Stout, Brome & Burnett, and Jefferies & Howell, for plaintiff in error.

W. J. Connell, for defendants in error.

Abstracts

DROLESBAUGH *v.* HILL *et al.*

(*Supreme Court of Ohio, March 12, 1901.*)

[60 N. E. Rep. 202.]

City Marshal—Arrest without Warrant—Liability of Sureties.

The sureties on the bond of an officer, conditioned for the faithful discharge of his duties, are liable thereon to the party injured, where, under color of his office in making an arrest with or without warrant, and without probable cause, he uses more force and violence than is necessary.

(Syllabus by the Court.)

Error to circuit court, Crawford county.

Action by one Drolesbaugh against Charles E. Hill and others. Judgment for defendants was affirmed by the circuit court, and plaintiff brings error. Reversed.

Finley & Gallinger and Anson Wickham, for plaintiff in error.

Harris & Sears, for defendants in error.

SOMERVILLE *v.* WOOD *et al.*

(*Supreme Court of Alabama, April 18, 1901.*)

[30 So. Rep. 280.]

City Treasurer—Power of Mayor and Council to Create Office and Require Bond.

Where the act establishing a charter of a municipality provides that the mayor and aldermen thereof "are authorized to create all such and to appoint all such officers as may be necessary to carry into effect the powers conferred by this act, * * * and to regulate and control them in the discharge of their duties," the mayor and aldermen of such municipality have the right and power to elect or appoint a treasurer thereof, and to require him, before entering into office, to give bond conditioned for the faithful performance of his duties as such officer; and therefore an ordinance enacted by the mayor and council of such municipality, creating the office of treasurer, and requiring the execution of a bond by such officer before entering upon his duties, is authorized, and within the powers conferred by the charter of such municipality.

Same—Bond—Validity—Obligation of Sureties.

In such a case, a bond given by the treasurer, regularly and duly elected by such municipality, conditioned to faithfully perform the duties of his office, imports a consideration, and is obligatory upon such treasurer and the sureties on his official bond.

Same—Same—Action Thereon—How Brought.

An action against the treasurer of a municipality and the sureties on his official bond, to recover damages for the alleged breach of such bond, should be brought in the name of the person aggrieved, and not in the name of the municipality for the use of such person.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by H. M. Somerville, Jr., against Felix M. Wood and others. Demurrers to complaint sustained, and plaintiff appeals. Reversed.

L. T. Rudulph, D. C. Buckshaw, and Ormond Somerville, for appellant.

Lane & White and J. S. Kennedy, for appellees.

Abstracts

COMMONWEALTH *ex rel.* O'ROURKE *v.* DAVIS *et al.*

(*Supreme Court of Pennsylvania, May 13, 1901.*)

[49 Atl. Rep. 75.]

Officers—Board of Education—Authority to Select School Site.

The power to select sites for the public schools of the city of Philadelphia is vested in its board of public education; Act March 3, 1818 (P. L. 124), authorizing it to determine the number of school houses; Act Feb. 18, 1871 (P. L. 100), requiring it to determine when a school house should be built, and placing under its direction "all matters in connection with the erection of said school house"; and Act April 25, 1889 (P. L. 50), empowering it, if it be unable to procure a desirable site for a school house by agreement with the owner, to condemn ground therefor.

Appeal from court of common pleas, Philadelphia county.

Mandamus, on the relation of Michael O'Rourke, against Charles E. Davis and others, constituting the department of education, under Act June 1, 1885. Writ refused, and relator appeals. Affirmed.

David W. Sellers and E. Hann Hanson, for appellant.

James Alcorn, Asst. City Sol., and John L. Kinsey, City Sol., for respondents.

HARRIS *v.* CHAMBERS *et al.*

(*Court of Appeals of Colorado, March 29, 1901.*)

[64 Pac. Rep. 688.]

Aldermen—Election—Cities Changing Class—Statutory Provisions.

Mills' Ann. St. § 4497, provides that the city council of a city of the first class shall consist of one alderman for each ward, to be elected for two years on the first Tuesday of April of each odd-numbered year. Gen. St. § 3363, as amended by Laws 1891, p. 374, § 1, re-enacted in Laws 1897, p. 273, § 1, requires that a city of the second class, on changing to a city of the first class, shall organize by the election of all officers belonging to its new grade, on the election and qualification of whom the terms of all former officers shall expire, provided that such organization shall not work the removal of any alderman of such city of the second class whose term will not have expired, but such alderman shall be one of the aldermen for his ward for such city in its new grade: *held*, that an alderman from each ward should be elected at the spring election in 1901 of a city which had passed from the second to the first grade during that year, though it had an alderman from each ward, whose term did not expire until 1902, since the proviso of section 3363 constitutes an exception to section 4497.

Appeal from district court, El Paso county.

Mandamus by R. S. Chambers and others against I. S. Harris. From an order granting the writ, respondent appeals. Affirmed.

W. S. Morris, for appellant.

A. M. Nicholas, for appellees.

STATE *ex inf.* MYLTON, Pros. Atty., *v.* RACKLIFFE.

(*Supreme Court of Missouri, June 29, 1901.*)

[64 S. W. Rep. 772.]

City Engineer—Abolition of Office—Repeal of Statute—Continuation of Office—Legislative Intent.

Rev. St. 1899, c. 91, art. 3, § 5537, creating the office of city engi-

neer, was expressly repealed by Act March 13, 1901; but the latter act did not expressly repeal section 5541 of the former act, prescribing such officer's duties. Subsequently Act March 14, 1901, created a city board of public works, and authorized the appointment by them of a city engineer. This latter act was held unconstitutional. The ordinances of a city for which defendant was elected city engineer in 1899, under Rev. St. 1899, c. 91, art. 3, provided that all city officers should hold their offices for two years, and until their successors were duly appointed and qualified: *held*, that on the repeal of Rev. St. 1899, c. 91, art. 3, § 5537, the repeal of section 5541 followed by necessary implication, and that there was no merit in the contention that the office should be continued by virtue of the city ordinances, and the fact that it appeared by the subsequent unconstitutional act that such was the intention of the legislature.

In banc. Appeal from circuit court, Buchanan county.

Action in the nature of quo warranto by the state, on information of James W. Mylton, prosecuting attorney, against J. R. Rackliffe. From a judgment sustaining a demurrer to the return, plaintiff appeals. Reversed.

H. M. Ramey and Stauber, Crandall & Strop, for appellant.

Vories & Vories and Brown & Dolman, for respondent.

PEOPLE *ex rel.* WARD *v.* SCHEU.

(*Court of Appeals of New York, June 4, 1901.*)

[60 N. E. Rep. 650.]

Officers—Terms of Office—Constitutional Provision—Applies Only to Offices Created by the Constitution.

Const. art. 10, § 5, providing that, in case of elective offices, no person appointed to fill a vacancy shall hold his office under such appointment longer than the commencement of the next political year next succeeding the first annual election after the happening of the vacancy, applies only to offices created by the constitution, and not to those created by the legislature.

Same—Commissioner of Public Works—A Statutory Officer—Vacancy—How Filled.

The office of commissioner of public works in the city of Buffalo is one created by the legislature, and not a constitutional office; and where the legislature did not provide for any election to fill vacancies in such office, except by municipal elections held in November of odd-numbered years, a vacancy in such an office on the death of a commissioner should be filled by appointment by the mayor, to continue until the 1st day of January after the next municipal election.

Same—Filling Vacancies—Constitutional Provision.

Const. art. 12, § 3, providing that all elections of city officers, "except to fill vacancies," shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, is not mandatory, but permissive, and is not in conflict with Const. art. 10, § 5, authorizing the legislature to provide for filling vacancies in offices.

Same—Same—Same—Validity of Buffalo City Charter Provision for Filling Vacancy in Statutory Office

Buffalo city charter (Laws 1891, c. 105, § 271, as amended by Laws 1895, c. 805) provides that a vacancy in the office of an elected commissioner of public works shall be filled by appointment by the mayor, and that the term of the appointee shall last until the 1st day of January after "the next municipal election": *held* not unconstitutional in limiting the right to hold an election to fill such a vacancy to an odd-numbered year, since the method of appointment or election was subject to legislative control; the office being statutory, and not constitutional.

Abstracts

Elections—Distinction between General and Municipal Elections—Construction of Buffalo City Charter.

The general election of 1900 was not a municipal election, within the meaning of the term as used in charter of the city of Buffalo (Laws 1891, c. 105, § 271), but it was the intention of the law to preserve a distinction between a general election and a municipal election.

Appeal from supreme court, appellate division, Fourth department.

Quo warranto by the people, on the relation of Francis G. Ward, against Augustus F. Scheu, to determine title to office. From an order of the appellate division (69 N. Y. Supp. 597) reversing a judgment in favor of plaintiff, he appeals. Affirmed.

Tracy C. Becker and Simon Fleischmann, for appellant. W. H. Cuddeback, for respondent.

KEYSER *et al. v.* UPSHUR *et al.*, Police Com'rs.

(Court of Appeals of Maryland, Feb. 20, 1901.)

[48 Atl. Rep. 399.]

Police Officers—Appointment—Competitive Examination—Nomination of Qualified Persons—Validity—Maryland Statute.

Acts 1900, c. 16, creating a board of police examiners, authorized them to make nominations to the police commissioners from graded lists of qualified persons for appointment or promotion on the police force, as determined by competitive examination, in the order in which they appeared on such list: *held*, that the examiners were not restricted as to the number to be nominated for positions or promotion, and hence their act in nominating 290 persons, when only 20 appointments were to be made, was proper.

Same—Same—Failure to Appoint in Order of Standing on List—Validity of Appointments Where Number of Certified Applicants Exceeds Number of Vacancies.

Acts 1900, c. 15, creating a board of police commissioners, prescribes an oath that they shall in no case appoint or promote a policeman for any reason but the fitness of such person, in their best judgment. Chapter 16 requires the board of examiners to nominate to the commissioners police officers for appointment or promotion from graded lists of qualified persons, determined by competitive examination; the nominations to be made in the order in which the names appear on the list. Chapter 16, § 745f, provides that the commissioners shall confirm or reject all nominations for appointment or promotion of police officers, but shall not appoint or promote any person not appearing on the graded list: *held* that, where the examiners nominated 290 persons to fill 20 vacancies, the appointments were not unlawful and void because the selection was not made in the order in which those chosen appeared on the list.

Same—Same—Same—Validity.

The appointments were not invalid because the commissioners did not take up the names on the graded list in order, one at a time, and either confirm or reject the appointment by a yea and nay vote, since their passing over some men on the list, and appointing others thereon, was not a rejection of those not appointed, requiring a yea and nay vote.

Same—Same—Yea and Nay Vote of Commissioners—Statute.

The appointment of police officers by police commissioners by a unanimous vote was a compliance with Acts 1900, c. 15, § 741, requir-

ing appointments to the police force to be made by a yea and nay vote of the commissioners.

Same—Same—Nominations for Appointment—Validity.

Where the board of police examiners, who are required to nominate police officers to the police commissioners for confirmation, made such nominations, the fact that in passing on such nominations one of the commissioners nominated 3, another 4, and another 13, of the officers appointed, does not invalidate the appointment, since the commissioners were merely selecting from among those nominated.

Same—Same—Same—Injunction—Appeal—Remanding Cause.

Where a petition for an injunction, founded on the bill and exhibits, to restrain police commissioners from paying probationary police officers their salaries, alleged that they were appointed without having been nominated by the board of examiners, was denied, and an appeal taken, the cause will be remanded, so that an answer may be filed, and proof made of the nomination, without reversing or affirming the order, as authorized by Code, art. 5, § 36, providing that where the substantial rights will not be determined by reversal or affirmance, or justice will be promoted by permitting amendment of the pleading or introduction of further evidence, the cause may be remanded without affirmance or reversal.

Appeal from circuit court of Baltimore city.

Bill for an injunction by William Keyser and others against George M. Upshur and others, board of police commissioners of Baltimore. From an order refusing an injunction, plaintiffs appeal. Remanded.

Argued before McSHERRY, C. J., and BRISCOE, JONES, PEARCE, and SCHMUCKER, JJ.

Edgar H. Gans and R. E. L. Marshall, for appellants.

Bernard Carter and Alonzo L. Miles, for appellees.

PEOPLE *ex rel.* DUNN *v.* HAM, Com'r.

(*Court of Appeals of New York, April 16, 1901.*)

[60 N. E. Rep. 191.]

Police Officers—Station-House Keepers—Appointment—New York Statutes.

Laws 1870, c. 77, tit. 12, § 2, organizing the police department of the city of Albany, provided that the powers thereinafter provided for should be exercised by a board of police commissioners and a fixed police force. This act was amended by Laws 1873, c. 495, conferring on the police board exclusive power to appoint a certain number of officers of police and patrolmen: *held*, that station-house keepers, though appointed to discharge certain duties connected with the police government of the city, were no part of the actual police force; they not being included in section 9 of said title 12, c. 77, of the Laws of 1870, expressly stating of whom the police force should consist.

Same—Power of Common Council to Abolish Position of Station-House Keeper—New York Statutes.

The common council of the city of Albany has the power to abolish the position of station-house keeper, under Laws 1898, c. 182, § 177, providing that the police force shall, as to its component parts, remain in each city as so constituted until changed by the action of the common council, which can determine the number of the members of such department.

Same—Same—Same.

Laws 1898, c. 182, § 177, conferring on the common council of cities of the second class power to abolish positions connected with the

police force, is not in conflict with sections 180 and 192 of the act, nor with Laws 1870, c. 77, § 9; the former sections relating to the power and duties of the common council in the regulation of the police department as such, and the latter provisions relating only to the removal and tenure of office of individual members, and having no application to the abolition of a position in good faith in the interest of economy, and with no intention to evade the provisions of such act.

Appeal from supreme court, appellate division, Third department.

Application by the people, on the relation of Thomas P. Dunn, for a writ of mandamus to Fred C. Ham, commissioner of public safety of the city of Albany, directing him to reinstate relator as station-house keeper in said city. From an order of the appellate division (68 N. Y. Supp. 298) affirming an order of the special term (66 N. Y. Supp. 264) granting such writ, defendant appeals. Reversed.

Arthur L. Andrews, for appellant.

James J. Farren, for respondent.

PEOPLE *ex rel.* LEARY *v.* KNOX *et al.*

(*Court of Appeals of New York, April 16, 1901.*)

[60 N. E. Rep. 17.]

Police Officers—Promotion—Acts of Heroism—Civil Service.

The power conferred on the police board of the former city of New York to promote a member of the police force for special acts of heroism, and his right to receive such promotion, is unaffected by any constitutional or statutory provision regulating promotions under the civil service, and providing for a competitive examination when practicable.

Same—Same—Rights of Policeman—Construction of Greater New York Charter.

Civil Service Act 1899, § 10, provides for the creation of a municipal civil service commission, and for appointments and promotions under the rules of such commission, and further provides that the authority of the commission shall not be so exercised as to take from any policeman any right or benefit by law or existing under lawful regulation of the department in which he serves. Civil Service Act 1883, as amended by Laws 1884, c. 410, and subsequent acts, contain the same provision, which is also contained in Greater New York Charter, § 125: *held* to preserve the right of a member of the police force before the charter took effect to promotion for a particular act of gallantry performed thereafter.

Landon, J., dissenting.

Appeal from supreme court, appellate division, First department.

Application by the people of the state of New York, on the relation of John P. Leary, for writ of mandamus against Charles H. Knox and others, municipal civil service commissioners of the city of New York. From an order of the appellate division (67 N. Y. Supp. 1142) reversing an order of the special term granting a peremptory writ of mandamus, requiring the defendants to certify upon the pay roll of the

relator that he was promoted to the position of roundsman, relator appeals. Reversed.

Abram I. Elkus, for appellant.

John Whalen, Corp. Counsel (James M. Ward, Theodore Connoly, and Terence Farley, of counsel), for respondents.

NELSON *v.* CITY OF SUPERIOR.

(*Supreme Court of Wisconsin, March 19, 1901.*)

[85 N. W. Rep. 412.]

Officers—Whether Firemen Are Officers within Meaning of Statute Prohibiting Reduction of Salaries.

Superior City Charter, § 11, authorizes the mayor to appoint firemen; section 21 empowers the mayor to remove them at pleasure; and section 13 fixes the term of office of all city officers, and provides that the common council in March shall fix the amount of the salary that shall be received by every city officer entitled to a salary during the ensuing year, not to be changed during such period: *held*, that a fireman was a city officer, within the meaning of the charter, and entitled to the salary fixed in March for the entire year, without reduction.

Same—Same—Fireman Not Estopped to Claim Full Salary by Signing Contract Consenting to Reduction.

The city in February, 1896, fixed the salary of firemen for the ensuing year, and in September passed a resolution reducing the compensation of firemen, and requiring the mayor to call a meeting of the firemen to secure their acceptance of a contract for the reduction of their salary: *held*, that the contract was void as against public policy, and signing it did not estop a fireman from demanding his full salary.

Same—Reduction of Salary—Insufficiency of Record to Show Amount of Legal Salary.

The salary of plaintiff, a fireman, who was receiving $65 per month, was changed by the city in February; and, in an action by plaintiff to recover for the reduction, judgment was rendered for the city: *held* that, where the record failed to show what was the legal salary of plaintiff, the judgment must be affirmed, though the city had no right to change the salary at any time other than in March, since it cannot be inferred that plaintiff was compelled to take less than his legal salary, by the change made in February.

Appeal from circuit court, Douglas county; James O'Neill, Judge.

Action by Fred Nelson against the city of Superior. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Crownhart & Foley, for appellant.

Archibald McKay and George B. Hudnall, for respondent.

STATE *ex rel.* GRAVES, Dist. Atty., *v.* CAVETT.

(*Supreme Court of Mississippi, May 20, 1901.*)

[29 So. Rep. 853.]

City Aldermen—Unlawfully Increasing Municipal Indebtedness—Eligibility to Re-election—Mississippi Statute.

Code 1892, § 3026, provides that a statement showing the financial condition of the city of Jackson at the end of each fiscal year shall

be made, and, if the indebtedness of the city is increased over the year preceding without the consent of the electors, the mayor and aldermen shall not succeed themselves or each other. Defendant was appointed alderman to fill an unexpired term, and during the year, and before his appointment, the indebtedness of the city was increased $4,000 by a contract not authorized by the electors, and there were several transfers of money by borrowing from one fund for another. Defendant was re-elected: *held*, that the provisions of the Code do not render an alderman ineligible to re-election unless he participated in the wrongful acts, and as the contract was made before defendant's appointment, and the transfer of moneys from one fund to another did not create an indebtedness, defendant could hold the office under his re-election.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

"To be officially reported."

Quo warranto by the state, on relation of J. B. Graves, district attorney, against J. C. Cavett. From an order sustaining defendant's demurrer to the writ and dismissing the petition, relator appeals. Affirmed.

Frank Johnston and Stirling & Harris, for appellant.

Alexander & Alexander and McWillie & Thompson, for appellee.

STATE *ex rel.* NELSON *v.* MOTT.

(*Supreme Court of Wisconsin, June 20, 1901.*)

[86 N. W. Rep. 569.]

School Commissioner—Action to Oust Person Unlawfully Acting as Such—Properly Brought in Name of State.

Under Rev. St. 1898, § 3466, authorizing the attorney general to bring an action on the complaint of any private person against any person usurping or unlawfully holding or exercising any public office, quo warranto to oust a person wrongfully holding the office of school commissioner in a city is properly commenced in the name of the state.

Same—Election by Mayor and Council—When Mayor May Cast Deciding Vote.

Laws 1883, c. 184 (Neenah City Charter) §§ 5, 13, provide that the mayor and aldermen shall constitute the common council, and that all appointive officers shall be elected by the council, and that a majority of the votes of all the aldermen shall be necessary to a choice, but that the mayor may cast a deciding vote in case of a tie. Section 183 provides that the charter shall be liberally construed: *held*, that the mayor can only cast a deciding vote in favor of a candidate for school commissioner when the entire board of aldermen were equally divided between two candidates, and not to make a majority in favor of one candidate when the other votes were scattering.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Quo warranto by the state, on relation of C. W. Nelson, against Wesley Mott, to determine the right of the latter to the office of school commissioner. From a judgment of ouster, defendant appeals. Affirmed.

J. C. Kerwin, for appellant.

Henry Fitzgibbon, John F. Kluwin, and Bouck & Hilton, for respondent.

Abstracts

COMPTON *v.* HOLMES.

(*Supreme Court of Texas, June 20, 1901.*)

[63 S. W. Rep. 621.]

Officers—Election—Construction of Texas Statute.

Rev. St. 1895, art. 1810, being a part of title 36, and providing th the provisions of that title shall apply to all elections, whether f officers or other purposes, when not otherwise provided by law, w enacted when chapter 7 of the title only related to the contest elections for members of the legislature. The legislature whi enacted chapter 7 also enacted Acts 1895, p. 58, relating to the conte of elections, but not including elections of municipal officers; b such act was not an amendment of title 36, c. 7, though it was includ therein by the compiler of the Code: *held*, that article 1810 would n extend the provisions of title 36, c. 7, to municipal elections, sin it only related to the chapter properly included in the Code.

Same—Same—Contest—Before What Tribunal—Texas Statute.

Rev. St. 1895, tit. 36, c. 7, relating to election contests, specifies t tribunals authorized to determine contests of elections for certai offices, but does not mention municipal officers; and the contesta for any office mentioned in the act is required to give notice of co test. Articles 1804–1804d, of the chapter, require the contestant give bonds, on which he shall become entitled to receive a commi sion to the office from the governor. Article 1809, specifying th officers to the commission by the governor, does not include municip officers. Article 1804t provides that the contest of any election f any other purpose than the election of county, precinct, or municip officers shall be under the regulations prescribed in the charter: *held* that the chapter does not authorize or apply to the contest of election of municipal officers.

Certified question from court of civil appeals of Firs supreme judicial district.

Election contest between J. P. Compton and I. R. Holmes Question certified from the court of civil appeals.

Brockman & Kahn and J. V. Meek, for appellant.

E. P. Hamblen, for appellee.

MCARDLE *et al. v.* MAYOR, ETC., OF CITY OF JERSEY CITY.

(*Court of Errors and Appeals of New Jersey, July 31, 1901.*)

[49 Atl. Rep. 1013.]

Excise Department in Cities—Authority of Legislature to Establish—Constitutional Law.

Act March 22, 1901 (P. L. p. 408), entitled "An act to establish a excise department in cities of the first class," is not in violation o the constitutional provision prohibiting private, local, and specia laws, since a classification on the basis of population in statute relating to the machinery and powers of municipal government i legitimate where population bears, as it does in this instance, a rea sonable relation to the necessities and proprieties of the municip government.

Same—Same—Same.

Act March 22, 1901 (P. L. p. 408), entitled "An act to establish a excise department in cities of the first class," does not infringe o Const. art. 4, § 7, par. 2, which interdicts special laws regulating th internal affairs of towns and counties.

Same—Election of Members—Statutes—Constitutionality.

Act March 22, 1901 (P. L. p. 408), entitled "An act to establish a excise department in cities of the first class," provides that th

Abstracts

board of excise commissioners shall consist of four members; that at the first election two shall be elected for one year and two for two years; that each political party shall nominate a candidate for each term; and that no ballot shall contain the name of more than one candidate for each term; and that at each subsequent annual election two members shall be elected for a term of two years, but no ballot shall contain the name of more than one candidate: *held*, that such provision violates Const. art. 2, § 1, which declares that every voter shall be entitled to vote for all officers that now are, or hereafter may be, elective by the people, since the law permits each voter to vote for only one-half the members of the board to be elected at each election.

Same—Members—Whether City Officers.

The members of the excise board created by Act March 22, 1901 (P. L. p. 408), entitled "An act to establish an excise department in cities of the first class," are officers, since they are to be elected "as other municipal officers," to perform important public duties, for a fixed term, at an annual salary, and required to take an official oath.

Same—Statute Invalid in Part—Effect.

Act March 22, 1901 (P. L. p. 408), entitled "An act to establish an excise department in cities of the first class," provides that such department shall consist of a board, to be elected in the manner specified in the act: *held* that, the prescribed manner of electing the members of the board being unconstitutional; the whole act must fall, since the board cannot be filled in any other manner, and without such board the act would be inoperative.

Resolution of Council—Conflict with Statute—Certiorari—Questions Reviewed.

Where, by certiorari, a resolution of a city council, which would be valid but for a certain act of the legislature with which the resolution conflicts, is brought before the court for review, the court may determine whether such legislative act is valid or inoperative, because in conflict with the constitution.

Error to supreme court.

Certiorari on the relation of Patrick McArdle and another to the mayor and aldermen of the city of Jersey City to set aside a resolution of the board of aldermen. From a judgment setting aside the resolution, the mayor and aldermen bring error. Reversed.

John W. Queen and Allen L. McDermott, for plaintiffs in error.

Water L. McDermott and Vredenburgh, Wall & Van Winkle, for defendants in error.

SCHMULBACH *et al. v.* SPEIDEL *et al.*

(Supreme Court of Appeals of West Virginia, Dec. 18, 1901.)

[40 S. E. Rep. 424.]

Officers—Wrongful Removal—Restoration—Mandamus.

Mandamus lies to correct an improper amotion from office and to restore to the full enjoyment of his franchise a person who has been improperly deprived thereof; and when one has been wrongfully deprived of his office by the illegal appointment of another the writ lies to compel his restoration, though the person appointed in his stead be in possession de facto.

Same—Election—City Council—Quorum—Refusal of Members to Vote.

When a city council is composed of two bodies, called "branches," a majority of each of which is necessary to a quorum, which by law are required to meet in joint session at the first meeting after the

regular charter election, or as soon thereafter as practicable, and elect certain city officers, and at such a regular meeting fewer members than a quorum appear in each branch, and the charter empowers a smaller number than a quorum to adjourn from time to time and compel the attendance of absent members, and in pursuance thereof the council had theretofore provided by ordinance that such smaller number may order the city sergeant, or any of his deputies, to arrest the absent members, or any of them, and cause them to appear forthwith at the place of meeting, and there to remain until the meeting adjourn or leave of absence be given, and had also previously provided by ordinance that the first branch, upon notice by messenger from the second branch, shall proceed in a body to the chamber of the second branch, and proceed to elect officers, a quorum of each being present, and such smaller number than a quorum so meeting do cause the absent members to be so arrested and compelled forthwith to attend, and before any adjournment in either branch is had the second branch, by messenger, gives such notice, and thereupon the presiding officer of the first branch and a minority of its members proceed willingly and the others under compulsion into the chamber of the second branch, and the election of officers is there proceeded with, and a majority of such first branch refuse to vote in such election, but a majority of all the members in such joint session do vote for the persons elected, such election is valid.

(Syllabus by the Court.)

Error to circuit court, Ohio county; H. C. Hervey, Judge.

Action by Henry Schmulbach and others against Joseph Speidel and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Caldwell & Caldwell, for plaintiffs in error.

John J. Coniff and H. M. Russel, for defendants in error.

CITY OF LOUISVILLE *v.* YOUNG, Treasurer *et al.*

(*Court of Appeals of Kentucky, Nov. 29, 1901.*)

[65 S. W. Rep. 599.]

Special Police—Power to Appoint—Repeal of Statute.

As repeals by implication are not favored, Ky. St. § 2870, empowering the commissioners of the board of public safety of a city of the first class to appoint special police to do special duty, was not repealed by the act of March 23, 1894, known as the "Metropolitan Police Bill," which was designed merely to regulate the ordinary police force, and to establish for it certain civil service provisions.

Burnam, Du Relle, and O'Rear, JJ., dissenting.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by the city of Louisville against Stuart R. Young, treasurer of the city of Louisville, and the Fidelity & Deposit Company of Maryland, on the bond of Stuart R. Young as treasurer. Judgment for defendants, and plaintiff appeals. Affirmed.

H. L. Stone, for appellant.

B. H. Young and M. W. Ripy, for appellees.

Abstracts

SCOTT *et al.*, City Council, *v.* STATE *ex rel.* GROTHE.

(*Supreme Court of Florida, Nov. 19, 1901.*)

[31 So. Rep. 244.]

Mandamus—Petition—Necessary Allegations.

An alternative writ of mandamus should make a clear prima facie case in favor of the relator by alleging all the essential facts which show the duty and impose the legal obligation on the respondent to perform the acts demanded of him, as well as the facts which entitle the relator to invoke the aid of the court in compelling the performance of such duty or obligation.

Public Officers—Discharge of Duty—Burden of Proof.

Public officers must be presumed to have discharged their duty in the absence of a showing to the contrary.

Mandamus—Petition—Sufficiency of Allegations.

Allegations which are equally consistent with a rightful or a wrongful refusal to act will not state a case for mandamus.

Same—Same—Same—Refusal of City Council to Recognize Member.

Respondents, as members of a city council, were judges of the qualification, election, and return of the members of such council. An alternative writ of mandamus to require them to recognize relator as such member, alleging that they refuse so to do, but not negativing the idea that such refusal is because, in the exercise of the discretion confided to them, they have found that he is not entitled to such office, states no case for mandamus.

(Syllabus by the Court.)

Error to circuit court, Marion county; William A. Hocker, Judge.

Application by the state, on the relation of Otto Grothe, for writ of mandamus against G. S. Scott and others, composing the city council of the city of Ocala. Writ granted, and defendants bring error. Reversed.

William Hocker, for plaintiffs in error.

L. N. Green, for defendant in error.

NEUMEYER, Auditor, *v.* KRAKEL.

(*Court of Appeals of Kentucky, April 25, 1901.*)

[62 S. W. Rep. 518.]

Police Department—Number of Policemen—Salaries—Power of General Council to Regulate—Construction of Charter.

The act of March 23, 1894, amendatory of the charter of cities of the first class, provides that "the government, administration, disposition and discipline of the police department and police force shall be such as the board of public safety may * * * prescribe, but in strict conformity to the provisions of 'An act for the government of cities of the first class'"; and also that "the board of public safety shall have power, and it is authorized to increase the police force by adding to the number of patrolmen from time to time, provided the general council shall have previously made an appropriation for that express purpose." The amendment further provides that "the board of public safety shall designate the salary and compensation for each member and officer of said police force, and may fix the salaries and compensation of such clerks and employees, other than policemen, whom they shall be authorized by law to employ, subject, however, to the gross amount of the appropriation made by the general council

for the support of said department," and that "the compensation of the members of the police force shall be payable monthly, by pay rolls, as provided by ordinances": *held*, that the amendment does not take from the general council the power which it had under the original charter to regulate by ordinance the number of policemen, the officers to be appointed, and the salaries to be paid.

General Council—Curtailing Power—Intent of Legislature.

It is not to be presumed that the legislature intended, by words which do not refer to the general council, to take from that body a power naturally belonging to such bodies, and uniformly exercised by them.

Same—Pay Rolls—Approval by Council—Validity of Requirement.

The general council of a city of the first class has power, by ordinance, to require that all pay rolls shall be approved by it before payment, though that be an executive function, especially as such an ordinance had been in force for many years prior to March 23, 1894, and the amendment of that date to the charter distinctly recognizes the ordinance.

Police Department—Appropriations—Board of Public Safety—Power to Expend Unappropriated Balances.

Under Ky. St. § 2982, part of charter of cities of first class, providing that "any unexpended balance of an appropriation in any current fiscal year shall be added by the comptroller to the amount appropriated for the same purpose out of the levy for the succeeding year," and that "unappropriated balances of levies in any current fiscal year shall be passed to the credit of the same funds for the succeeding year," the board of public safety has no power to use in any year, in addition to the amount appropriated by the general council for the police department, any balance in the treasury arising from a levy for the same purpose for previous years, until it has been appropriated by the council.

Same—Term of Office—Duration under Kentucky Statutes.

Const. § 23, forbids the general assembly from creating any office "the appointment of which shall be for a longer time than a term of years." Id. § 93, provides that inferior state officers may be appointed for a term not exceeding four years. Id. § 107, makes the same provision as to inferior county or district officers. Id. § 160, provides that the terms of town or city officers elected by the voters shall be four years, and until their successors shall be qualified: *held*, that appointive city officers cannot by statute be given a term longer than four years; and therefore it would seem that Ky. St. §§ 2874, 2882, providing, in effect, that policemen shall not be removed by the board of safety during good behavior, are void to the extent that they attempt to give a term of more than four years.

Same—Same—Power of Council to Reduce Force.

Limitations upon the power of the board of safety to make changes in the police force do not prevent the council, in the exercise of its legislative power, from reducing the number of policemen so as to put a policeman out of office before the expiration of his term.

Paynter, C. J., and Guffy and White, JJ., dissenting.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Andrew Krakel against Charles Neumeyer, auditor, for a mandamus. Judgment for plaintiff, and defendant appeals. Reversed.

Henry L. Stone, for appellant.

Kohn, Baird & Spindle and Zach Phelps, for appellee.

Abstracts

STATE *ex rel.* BOORUM *v.* CONNELLY, City Clerk.

(*Court of Errors and Appeals of New Jersey, April 22, 1901.*)

[48 Atl. Rep. 955.]

Municipal Elections—New Jersey Statute Regulating, Not Unconstitutional as Special Law.

Act Feb. 28, 1901, providing that all municipal officers required to be elected shall be voted for and elected on the first Tuesday after the first Monday of November in each year, and with the same registration, and on the same official ballots, required by law for the election of state and county officers, and not otherwise, and fixing the terms of officers elected or appointed in cities, and the manner of their appointment, is not unconstitutional, as being special and local, regulating the internal affairs of cities, in contravention of Const. art. 4, § 7, par. 11, prohibiting private, local, or special laws regulating the internal affairs of towns and counties, since cities are a distinct class, and, within the common-law classification, laws relating to their internal affairs are general.

Same—Same.

Act approved February 28, 1901, entitled "An act relative to the time of election, appointment, and terms of office of officers elected or appointed in cities of the state," which changes the time for the election of city officers from spring to fall, does not violate Const. art. 4, § 7, par. 4, requiring that every law shall embrace but one object, which shall be expressed in the title, because it extends the terms of office of the several city officials holding office at the passage of the act until successors could be elected under the act, which was not specified in the title, since such extension was cognate to the matter legislated on, and embraced in the title of the act.

Vroom, J., dissenting.

Error to supreme court.

Mandamus by the state, on relation of Cornelius V. Boorum, against James F. Connelly, city clerk of Newark, to compel him to deliver to a board of registry and election copies of the registers of the previous general election, and all poll-books, etc., necessary to prepare for an election. From an order denying the writ, relator brings error. Affirmed.

Samuel Kalisch, for plaintiff in error.

Thomas N. McCarter, for defendant in error.

PAGE *v.* MILLERTON.

(*Supreme Court of Iowa, May 29, 1901.*)

[86 N. W. Rep. 440.]

City Court—Validity of Act Establishing—Constitutional Law.

Code, tit. 3, c. 6, authorizing cities of certain size to establish superior courts in a prescribed manner, such courts, when established, to take the place of the city police court, does not contravene Const. art. 5, § 1, providing that the judicial power shall be vested in the supreme court, district court, and such other courts as the general assembly may establish, as delegating to the people the power to establish courts, since the jurisdiction of the court, and manner in which it was to be established, was prescribed by the legislature.

Same—Same—Same.

Since Code, tit. 3, c. 6, authorizing the establishment of city courts, and conferring on them concurrent jurisdiction with the district and circuit courts, operates uniformly on all persons within the relations and circumstances provided for, it does not violate Const. art. 1, § 6, requiring all laws of a general nature to be of uniform operation.

Same—Same—Same.

Though Code, tit. 3, c. 6, in conferring on superior courts concurrent jurisdiction with the district and circuit courts, requires persons residing outside the city in which such court is established, but within the district, to submit to its jurisdiction, such act does not violate Const. art. 1, § 9, providing that the right of trial by jury shall remain inviolate, as the public policy of such law is for the legislature, and not for the courts.

Appeal from superior court of Keokuk; Rice H. Bell, Judge.

Action for judgment on a promissory note. Defendant answered, averring that for reasons stated the court had no jurisdiction. The plaintiff demurred to the answer, on the ground that the matters stated constitute no defense. The demurrer was sustained, and the defendant electing to stand on his answer, and refusing to further plead, judgment was rendered against him, from which he appeals. Affirmed.

B. J. Wellman, for appellant.

T. B. Snyder and Edward Prichett, for appellee.

CITY OF LEXINGTON *v.* HOME CONST. CO. *et al.*

(*Court of Appeals of Kentucky, Nov. 22, 1901.*)

[65 S. W. Rep. 1.]

Ordinance—Proceeding to Test Validity—Delay in Tendering Answer—Refusal to Permit City to File Answer.

In an action against a city and others to test the validity of an ordinance, it was not an abuse of discretion to refuse to permit the city to file an answer 11 months after the petition was filed, and after issues had been formed between the plaintiffs and another defendant, and the case submitted by agreement; no sufficient reason being shown why the answer was not tendered sooner.

Same—Same—Right of Defendant Who Has Not Filed Answer to Appeal.

A defendant who has not filed an answer cannot prosecute an appeal, as against a codefendant, from a judgment dismissing the petition against both.

Appeal from circuit court, Fayette county.

"To be officially reported."

Action by J. A. Barlow and another against the city of Lexington, the Home Construction Company, and others, to test the validity of an ordinance. Judgment dismissing petition, and the city of Lexington appeals. Dismissed.

W. S. Bronston, for appellant.

Geo. C. Webb, for appellee.

MCFARLAIN *v.* TOWN OF JENNINGS.

(*Supreme Court of Louisiana, Dec. 16, 1901.*)

[31 So. Rep. 62.]

Municipal Census—Implied Power of City to Take.

In view of the special power expressly granted, and the absence of legislative provision regarding enumeration required to enable a

Abstracts

municipal corporation to enforce a grant of power, it is competent for the municipal authorities, by regular methods, to ascertain and make public the number of persons residents of the municipalities.

Same—Necessary to Valid Exercise of Powers Granted—Evidence.

But the court will not assume that the statute has been complied with unless it be made to appear, by sufficient and competent testimony obtained in some regular way, that the number of the population was more than 2,000 at the date that an ordinance was passed to enforce the power.

Same—Following Required Methods—Injunction.

While deciding that the municipality has the power to ascertain the number, the court holds that the methods required were only followed after the plaintiff's injunction had been issued, and not in time to affect the injunction.

Ordinances Affecting Public Order and Health—Power to Enjoin Penal Ordinance.

The Courts have the power to enjoin the enforcement of municipal ordinances relating to public order and health, even though penal in their nature. Le Court *v.* Gaster, 23 South. 463, 50 La. Ann. 521.

Same—Same—Irreparable Injury—Sufficiency of Allegations.

As relates "to irreparable injury," the allegations made the showing sufficient, and the objection on the ground that it was not is not sustained.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; Edmund D. Miller, Judge.

Action by A. D. McFarlain against the town of Jennings. Judgment for plaintiff. Defendant appeals. Affirmed.

Cline & Cline, for appellant.

Sompayrac & Toomer, for appellee.

ROBINSON *v.* MAYOR, ETC., OF CITY OF BALTIMORE.

(*Court of Appeals of Maryland, March 8, 1901.*)

[49 Atl. Rep. 4.]

Ordinances—Power of Mayor and Council to Repeal under Baltimore City Charter.

Acts 1898, c. 123, § 3 (new city charter of Baltimore), declaring that "all ordinances now in force and not inconsistent with this act are hereby continued until changed or repealed," does not in any manner limit the power of the mayor and council to repeal any existing ordinance, whether inconsistent with that act or not; and hence the mayor and council had power to pass Ordinance No. 25 of Ordinances of 1899–1900, which repealed City Code 1893, art. 50, § 2a, giving the mayor power to appoint assessors of taxes; so that an assessor so appointed was not entitled to receive compensation after Ordinances of 1899–1900, No. 25, took effect.

Same—Same—Tax Assessor—Abolition of Office.

Acts 1898, c. 123, § 25 (new city charter of Baltimore) providing that all municipal officers in office at the passage of the act shall hold their offices under existing ordinances as if that article had not been passed, until their successors were appointed, did not prevent the repeal of ordinances relating to city offices, so that an official holding under a then-existing ordinance was entitled to hold after the ordinance under which he claimed had been repealed, and his office abolished, but only continued such officials in office subject to the right of the mayor and counsel to abolish their offices; and hence an assessor appointed by the mayor under City Code 1893, art. 50, § 2a, was not

entitled to receive compensation after this section was repealed by Ordinance No. 25 of Ordinances of 1899-1900.

Appeal from Baltimore court of common pleas.

Action by Howell D. Robinson against the mayor and city council of Baltimore. From judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, PAGE, PEARCE, and SCHMUCKER, JJ.

John V. L. Findlay and Thos. Mackenzie, for appellant.

Wm. Pinkney Whyte and Olin Bryan, for appellee.

LOVE *v.* PHALEN, Judge of Recorder's Court.

(*Supreme Court of Michigan, Nov. 4, 1901.*)

[87 N. W. Rep. 785.]

Streets—Regulation—Public Address in Street—Power of Council to Forbid.

Detroit City Charter 1893, c. 7, § 34, giving the common council power to control and regulate the manner in which the highways, streets, lanes, alleys, and public grounds and spaces should be used, authorized an ordinance forbidding the making of any public address in any public place within a half mile circle of the city hall, without first obtaining permission from the mayor.

Same—Same—Same—Validity of Ordinance.

The ordinance was a valid exercise of the power conferred.

Mandamus by Charles E. Love against James Phalen, judge of recorder's court, to compel defendant to entertain a certain prosecution. Granted.

Timothy E. Tarsney, Corp. Counsel, for relator.

James H. Pound, for respondent.

KOUNTZE *et al. v.* CITY OF OMAHA.

(*Supreme Court of Nebraska, Nov. 20, 1901.*)

[88 N. W. Rep. 117.]

Special Statute—Matter Included under General Statute—Construction.

A special statute relating to a particular subject will not ordinarily be held inconsistent with a general enactment of such a nature that but for the special statute it would have included the subject-matter of the latter. In such case the general act operates according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act; and this is so whether the general and special provisions are contained in the same statute, or in independent acts adopted at the same or different times.

Same—Omaha City Charter—Constitutionality.

Section 110 of the Omaha city charter act *held* not to be violative of any constitutional guaranty, and to be valid.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Fawcett, Judge.

Action by Herman Kountze and others against the city of Omaha. Judgment for defendant, and plaintiffs appeal. Affirmed.

Isaac E. Congdon, for appellants.

W. J. Connell, E. H. Scott, and Jas. H. Adams, for appellee.

Abstracts

CITY OF LAMPASAS, Plff. in Err., *v.* JAMES M. BELL.

(*Argued December 3, 1900. Decided February 11, 1901.*)

[21 Sup. Ct. Rep. 368.]

Action on Bonds—Appeal—Constitutional Question—Who May Raise—Right of City to Object on Behalf of Persons Brought within Limits under Alleged Illegal Incorporation.

The contention that a new incorporation of a city, bringing in people who were not formerly in the city, without giving them any opportunity to be heard, is in violation of their constitutional rights, cannot be made by the city on behalf of such people, who have not objected to the incorporation on that ground, so as to raise a constitutional question for the purpose of a direct appeal to the Supreme Court of the United States from a circuit court under the judiciary act of 1891, § 5 (26 Stat. at L. 828, chap. 517), in an action against the city on unpaid coupons for interest on bonds issued after the new incorporation.

Same—Appeal—Must Present Substantial Controversy under Federal Judiciary Act.

Questions which can be raised under any of the subdivisions of § 5 of the judiciary act of 1891 (26 Stat. at L. 828, chap. 517), for the purpose of a direct appeal to the Supreme Court of the United States from a circuit court, must be real, and must present controversies that are substantial, not only from the nature of the principles invoked, but from the relation to them of the party by whom they are invoked.

In Error to the Circuit Court of the United States for the Western District of Texas to review a decision in favor of the plaintiff against a city for interest on bonds. Dismissed.

Messrs. John C. Chamberlain, J. C. Mathews, Clarence H. Miller, Franz Fiset, and W. H. Browning for plaintiff in error.

Messrs. Henry B. B. Stapler, Robert G. West, and T. B. Cochrane for defendant in error.

PEOPLE *ex rel.* VILLAGE OF BROCKPORT *v.* SUTPHIN *et al.*

(*Court of Appeals of New York, March 8, 1901.*)

[59 N. E. Rep. 770.]

Town Board—Review of Proceedings—Unanimous Reversal—Jurisdiction of Court of Appeals.

Code Civ. Proc. § 1338, provides that, on an appeal to the court of appeals from a judgment reversing a judgment entered on the report of a referee or a determination of a trial court or on an order granting a new trial, it must be presumed that the judgment was not reversed on a question of fact. Const. art. 6, § 9 (Code Civ. Proc. § 191), prohibits the court of appeals from reviewing a unanimous decision of the appellate division of the supreme court that there is evidence supporting a finding of fact or verdict not directed by the court: *held*, that the court of appeals was not deprived of jurisdiction by the presumption to review a unanimous reversal by the supreme court of a determination of a town board, but simply limited the scope of the review to the questions of law involved.

Same—Same—Same—Law and Fact—Presumptions.

Code Civ. Proc. § 1338, providing that on an appeal to the court of appeals from a judgment reversing a judgment entered on the report of a referee, or a determination of a trial court or on an order granting a new trial, it must be presumed that the judgment was not reversed on a question of fact, did not preclude the court of appeals

from reviewing on appeal a unanimous reversal by the supreme court of a determination of a town board disallowing the claim of a village.

Same—Same—Refusal to Allow Claims—Fees of Police Justices—Certiorari.

Laws 1897, §§ 185, 190, provide that claims of villages for fees in criminal proceedings, which would be payable to a police justice or policeman if he were not paid a salary, and which are a town or county charge, must be presented to the town or county for audit. In certiorari to review a refusal of the town board to allow the claims of a village within the town for the fees of the police justice and policeman in criminal cases the return did not show, but did not deny, that the village officials were each paid a salary, though the petition and writ recited such facts: *held*, that all allegations of the petition not denied in the return are deemed admitted, under Code Civ. Proc. § 2138, requiring that certiorari must be heard on the writ and return, and the papers on which the writ was granted, and hence the village had a proper foundation for its claim.

Same—Same—Certiorari—Time of Issuance.

Under Code Civ. Proc. § 2125, providing that a writ of certiorari must be granted and served within four months after the determination to be reviewed becomes final and binding on the relator, it was error for the court to dismiss a writ of certiorari against a town board for the reason that the town board had adjourned when the writ was issued.

Reincorporation—Curative Act—Validity—Claims against Town—Police Fees.

Laws 1873, c. 84, entitled "An act in relation to the village of Brockport," authorizes the election, and declares the compensation and duties, of the assessors of such village; authorizes the trustee thereof to raise and expend a highway tax, and to regulate the keeping of billiard tables, etc., for hire; confirms and validates a special election held in B. on the question of reincorporation; creates the office of police justice in said village, and defines his jurisdiction: *held*, that such act was not repugnant to Const. art. 3, § 16, requiring that the subject of all bills shall be clearly expressed in the title, and hence the reincorporation of the village was valid, and the village was entitled to the allowance of police fees, as provided by Laws 1897, c. 414, §§ 185, 190.

Claims against Town—Rejection—Certiorari—Reversal—Auditing.

Where the claim of a village, containing a large number of items against a town, had been rejected in gross by the town board, on reversal on certiorari such claim would be remitted to the town board, with instructions to audit it as required by law.

Appeal from supreme court, appellate division, Fourth department.

Certiorari by the people of the state of New York, on relation of the village of Brockport, against John Sutphin and others, constituting the town board of the town of Sweden, county of Monroe. From an order of the appellate division (66 N. Y. Supp. 49) reversing in part the determination of the town board, and dismissing the writ as to the remainder of the relator's claim, both parties appeal. Reversed in part, and in part modified and affirmed.

John D. Burns, for plaintiff, village of Brockport.

Delbert A. Adams, for defendant, board of town of Sweden.

Abstracts

McNULTY *v.* CITY OF NEW YORK.

(Court of Appeals of New York, Oct. 1, 1901.)

[61 N. E. Rep. 111.]

Street-Cleaning Department—Recovery for Extra Work—Defences—Pleading.

Under Code Civ. Proc. § 500, requiring an answer to contain a statement of any new matter constituting a defense, in an action to recover on claims for extra work by drivers in the street-cleaning department the defense that the appropriation for street-cleaning purposes was exhausted, and that such payment would be in violation of Consol. Act, § 47, if relied on by the city, must be pleaded.

Appeal from supreme court, appellate division, First department.

Action by Patrick J. McNulty against the city of New York. Judgment for plaintiff was affirmed by the appellate division (70 N. Y. Supp. 133), and defendant appeals. Affirmed.

John Whalen, Corp. Counsel (Theodore Connoly and Terence Farley, of counsel), for appellant.

Delos McCurdy and William J. Walsh, for respondent.

ALTER *et al. v.* STATE *ex rel.* KOUNTZE *et al.*

(Supreme Court of Nebraska, June 19, 1901.)

[86 N. W. Rep. 1080.]

Suit against Municipal Corporation—Default—Judgment—Agreement of Attorneys—Collateral Attack.

If suit is begun against a municipal corporation by filing petition and issuing and serving of summons, it is irregular to enter a judgment against defendant without first entering its default. But judgment, when so entered after answer day upon the written stipulation of defendant's attorney, will not be void when collaterally attacked.

Judgment against Municipality—Payment—Mandamus to Compel Tax Levy—Statute.

Section 482 of the Code applies to judgments against municipal corporations; but proceedings by mandamus, if in good faith, to compel a levy and collection of taxes to pay the judgment, will be equivalent to issuing an execution on a judgment against an individual.

Same—Keeping Alive—Part Payment.

Whether levy and collection of taxes by the proper officers, and paying the same upon judgment, will prevent the same from becoming dormant, quære.

Same—Statute of Limitations.

If no tax is levied, and no proceedings are begun to compel such levy, a judgment against a municipal corporation will become dormant in five years.

Same—Revivor—Statutory Method Exclusive.

After a judgment against a municipal corporation has become dormant, the levy of a tax and payment of such judgment will not revive the same. The statutory method of revivor is exclusive.

(Syllabus by the Court.)

Error to district court, Adams county; Adams, Judge.

Action by the state, on relation of Kountze Bros. and others, against D. M. Alter, chairman of the board of supervisors of Adams and Hall counties, and others, to procure a

peremptory writ of mandamus to compel the collection of taxes to pay a judgment. From judgment in favor of plaintiffs, defendants bring error. Reversed.

Harrison & Pearne, W. P. McCreary, and W. F. Button, for plaintiffs in error.

John M. Ragan, Reavis & Reavis, and A. H. Bowen, for defendants in error.

JACKSON ELECTRIC RY. & POWER CO. *v.* ADAMS, State Revenue Agent.

(*Supreme Court of Mississippi, Nov. 18, 1901.*)

[30 So. Rep. 694.]

Illegal Appropriations—Ultra Vires Agreement to Return Forfeited Deposit.

Under Code 1892, § 3003, providing that municipal expenditures of money shall be under a specific appropriation, an oral agreement by the board of mayor and aldermen that a deposit forfeited to the city by a corporation should be considered as a deposit of another corporation, and returned to it upon a certain contingency to be delivered to the corporation which originally made such deposit, was ultra vires and void.

Same—Same—Not Included under Power to Remit Fines and Penalties.

Code 1892, § 2986, giving the mayor of municipal corporations power to remit fines and forfeitures and annul penalties for offenses against the ordinances of the municipality, etc., relates only to the remission of fines and penalties pertaining to criminal procedure, and does not authorize the return to a corporation of a forfeited deposit made to insure the performance of a contract.

Same—Same—Constitutional Provision.

Const. 1890, § 100, providing that no obligation or liability held by any city or town shall be exchanged or transferred except on payment of its face value, expressly prohibits such return.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

"To be officially reported."

Action by Wirt Adams, as state revenue agent, against the Jackson Electric Railway & Power Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Williamson, Wells & Croom, for appellant.

Harper & Potter, for appellee.

SCHOOL DIST. NO. 30 OF HALL COUNTY *v.* SCHOOL DIST. OF CITY OF GRAND ISLAND, HALL COUNTY.

(*Supreme Court of Nebraska, Nov. 20, 1901.*)

[88 N. W. Rep. 120.]

Fines and License Fees—Right of School District to Claim Division.

A school district is not entitled to any of the proceeds of the fines and license money collected under the ordinances of a city, unless some part of its territory is included within the territorial limits of such city.

Abstracts

Annexation of Territory—Ordinance as Evidence.

An ordinance defining the boundaries of a city cannot be accepted as evidence of the annexation of contiguous territory, not included in the corporate limits prior to the passage of such ordinance.

(Syllabus by the Court.)

Error to district court, Hall county; Thompson, Judge.

Action by school district No. 30 of Hall county, Neb., against school district of city of Grand Island, Hall county, Neb. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. G. Ryan, R. R. Horth, and I. J. Dunn, for plaintiff in error.

O. A. Abbott, for defendant in error.

BOARD OF SCHOOL DIRECTORS FOR BUNCOMBE COUNTY *v.* CITY OF ASHEVILLE.

(*Supreme Court of North Carolina, May 14, 1901.*)

[38 S. E. Rep. 874.]

Violation of Ordinances—Disposition of Fines—Appropriation to School Fund.

Under Const. art. 9, § 5, directing that the clear proceeds of all penalties and of all fines collected in the several counties for any breach of the penal laws of the state shall be appropriated for maintaining the free public schools, and Code, § 3820, making violations of town ordinances misdemeanors, fines collected by municipal officers in criminal prosecutions for violations of the city ordinance belong to the common-school fund of the county.

Same—Same—Same—Action by County Board to Recover from City—Statute of Limitations.

Code, § 155, prescribing a three-years period of limitation to actions arising out of a contract, express or implied, applies to an action by a county board against a city to recover fines collected by such city, and belonging to the school fund.

Appeal from superior court, Buncombe county; Allen, Judge.

Action by the county board of school directors for Buncombe county against the city of Asheville to recover certain moneys collected by it as the proceeds of fines. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bourne & Parker, for appellant.

Locke Craig and J. D. Murphy, for appellee.

KAVANAGH *v.* BOARD OF POLICE PENSION FUND COM'RS.

(*Supreme Court of California, Aug. 24, 1901.*)

[66 Pac. Rep. 36.]

Police Department—Pension Fund*—Right of Widow of Retired Member to Claim Benefit.

A policeman of the city of San Francisco, who is placed on the retired list and pensioned, pursuant to the provisions of St. 1889, p. 56, § 3, after serving more than 20 years, who never resigned or was dismissed, continues to be a member of the department, and on his

*See note appended to In re Tobin, 6 Mun. Corp. Cas. 375.

death from natural causes his widow is entitled to the sum of $1,000, provided in St. 1891, p. 287, § 7, to be paid to the widow on such death of any member of the police department after 10 years' service.

Same—Same—Same—Impairment of Vested Rights.

Where the right of the widow of a member of the police department of San Francisco to the payment of $1,000 from the pension fund, under St. 1891, p. 287, § 7, was vested by the death of her husband before the new charter of that city was enacted, she could not be deprived of such right by the subsequent change in the law.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by Annie R. Kavanagh against the board of police pension fund commissioners. From a judgment for plaintiff, defendant appeals. Affirmed.

Franklin K. Lane, for appellant.

Jos. J. Dunne, for respondent.

SPITZER *et al. v.* RUNYAN, Mayor, *et al.*

(*Supreme Court of Iowa, April 13, 1901.*)

[85 N. W. Rep. 782.]

Municipal Aid—Conveying Street to Railway Company—Validity of Proceedings—Statutes.

Where a city vacates streets for the purpose of giving the land to a railroad company for depot purposes, in consideration of the company's abolishing certain grade crossings, the action of the city is not invalid because no steps were taken under Code, §§ 885, 886, declaring the proper proceedings for a city to pursue to condemn or purchase land to donate to a railroad company; the city having the land already, and the grant being made for a consideration.

Same—Same—Consideration—Public Use.

Where, under Code, § 751, authorizing cities and towns to vacate streets and alleys, a city vacates certain streets and alleys for the purpose of conveying the land to a railroad company for depot purposes, in consideration of the company's abolishing certain grade crossings by constructing viaducts and subways, the action of the city will not be disturbed; the vacation of the streets being ostensibly for the public good, and there being no fraud charged.

Same—Same—Authority to Convey under Iowa Statute.

Under Code, § 883, declaring that a city shall have the power to dispose of the title or interest of the corporation in any of its real estate in such manner as the council shall direct, where a city, by ordinance, has vacated certain streets, it has power to grant land to a railroad company for depot purposes in consideration of the company's doing away with certain grade crossings by putting in viaducts and subways.

Same—Same—Mutuality of Contract—Obligation of Company.

Where a city vacated streets for the purpose of granting the land to a railroad company for depot purposes, in consideration of the company putting in a viaduct at a certain street crossing and a subway at another, and a section of the ordinance of vacation declared that the railroad was granted the right to maintain the viaduct, a contention that the ordinance did not obligate the railroad company to anything was without merit, since, whatever construction should be put on the section, it must be held to relate only to the viaduct, and the city could at any time require the building of the same.

Appeal from district court, Benton county; Obed Caswell, Judge.

Abstracts

Plaintiffs sued out of the district court a writ of certiorari to test the validity of an ordinance passed by the city council of the city of Vinton whereby certain streets and alleys were vacated, and the land comprised therein granted to the Burlington, Cedar Rapids & Northern Railway Company for depot purposes. The district court dismissed the petition at plaintiff's costs, and they appeal. Affirmed.

Jamison & Smyth, for appellants.

S. K. Tracy and C. Nichols, for appellees.

BOARD OF TRUSTEES OF HOUSE OF REFORM *v.* CITY OF LEXINGTON.

(*Court of Appeals of Kentucky, Dec. 3, 1901.*)

[65 S. W. Rep. 350.]

Municipal Aid—Validity of Appropriation to Secure Location of State House of Reform.

Under Const. § 179, providing that the general assembly shall not authorize any county or city to "appropriate any money for, or loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads or gravel roads; provided, if any municipal corporation shall offer to the commonwealth any property or money for locating or building a capitol, and the commonwealth accepts such offer, the corporation may comply with the offer,"—does not prohibit a city authorized by its charter to erect and maintain a house of correction and a house of refuge from making an appropriation to secure the location near the city of a state house of reform to which it may send its youthful offenders; that privilege being a sufficient consideration for the appropriation, though other cities of the same class have the same privilege, as the privilege is made more valuable to it than to other cities by the proximity of the institution.

Same—Same.

Whatever doubts exist as to the constitutionality of such an appropriation must be resolved in favor of its constitutionality.

Paynter, C. J., and Hobson and Guffy, JJ., dissenting.

Appeal from circuit court, Fayette county.

"To be officially reported."

Action by the board of trustees of the house of reform against the city of Lexington to compel defendant to make provision for paying an appropriation. Judgment for defendant, and plaintiff appeals. Reversed.

Forman & Forman and Wm. Worthington, for appellant.

W. S. Bronston, for appellee.

POPPLETON *v.* MOORES, Mayor, *et al.*

(*Supreme Court of Nebraska, Nov. 20, 1901.*)

[88 N. W. Rep. 128.]

Water Company—Validity of Ordinance Extending Franchise.

An ordinance extending from June 11, 1900, to September 1, 1908, the right of the Omaha Water Company to exercise its franchise free from the city's option to purchase, without compensation to the city,

and without submission of the question of such extension to a popular vote, is forbidden by section 19, Comp. St. 1897, c. 12a.

Same—Same—Same—Power of Equity to Enjoin Passage.*

An extension of a franchise, though made in the form of an ordinance, is not such an act of legislative power as to be free from interposition of the courts by injunction, where such extension is clearly contrary to the city's statutory charter, and is liable to operate to the prejudice of taxpayers and water users.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Scott, Judge.

Action by William S. Poppleton against Frank E. Moores, mayor of the city of Omaha, and others. Judgment for plaintiff. Defendants appeal. Affirmed.

W. J. Connell and James H. Adams, for appellants.

Weaver & Giller, for appellee.

WELDIN *et ux.* *v.* MAYOR, ETC., OF CITY OF WILMINGTON.

(*Superior Court of Delaware, Newcastle, Nov. Term, 1901.*)

[51 Atl. Rep. 157.]

Waterworks — Water Commissioners — Power to Purchase Land — Increasing Debt beyond Limit—Statutes—Construction.

17 Del. Laws, c. 205, § 1, provides that the city of Wilmington, through its board of water commissioners, may acquire lands to construct waterworks, and to supply the city with water. Section 4 gives the board complete control over such waterworks, including collection of water revenues, and provides that they may do all things necessary to carry the act into effect. Section 7 provides that the board shall prepare a plan for permanent waterworks, and that they may acquire, by contract or otherwise, "as hereinafter provided," all such real estate as may be needed for the construction of such waterworks. Section 12 provides that "for the purpose of defraying all the cost of acquiring real estate for reservoirs, * * * and constructing all the works contemplated by this act," the city, on requisition of the board, shall issue bonds not exceeding a certain amount: *held*, that the purpose of section 12 was to relieve the board from the limitation prescribed by the city charter (17 Del. Laws, p. 454, § 71) upon the city's funded indebtedness, so that they might, if necessary, raise funds for all the necessary expenses of the waterworks, to the amount specified in section 12, even though the city's funded debt be raised thereby above the prescribed limit.

Same—Same—Same—Payment Out of Water Revenues—Statutes—Construction.

The authority of the board to levy and collect water revenues for the purposes of the act being granted by implication, as necessarily incident to the powers expressly conferred by section 1, and to the duties imposed by the act,—especially sections 4 and 7,—under section 14, providing that the board shall fix the water rates so as to produce revenue sufficient to pay interest on the water bonds provided for in section 12, and the running expenses of the waterworks, and that the net income of the water revenues, in excess of what may be necessary for completing, constructing, operating, and repairing the waterworks, and for the interest on the bonds, shall be applied to certain other purposes, the board had power to purchase and pay for land for reservoirs out of such net income.

Lore, C. J., dissenting.

---

*See note appended to Barto *v.* Board of Sup'rs of San Francisco, ante, p. 700.

Abstracts

Action in debt by Thomas T. Weldin and another against the mayor and council of Wilmington. Judgment for plaintiffs.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

William S. Hilles and John P. Nields, for plaintiffs.

Herbert H. Ward and Robert G. Harman, for defendant.

WARREN *v.* CITY OF NEWPORT.

(*Court of Appeals of Kentucky, Oct. 11, 1901.*)

[64 S. W. Rep. 852.]

Municipal Indebtedness—Constitutional Restriction—Improvements Authorized Prior to Constitution.

The provisions of Const. §§ 157, 158, limiting the indebtedness of cities, do not apply to an indebtedness for public improvements which a city of the second class was specially authorized, prior to the adoption of the constitution, to contract, it being provided by the charter of cities of that class passed since the adoption of the constitution that the general council shall have power to issue bonds for an amount sufficient to complete and pay for any "public improvement authorized to be constructed under the laws heretofore enacted."

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by W. U. Warren against the city of Newport for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

Otto Wolff, for appellant.

Aubry Barbour, for appellee.

HAZELTINE *v.* BLAKE, City Treasurer.

(*Supreme Court of Washington, Oct. 8, 1901.*)

[66 Pac. Rep. 394.]

Municipal Indebtedness—Restrictions—Bonds—Warrants—Overissue—Validity.

Const. art. 8, § 6, prohibits a city from becoming indebted in any manner to an amount exceeding 1½ per centum of the taxable property as shown by its last assessment for city purposes, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, and, in cases where such assent is obtained, to an amount exceeding 5 per centum in all: *held*, that bonds issued by a city with the assent of its voters at a time when it had outstanding warrants in excess of the 1½ per centum limitation were valid up to the amount that could be lawfully incurred under the 5 per centum limitation, and were properly chargeable thereto, and not to the 1½ per centum limitation, and therefore that the city was liable on warrants for indebtedness incurred without the assent of the voters where the indebtedness under such warrants, exclusive of the bonds in question, did not exceed 1½ per centum of the city's taxable property.

Appeal from superior court, Thurston county; Thos. Carroll, Judge.

Action on a city warrant by A. J. Hazeltine, as trustee,

against F. G. Blake (C. B. Mann substituted), as treasurer of the city of Olympia. Judgment for plaintiff, and defendant appeals. Affirmed.

Troy & Falknor and M. G. Royal, for appellant.

Geo. H. Funk, for respondent.

STATE *ex rel.* STRAHORN *v.* BLAKE, City Treasurer.

(*Supreme Court of Washington, Oct. 9, 1901.*)

[66 Pac. Rep. 396.]

Municipal Indebtedness—Restrictions—Bonds—Warrants—Overissue—Validity.

Const. art 8, § 6, prohibits a city from becoming indebted in any manner to an amount exceeding 1½ per centum of the taxable property as shown by its last assessment for city purposes, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, and, in cases where such assent is obtained, to an amount exceeding 5 per centum in all: *held*, that where a city, with the assent of its voters, issued bonds, the amount of which, if added to its indebtedness under the 1½ per centum limitation, would bring the total debt of the city above the constitutional limitation of 5 per centum, such overissue could not be charged to the 1½ per centum indebtedness which the city was authorized to incur without the assent of its voters, so as to invalidate a warrant on a contract properly made within the first limitation.

Appeal from superior court, Thurston county; Thos. Carroll, Judge.

Action by the state, on the relation of Robert E. Strahorn, against F. G. Blake (C. B. Mann substituted), as treasurer of the city of Olympia, to compel payment of city warrants. Judgment for defendant, and plaintiff appeals. Reversed.

Geo. H. Funk and Kerr & McCord, for appellant.

Troy & Falknor and M. G. Royal, for respondent.

TOWN OF HUMBOLDT *v.* CITY OF BARNESVILLE.

(*Supreme Court of Minnesota, May 17, 1901.*)

[86 N. W. Rep. 87.]

Incorporation—Liability for Debts of Townships Out of Which Created—Exemption—Statute.

The city of Barnesville was incorporated under the provisions of Sp. Laws 1889, c. 3: *held*, that by section 5 of subchapter 1 of said chapter 3 said city was expressly exempted and relieved from all liability on account of debts and obligations of the plaintiff township and another township, out of which it had been created by chapter 3. (Syllabus by the Court.)

Appeal from district court, Clay county; L. L. Baxter, Judge.

Action by the town of Humboldt against the city of Barnesville. From an order refusing a new trial after dismissal of action, plaintiff appeals. Affirmed.

C. A. Nye, for appellant.

Charles S. Marden, for respondent.

Abstracts

EDWARD C. JONES CO. *v.* TOWN OF GUTTENBURG *et al.*

(Supreme Court of New Jersey, Feb. 27, 1901.)

[48 Atl. Rep. 537.]

Bonds—Mandamus to Compel Issue.

A municipal corporation was authorized by statute to issue its bonds for the purpose of liquidating the portion of its indebtedness incurred for street improvements; the amount of the issue to be limited to the amount of such indebtedness, with accrued interest. Pursuant to such authority, the municipality adopted a resolution for the issuing of $90,000 of its bonds for the purpose aforesaid, and subsequently adopted a further resolution to execute and deliver such bonds to J. & Co. at an agreed-upon price. The validity of these resolutions was afterwards attacked by certiorari, and was judicially affirmed. The municipality notwithstanding refuse to issue the bonds, and, as a reason for such refusal, state, in their return to an alternative writ of mandamus sued out by J. & Co. to compel the execution and delivery of such bonds, that the amount of its indebtedness, to liquidate which the bonds were resolved to be issued, was incorrectly set out in said resolution, and was less than $90,000. The truth of this statement being admitted by the relators, *held*, that a peremptory writ of mandamus to compel the issuing of such bonds should be refused.

Mandamus—Will Not Lie to Compel Performance of Illegal Act.

The power to issue a writ of mandamus is a discretionary one, and will never be exercised for the purpose of compelling municipal officers to perform an act which, on the hearing of the application for the writ, is conclusively shown to be illegal, notwithstanding the existence of a prior adjudication affirming the validity of such act.

(Syllabus by the Court.)

Application by the state, on the relation of the Edward C. Jones Company, for a writ of mandamus against the town of Guttenburg and the board of councilmen of said town. Writ denied.

Argued June term, 1900, before DEPUE, C. J., and GUMMERE and FORT, JJ.

Corbin & Corbin, for relator.

Charles C. Black, for defendants.

SAGE *et al.* *v.* FARGO TP.

(Circuit Court of Appeals, Eighth Circuit, March 4, 1901.)

[107 Fed. Rep. 383.]

Municipal Bonds—Power of Township to Issue—Kansas Statute.

Under Laws Kan. 1886, p. 123, relating to the organization of new counties, which provided that no bonds of any kind should be issued by any county organized thereunder, or by any subdivision thereof, within one year after such organization, and which was amended by Laws 1887, p. 186, so as to read that "no bonds * * * shall be voted for and issued by any county or township within one year after the organization of such new county under the provisions of this act," a township had no power to vote upon the issuance of bonds within a year after the organization of the county, and railroad aid bonds issued pursuant to a vote at an election held within a year after the organization of such county are void, although not issued until after the expiration of such year, and, where the date of the election appears upon their face, all purchasers are chargeable with notice of their invalidity.

Same—Void Bonds—Acts of Ratification.

Municipal bonds, which were void from the beginning because of

want of power in the municipality to issue them, cannot be validated by any subsequent act of ratification or estoppel.

In Error to the Circuit Court of the United States for the District of Kansas. Affirmed.

O. H. Bentley and Rodolph Hatfield, for plaintiffs in error.

S. S. Ashbaugh, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

FRITZ *v.* CITY AND COUNTY OF SAN FRANCISCO *et al.*

(*Supreme Court of California, April 3, 1901.*)

[64 Pac. Rep. 566.]

Improvement Bonds—Vote of Electors—Construction of Statute—Typographical Error.

Under the park and boulevard act (St. 1889, p. 362, § 6), providing that at special elections, wherein the question of the issuance of bonds is submitted to the voters, "if two-thirds of the qualified electors voting an assent" to such issuance, the proper authorities may provide for the issuance, only two-thirds of the votes cast at the election are necessary for the issuance of such bonds, since the insertion of the word "an" before "assent" was clearly a typographical error, and its elimination made the provision perfectly plain.

Same—Acquisition of Land for Park Purposes—Statute Superseded by City Charter.

The park and boulevard act (St. 1889, p. 361) prescribes a complete scheme for the acquisition of lands for park and boulevard purposes, by the issuance of bonds therefor, and the method of submitting such questions to the voters. San Francisco Charter 1900, art. 16, § 29, provides that, when the supervisors determine that the public interest requires "the construction or acquisition of any permanent municipal building or improvement" of a certain cost, they must submit the proposition to incur a bonded indebtedness for such purpose to the electors; and in other sections the plan set out for the acquisition of such property was complete, but different and inconsistent in many respects from the park and boulevard act in regard to the creation of the bonded indebtedness: *held*, in an action against the city and county of San Francisco to enjoin the issuance of bonds under the park and boulevard act for the purpose of acquiring park lands, that the acquisition of lands for public park purposes comes within the charter provisions for permanent improvements, and hence the park and boulevard act was superseded by the city charter, under Const. art. 11, § 8, stating that a city or county charter shall become the recognized law thereof, and supersede any charter or other laws inconsistent therewith.

Same—Issuance—Charter Provision—Construction.

Where a special election on the question of issuing bonds for the purpose of park lands in San Francisco was held under the park and boulevard act (St. 1889, p. 361), which act was subsequently superseded by the adoption of the San Francisco county and city charter of 1900, before the bonds were issued, sucn bonds could not be issued under the charter, since they could only be issued on the procedure laid down by the charter, the scheme being complete in itself.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Eugene M. Fritz against the city and county of San Francisco and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Charles E. Naylor, Arthur H. Barendt, and W. B. Treadwell, for appellant.

Franklin K. Lane, City Atty., George W. Lane, John Chetwood, Jos. Rothschild, Rosenthal & Wise, Freeman & Bates, and D. C. Murphy, for respondents.

GABLE *et al. v.* CITY OF ALTOONA *et al.*

(*Supreme Court of Pennsylvania, June 4, 1901.*)

[49 Atl. Rep. 367.]

Improvement Bonds—Liability of City upon Bonds Based upon Illegal Assessment.

A city issued bonds for payment of street improvements, reciting their issue by virtue of Act May 23, 1889, art. 15, § 17, providing that in contracts for improvements, the cost of which is to be paid by assessments, the city may agree with the contractor that he shall take an assignment of the assessments in payment, the city not otherwise to be liable, though the assessments be not collectible; or it may issue improvement bonds based solely on the assessments: *held* that, the assessments being invalid because of irregularity in the passage of the ordinance, the city was liable on the bonds.

Same—Same—Where Same Exceed Debt Limit.

Where bonds for improvement of a street are issued under Act May 23, 1889, art. 15, § 17, to be paid from assessments, Const. art. 9, § 8, providing that municipal indebtedness shall not be increased beyond a certain amount without assent of the electors given at an election, does not prevent the city being liable on the bonds, the assessments being invalid because of irregularity in passage of the ordinance, there being no intention when the bonds were issued that the indebtedness should be thereby increased.

Appeal from court of common pleas, Blair county.

Suit by William F. Gable and others against the city of Altoona and others. Decree for defendants. Plaintiffs appeal. Affirmed.

McNeil & Flick, for appellants.

Thomas H. Greevy and Charles A. Fagan, for appellees.

CHAMBERS *et al. v.* ADAIR.

(*Court of Appeals of Kentucky, May 21, 1901.*)

[62 S. W. Rep. 1128.]

Board of Education—Time of Election—Repeal of Charter Provision.

The provisions of a city charter in force when the constitution was adopted, fixing the time of election of the members of the city board of education, were not repealed by the constitution, by the common-school law, or by the charter of cities of the fifth class, to which class the city in question was assigned; no provision for public education being made by the charter of fifth-class cities.

De Facto Officers—Will Not Be Enjoined from Performing Duties of Office.

Injunction does not lie to restrain a de facto officer from performing the duties of his office on account of an irregularity in the time or manner of his election; his possession under color of title giving validity to his acts, so far as they affect the public and third persons.

School Bonds—Taxation to Pay Same—Change of Boundary of District.

Where a school district embraced all of a city boundary and certain

territory outside the city, and subsequently the city boundary was enlarged so as to be co-extensive with the school district, but was thereafter again cut down, territory thus excluded from the city boundary continued to be subject to taxation to pay bonds issued by the school district as originally created.

School Tax—Sufficiency of Petition to Enjoin.

The petition in an action to enjoin the collection of a tax was defective, in that it failed to set forth the amount of the tax demanded of plaintiff, and in that no property was described as having been levied on, and no allegation made as to whether the property owned by plaintiff is real or personal, or as to its value.

Appeal from circuit court, Hancock county.

"To be officially reported."

Action by S. A. Adair against G. D. Chambers and others to enjoin the collection of a tax. Judgment for plaintiff, and defendants appeal. Reversed.

Geo. W. Jolly, G. D. Chambers, and C. C. McAdams, for appellants.

D. L. Adair, for appellee.

BOARD OF EDUCATION OF HAWESVILLE *et al. v.* LOUISVILLE, H. & ST. L. RY. CO.

(*Court of Appeals of Kentucky, May 21, 1901.*)

[62 S. W. Rep. 1125.]

School Bonds—Power of Board of Education to Levy Tax to Pay Same.

A corporation was created, with power to borrow money, and to issue bonds therefor, to be used to erect school buildings and to carry on a graded school in a school district embracing all of a town and certain territory outside the town. The trustees of the corporation consisted of the trustees of the town and the common-school trustees of the district, and they were authorized to levy a tax to pay the bonds provided for. Thereafter the boundary of the town was enlarged so as to be co-extensive with the school district, and provision was made for the election of a board of education, with all the powers originally conferred upon the trustees of the town and the trustees of the common-school district: *held*, that the board of education has power to levy a tax to pay the bonds issued by the district as originally created.

Public Schools—Charter Provision—Repeal—Construction.

Neither the charter of cities of the fifth class, which makes no provision for public education, nor the common-school law, repealed provisions relating to public schools which were embraced in the old charters of cities of the fifth class which were in force at the time the common-school law was enacted.

Bonds—Authority to Levy Tax a Contract with Bondholders—Cannot Be Revoked.

Where a statute has authorized a municipal corporation to issue bonds and exercise the power of local taxation to pay them, the power of taxation thus given is a contract with the bondholders and cannot be withdrawn until the contract is satisfied.

Same—Pleading—Statute Authorizing Tax to Pay Bonds—Whether Private or General.

Acts empowering a local board of education to levy a tax to pay bonds issued for school purposes are not private statutes which must be specially pleaded, but are general laws of local application.

Same—Same—Action to Recover Taxes—How Brought.

Under Ky. St. § 4104, providing that taxes due from any railroad

Abstracts

company to a city or taxing district may be recovered, by the officer authorized to receive the same, by action in the name of the commonwealth, an action against a railroad company to recover taxes due a school district was properly brought in the name of the commonwealth and of the local board of education, which was created a corporation, and the members of which were the trustees of the school district.

Appeal from circuit court, Hancock county.

"To be officially reported."

Action by the board of education of Hawesville and the commonwealth against the Louisville, Henderson & St. Louis Railway Company to recover taxes. Judgment for defendant, and plaintiffs appeal. Reversed.

Geo. W. Jolly, G. D. Chambers, and C. C. McAdams, for appellants.

Helm, Bruce & Helm, for appellee.

PADGETT *et al. v.* POST.

(*Circuit Court of Appeals, Fourth Circuit, February 7, 1901.*)

[106 Fed. Rep. 600.]

Municipal Bonds—Repeal of Statutory Provisions for Payment—Mandamus to Enforce Judgment.

Where the legislature of a state has authorized a municipality to issue bonds, and provided in the same act for the levy and collection of taxas to pay the principal and interest of the same, such provision becomes a part of the contract on the issuance of the bonds, which cannot be impaired by any subsequent legislation; and a federal court which has rendered a judgment against the municipality on such bonds or their coupons may compel the levy of a tax for its payment by mandamus, notwithstanding the attempted repeal of the provisions therefor by the legislature.

Constitutional Law—Impairing Obligation of Contracts—South Carolina Statute.

The acts of the legislature of South Carolina prohibiting the levy of any tax to pay township bonds issued in aid of a railroad, except in certain cases, or any judgment rendered thereon, and repealing all acts inconsistent therewith (22 St. at Large, p. 534; 23 St. at Large, p. 78), are in violation of the constitution of the United States, as impairing the obligation of contracts, and void, in so far as they affect bonds in the hands of bona fide holders, which were issued under prior statutes providing for the levy of taxes for their payment; and they constitute no defense to a proceeding in a federal court for a writ of mandamus to compel the levy of a tax to pay a judgment of such court rendered upon such bonds.

Municipal Bonds—Mandamus to Enforce Judgment—Levy to Pay Arrearage of Interest.

It is no defense to a proceeding for a writ of mandamus to compel the levy of a tax to pay a judgment rendered on municipal bonds that the act under which bonds were issued required the levy of an annual tax to pay the interest and create a sinking fund to pay the principal, and that the municipality has failed to make such annual levies; and the writ may command a single levy to meet the entire judgment.

In Error to the Circuit Court of the United States for the District of South Carolina. Affirmed.

T. G. Croft (Croft & Tillman, on the brief), for plaintiffs in error.

Henry A. M. Smith, for defendant in error.

Before GOFF, Circuit Judge, and PURNELL and WADDILL, District Judges.

CITY OF PIERRE *v.* DUNSCOMB *et al.*

(*Circuit Court of Appeals, Eighth Circuit, February 27, 1901.*)

[106 Fed. Rep. 611.]

Bonds—Power to Issue—Later General Grant Not Limited by Prior Specific Grant.

A later grant of general power to issue bonds for corporate purposes is not restricted by a prior grant of power to issue them for specified purposes.

Funding Bonds—Power to Issue Included in Power to Issue for Corporate Purposes.

The power to borrow money and issue bonds for corporate purposes includes the power to issue bonds for the purpose of refunding the indebtedness of a corporation.

Same—Chapter 37, Laws S. D. 1890, Authorizes.

Chapter 37, Laws S. D. 1890, art. 5, § 1, which empowers a city of that state to borrow money and issue bonds for corporate purposes, authorizes it to issue bonds to refund its indebtedness; and this grant of power is not restricted by the constitution of the state, or by chapter 16, Gen. Laws Dak. 1887.

Funding Bonds Create No Debt.

Funding bonds neither create nor increase the indebtedness of a municipality, but merely change its form.

Certificate of Issue of Refunding Bonds in Pursuance of Legislative Authority—Effect.

The certificate upon the face of municipal bonds that they have been issued in pursuance of legislative authority for the purpose of funding the indebtedness of the city is a declaration that they have been issued for the purpose of funding a valid debt in the method prescribed by law, and that they neither create nor increase any indebtedness of the municipality; and, as against a bona fide purchaser, they estop the municipality from denying this declaration.

Excessive Indebtedness Immaterial to Purchaser of Funding Bonds.

When an innocent purchaser buys of others than the municipality and its agents its negotiable bonds, which recite that they were issued to fund the debt of the municipality, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it.

(Syllabus by the Court.)

Municipalities—Limitation of Indebtedness.

Where the constitution of the state prohibits the cities of the state from incurring an indebtedness beyond a given per cent. upon the assessed value of the taxable property of the city, bonds issued in excess of that limit will, upon proof of that fact, be declared void.

Same—Recital in Bonds.

Where there is no recital in the bonds to the effect that they do not exceed the constitutional limit of indebtedness, and the assessment roll of the city issuing the bonds, when taken in connection with the official public record of the indebtedness of the city, kept in pursuance of law, discloses the fact that they are in excess of the constitutional limit of indebtedness, then the general recital in the bonds that they are "issued for the purpose of funding the outstanding indebtedness of the city, in pursuance of the general incorporation laws of the state" and "an ordinance of the said city," will not estop

Abstracts

the city from showing that the bonds exceed the amount of the constitutional limit of indebtedness; and when that fact is shown they are void in the hands of every one, including bona fide purchasers for value. Dixon Co. *v.* Field, 4 Sup. Ct. 315, 111 U. S. 83, 28 L. Ed. 360; Lake Co. *v.* Graham, 9 Sup. Ct. 654, 130 U. S. 674, 32 L. Ed. 1065; Sutliff *v.* Commissioners, 13 Sup. Ct. 318, 147 U. S. 230, 37 L. Ed. 145.

Same.

In Gunnison Co. Com'rs *v.* E. H. Rollins & Sons, 19 Sup. Ct. 390, 173 U. S. 255, 43 L. Ed. 689, the supreme court deduced these two rules from their previous decisions: (1) That where the recital in the bonds is to the effect that they are issued under and by virtue of, and in full compliance with, the statute or laws of the state, or other equivalent recitals, the county or city issuing the bonds is not estopped from showing that the constitutional limit of indebtedness had been reached before the bonds were issued, and when that fact is shown the bonds are void in the hands of every one; (2) but, where the bonds contain an express recital to the effect that the debt thereby created does not exceed the limit prescribed by the constitution, then the county or city is estopped from asserting, as against a bona fide holder for value, that the contrary was the fact.

Same—Refunding Bonds.

Where the indebtedness of a city exceeds the constitutional limit of indebtedness, the issue and sale for cash of funding bonds increases the indebtedness of the city, and the bonds are void. Doon Tp. *v.* Cummins, 12 Sup. Ct. 220, 142 U. S. 366, 35 L. Ed. 1044; Shaw *v.* School Dist., 23 C. C. A. 169, 77 Fed. 277; Keene Five-Cent Sav. Bank *v.* Lyon Co. (C. C.) 97 Fed. 159.

(Per Caldwell, Circuit Judge, dissenting.)

In Error to the Circuit Court of the United States for the District of South Dakota. Affirmed.

Ivan W. Goodner, for plaintiff in error.

A. B. Kittredge, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

KELLY *et al. v.* COLE, State Auditor.

(*Supreme Court of Kansas, July 6, 1901.*)

[65 Pac. Rep. 672.]

Refunding Bonds—Power to Issue—Extent—Statute.

Section 1, c. 288, Laws 1901, construed, and held to limit the power conferred upon the municipalities therein named in the issuing of refunding bonds to the amount of the bonded indebtedness of such municipality actually existing at the time the act of refunding occurs.

Same—Existing Indebtedness—Matured Interest Coupons.

Matured interest coupons, evidencing earned interest, attached to a municipal bond, inhere in and form a part of the bond itself, and are comprehended in the term "bonded indebtedness actually existing," and may be completed in ascertaining the amount of refunding bonds which may be issued under the provisions of said act.

Same—Same—Unearned Interest Coupons.

Unearned interest coupons, attached to municipal bonds, are not "bonded indebtedness actually existing," within the legislative meaning and intent as expressed in said act, and may not be included in the amount for which refunding bonds may issue under the power therein conferred.

(Syllabus by the Court.)

Application of H. B. Kelly and others for writ of mandamus

to George B. Cole, auditor of the state of Kansas. Writ denied.

Overmyer, Mulvane & Gault and Waggener, Horton & Orr, for plaintiffs.

A. A. Goddard, Atty. Gen., and J. S. West, Asst. Atty. Gen., for defendant.

ROBERTS & CO. *v.* TAFT *et al.*

(*Circuit Court of Appeals, Sixth Circuit, July 2, 1901.*)

[109 Fed. Rep. 825.]

Refunding Bonds—Construction of Ohio Statutes.

Rev. St. Ohio, §§ 2729a, 2729b, authorizing the sinking-fund commissioners in cities of the first class to issue bonds to refund the bonded debt, should be construed with section 2701, authorizing cities to issue such bonds, and section 2709, providing that bonds so issued should be sold to the highest and best bidder after 30 days' notice by advertisement, since all such sections are in pari materia; and it is immaterial that the sections were adopted at different times, and are found in different chapters.

Same—Sale—Statutory Requirements—Failure to Advertise for Bids—Validity.

A contract by the trustees of the sinking fund of the city of Cincinnati for the sale to a banking company of an entire issue of refunding bonds, without having advertised for or received bids therefor, is unauthorized and void, under Rev. St. Ohio, § 2709, providing that such bonds shall be sold to the highest bidder after 30 days' notice by advertisement.

Appeal from the Circuit Court of the United States for the Southern District of Ohio. Affirmed.

Lawrence Maxwell, Jr., and A. C. Cassatt, for appellant.

J. R. Sayler, E. A. Ferguson, and W. T. Porter, for appellees sinking-fund trustees.

C. J. Hunt and Wade H. Ellis, Corp. Counsel, for appellees city and trustees of sinking fund.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

SMITH *et al. v.* MAYOR, ETC., OF CITY OF DUBLIN *et al.*

(*Supreme Court of Georgia, July 19, 1901.*)

[39 S. E. Rep. 327.]

Bonds—Election—Sufficiency of Notice—Legal Requirements.

Notice given by the municipal authorities that an election will be held in a named city on the question of issuing bonds by that city, and which contains no information as to the amount of the bonds sought to be issued, or of the purpose for which the proceeds thereof are to be used, save as expressed in the following language: "Said bonds to be known as 'School and City Improvement Bonds,' and to be issued to the aggregate amount of $25,000, in denominations of from $1,000 to $5,000 each, as purchasers may desire, and not more than $20,000 of the amount realized therefrom to be used for the purpose of building and erecting a school house, and not more than $5,000 for the purpose of enlarging and improving the light and water plant of said city, and the surplus, if any, to be used by the mayor and council in such other manner as they may see fit,"—does not meet the legal requirement that a notice of this character shall "specify what amount of bonds are to be issued, [and] for what purpose."

Abstracts

Same—Validation—Burden of Proof.

Before a judgment validating bonds sought to be issued by a municipal corporation can lawfully be rendered, sufficient facts affirmatively showing that such issue was sanctioned by two-thirds of the qualified voters of such municipality must appear.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

Action by the state against the city of Dublin and others. C. C. Smith and others intervened. From a judgment sustaining the issue of certain bonds by the city of Dublin, interveners bring error. Reversed.

Akerman & Akerman, for plaintiffs in error.

S. B. Baker, H. G. Lewis, Sol. Gen., and Jas. K. Hines, for defendants in error.

THOMPSON *et al. v.* VILLAGE OF MECOSTA.

(*Supreme Court of Michigan, July 10, 1901.*)

[86 N. W. Rep. 1044.]

Improvement Bonds—Execution—Who Liable—Village or Trustees.

A bond entitled "Public Improvement Bond of the Village of Mecosta, Michigan," recited that it was issued under the authority of an act authorizing the village trustees to levy and collect a tax for public improvements, and to issue bonds therefor. By it the "board of trustees of the village," etc., promised to pay. It was signed by the president and clerk of the village, and sealed with the village seal: *held*, that it was the bond of the village, to be paid from public funds, and not the bond of the trustees.

Same—Delivery.

Where the findings of the trial court recite the records of a village, stating that a village bond payable to bearer was "given to" a certain firm, speak of the bond as issued by the village, and state that the bond came into the hands of such firm, the findings sufficiently find the fact of delivery.

Same—Execution and Delivery—Burden of Proof.

An affidavit made in behalf of a village by its president, and filed in an action against the village to recover on a bond, denying the execution and delivery of the bond, though not entitled in the cause, is sufficient to require the plaintiff to prove the execution and delivery.

Same—Delivery—Finding of Fact—Sufficiency of Evidence.

Where a village council obtained special legislation authorizing the issue of certain bonds, employed lawyers to advise in the matter, and submitted the question to a vote, and the records show that they determined "to issue bonds," and that they authorized their president to negotiate the loan and sign the bonds, and thereafter the council made payments thereon, a finding that the bonds were delivered by the authority of the council is justified.

Same—Recitals—Bona Fide Holder.

Where a village which is authorized by special act to issue bonds for public improvements issues its bonds, reciting that they are issued under such act, and for such purpose, a bona fide purchaser for value has a right to rely on such statements, and may recover thereon, though the bonds were actually delivered for a private improvement, and hence void in the hands of the original holder.

Same—Purchaser for Value—Who Is.

Where plaintiffs received a village bond in payment of a debt owed them by the previous holder, they are purchasers for value.

Same—Same—Same.

Where the holder of a village bond indorsed and delivered it to

plaintiffs to secure an extension of time, and to apply as part payment on a debt which he owed to them, the extension of time was a valuable consideration, and plaintiffs were holders of the bond for value.

Same—Bona Fide Holder—Want of Notice of Invalidity Not Presumed from Fact of Purchase.

A village bond, valid on its face, but invalid because issued and delivered for a private purpose, was received by a bank in payment of a note due from the original holder of the bond. There was no testimony as to the transaction, except that of the president of the bank, who did not say that it was within his personal knowledge or recollection. The bank books showed that the bond was purchased and applied on the note: *held*, that a finding that the bank was a bona fide purchaser, without notice of the infirmity of the bond, was not justified, since want of notice should not be presumed from mere evidence of a purchase for value.

Error to circuit court, Jackson county; Clement Smith, Judge.

Action by Anna Maria Thompson and others against the village of Mecosta. From a judgment for plaintiffs, defendant brings error. Reversed.

Watts, Smith & Baldwin, for appellant.

Eugene Pringle and M. Brown, for appellees.

ELLIS *et al.* *v* WITMER *et al.*

(Supreme Court of California, Sept. 30, 1901.)

[66 Pac. Rep. 301.]

Street Improvements—Publication of Notice—Advertisement for Bids—Sufficiency of Publication.

A city, by an order of its council which sufficiently designated the newspaper in which it was to be published, advertised for bids for certain street improvements, and by subsequent orders directed the clerk to "readvertise" for the same. A bid was submitted subsequently to the readvertisement, and accepted. Vrooman Act (St. 1885, p. 149) § 5, as amended by St. 1891, p. 199, requires the city council to cause a notice for street improvements to be published in a newspaper: *held*, that the order for the publication under which the bid was offered was not insufficient for failing to designate the newspaper, the subsequent orders being construed with the original order.

Same—Assessment Warrants—Bonds—Issue—Statutes.

St. 1885, p. 155, § 10, required the street superintendent, on the return of the warrant for a street-improvement assessment, to record it forthwith; and St. 1891, c. 117 § 40, stipulates that the superintendent, after the expiration of 30 days from the date of the warrant, shall certify a list of the unpaid assessments to the city treasurer, who shall "thereupon" issue bonds: *held* that, where a warrant was dated November 4th and returned December 3d, a bond dated December 5th was not invalidated by the fact that it was not made out and issued until some time afterwards, the delay being occasioned by ministerial acts.

Same—Collecting Assessment Bonds—Sale of Property—Injunctions.

The aid of equity cannot be invoked to restrain a sale of property in satisfaction of a street-improvement assessment by the owners of a part interest in the property, where the bond and assessment were valid, and the owners had not paid or tendered their part of the assessment.

Abstracts

Same—Same—Same—Interest.

Under St. 1891, p. 119, § 41, providing that, on demand of the holder of street-improvement bonds for payment, the whole bond, with its accrued interest, shall become due and payable, and on the day following delinquent, a sale for the principal of an assessment bond, and accrued interest to the date of notice of sale, was not for an excessive amount, though a demand for payment had been made four years previous, sale under which was enjoined, since the obligation to pay interest continues, though the bond be delinquent, notwithstanding the section makes applicable to the collection of such bonds all the provisions regulating the collection of delinquent state and county taxes.

Same—Same—Estimating Interest.

A contention that the estimated interest on a street-assessment bond was too much was without merit, where the same was estimated for five years, which, counting from the date of the bond, expired three days before the notice, and twenty-six before the sale.

Same—Same—Sale of Property—Notice of Sale—Sufficiency.

Under St. 1891, p. 119, § 41, prescribing that the city treasurer in the collection of street-assessment bonds shall act with all the powers and duties of the tax collector, and Pol. Code, § 3764, stating that the notice of sale for taxes must contain the names of the persons delinquent, a notice for the sale of land for the payment of street-assessment bonds which did not contain the names of the delinquent owners was defective.

Same—Same—Same—Place of Sale.

Under St. 1891, p. 119, § 41, providing that the proceedings for the collection of street-assessment bonds shall be as required for delinquent state and county taxes, and Pol. Code, § 3768, specifying the proper place for the tax sale as in front of the court house or in front of the tax collector's office, as the board of supervisors may by resolution have directed, a contention that the sale for the collection of the bonds was conducted at the wrong place cannot be determined in the absence of any resolution of the board fixing the place.

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Suit by Frank Ellis and others against H. C. Witmer and another. From a judgment in favor of the plaintiffs, and from an order denying the defendants' motion for new trial, defendants appeal. Reversed.

Lynn Helm, for appellants.

Goodrich & McCutchen, for respondents.

BRAY *v.* CITY COUNCIL OF FLORENCE.

(*Supreme Court of South Carolina, Oct. 7, 1901.*)

[39 S. E. Rep. 810.]

Bonds—Constitutional Provisions—Amendments.

February 19, 1900, a joint resolution proposed an amendment to article 8, § 7, of the constitution, and also provided that the limitation in such amendment as to municipal bonds, and in article 4, § 5, should not apply to bonded indebtedness of certain cities. Act Feb. 8, 1901, ratified the amendment as to article 8, § 7, but set forth that the reference to article 4, § 5, of the constitution, was erroneous, in that it did not apply to bonds, but the article in question should have been article 10: *held*, that the legislature has no power to change the terms of the joint resolution so as to express the evident intent of the lawmakers, and substitute article 10 for article 4, but that the

other portion of the amendment is operative without reference to such article.

Constitutional Provisions—Amendments.

Where one section of the constitution is so amended as to be repugnant to the original section of the constitution, such original section is repealed.

Bonds—Elections—Registration—Statutes.

Const. art. 2, §§ 12, 13, provide for the registration of voters, and that, at an election in any municipal corporation to determine the question of bonding the same, all electors qualified under section 12 shall be allowed to vote. Act March 5, 1896, provided for the registration of electors of a city, and for the appointment of a register of electors 90 days before the holding of a regular election. Act March 9, 1896, authorized special elections in incorporated cities or towns for the purpose of issuing bonds, and provided that such electors shall be entitled to vote as are qualified under article 2, § 13, of the constitution: *held*, that it was not intended to require registration for all special municipal elections, but that registration for the general municipal election prior to the special election was sufficient.

Same—Limitation of Indebtedness—Constitutional Provisions—Amendment.

Act March 9, 1896, § 1, as amended by Acts Feb. 11, 1897, and March 2, 1897, provides that the bonded indebtedness of any city shall never exceed 8 per cent. of the assessed value of the taxable property therein. This limitation is in the exact language of the constitution, and fixes no other constitutional limitation at the time of the passage of the act: *held* not to prevent the issuing of a bonded indebtedness in excess of such limitation by a city or town, as permitted by the amendment of the constitution under the joint resolution of February 19, 1900.

Petition of Charles D. Bray for a writ of injunction against W. H. Malloy and others, constituting the city council of the city of Florence. Dismissed.

S. W. G. Shipp, for petitioner.

Walter H. Wells, Geo. S. Legare, and Mr. Moore, for defendants.

COQUARD *v.* VILLAGE OF OQUAWKA.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 660.]

Bonds—Authority of City to Issue Commercial Paper.

A municipal corporation has no power, except by statute, to issue commercial paper, and without such power its paper is void, even in the hands of a bona fide holder.

Same—Authority to Refund—Illinois Statute.

Act Feb. 13, 1865 (Rev. St. 1874, p. 789) § 1, providing that "in all cases where counties or cities have heretofore * * * issued bonds or securities," etc., which remain outstanding, the proper authorities may issue new bonds in place thereof, was limited by its terms to cities or counties which had before its passage issued bonds, and did not apply to a municipality which organized as a city after its passage.

Same—Same—Not Implied from Original Authority to Issue.

The power of a municipal corporation to issue new negotiable bonds having the incidents of commercial paper, to take the place of a former issue, cannot be implied merely from the power originally conferred, authorizing such former issue.

Unauthorized Refunding Bonds—Action to Recover on Common Counts—Statute of Limitations.

In an action on refunding bonds issued without authority by a municipal corporation, recovery could not be allowed on the common

counts on the original bonds or indebtedness, where such indebtedness was barred by limitations pleaded in the suit.

Same—Right of Assignee to Recover on Original Indebtedness.

In an action by an assignee on refunding bonds issued without authority by a municipal corporation, recovery could not be had on the original indebtedness, that transaction not being had with him, and the bonds sued on and the written adjustment not having been made with him.

Error to appellate court, Second district.

Assumpsit by Louis A. Coquard against the village of Oquawka. From a judgment of the appellate court (91 Ill. App. 648) affirming a judgment for defendant, plaintiff brings error. Affirmed.

Franklin A. McConaughy, for plaintiff in error.

Raus Cooper and Kirkpatrick & Alexander, for defendant in error.

DAVIS *et al. v.* TOWN OF ROGERSVILLE *et al.*

(*Supreme Court of Tennessee, Oct. 26, 1901.*)

[64 S. W. Rep. 893.]

Bond Issue—Election—Registration—Tennessee Statutes.

On April 19, 1901, a town was authorized by the general assembly to issue bonds, with 90 days therefrom in which to submit the question to the qualified voters. On April 17, 1901, the Dortch and Registration laws were extended to the town. These laws required a general registration in August: *held*, that an election on the question of the bond issue, held in July, within the 90-day limit, was properly held under the old election laws, and could not be held under the Dortch and Registration laws.

Appeal from chancery court, Knox county; Jos. W. Sneed, Chancellor.

Suit by A. P. Davis and others against the town of Rogersville and others to enjoin an issue of bonds. From a decree of the court of chancery appeals reversing a decree of the chancellor, complainants appeal. Reversed.

Smith & Margraves, for appellants.

Huffmaster & Chesnutt, for appellees.

LUSSEM *v.* SANITARY DIST. OF CHICAGO.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 544.]

Sanitary Districts—Drainage Bonds—Purpose—Sufficiency of Ordinance.

The sanitary drainage act (Hurd's Rev. St. 1899, p. 329, § 9) provides that districts organized thereunder may borrow money for corporate purposes, and may issue bonds therefor. An ordinance of the board of trustees of a sanitary district, authorizing an issue of bonds, specified the purposes for which the proceeds were to be used as "corporate purposes": *held*, that the purposes of the bonds were sufficiently definite, under the ordinance, to sustain their validity.

Same—Power to Widen and Deepen Navigable Rivers—Chicago Drainage Canal—Statutes Construed.

The sanitary district of Chicago was organized under Hurd's Rev.

St. 1899, p. 327, to construct an outlet for drainage and sewage in the Desplaines and Illinois rivers by causing a flow thereto of wat from Lake Michigan through artificial channels. Sections 20, 2 and 27 of the act specify the size and capacity of such channel require 300,000 cubic feet of water to be discharged per minute, a limit the current to three miles per hour. The permit granted to t sanitary district by the secretary of war and chief engineer of t United States to divert the waters of the Chicago river into the art ficial channel, limits the discharge from the river into the chann by requiring that a current shall not be created in said river exceed 1¼ miles per hour. The requisite amount of water could n be discharged from the river into the channel without causing a increase in the current of the river exceeding the limit specified i the permit. Sections 7 and 17 authorize the district to enter o widen, and deepen any navigable stream or water way, and to whatever is necessary to cause such channels or outlets to fulfill the purposes, without interfering with the public use, and on payme of damages to private property: *held*, that the sanitary district ha power, with the consent of the federal government, and on payme of any damages, to widen and deepen the Chicago river so as to gi it capacity to supply the artificial channel of the district with enoug water to comply with the act of its organization, and at the sam time not violate the regulations of the secretary of war limiting t speed of the current.

Same—Power of City to Rebuild Bridges.

Under such act the city had power to build new bridges to repla bridges rendered useless by the widening of the river.

Same—Jurisdiction Does Not Conflict with That of City.

The jurisdiction over the Chicago river given to the sanitary di trict of Chicago by this act does not conflict with the jurisdictio exercised by the city of Chicago over such river.

Same—Debt Exceeding Limit—Basis to Determine.

Under sections 9, 10, and 12 of the act, limiting the amount indebtedness the district may incur, the last assessment for state an county purposes previous to issue of the district's bonds is the bas on which to determine whether the statutory limit has been exceede

Same—Same—Same.

Where the taxable property in the district was sufficient to authori the issue of bonds under sections 9, 10, and 12 of the act, the bon could not be defeated by reason of the decreased valuation of t property thereafter.

Same—Bonds—Interest—Tax Levy—Failure to Provide—Effect.

Bonds issued under ordinances of the sanitary district of Chicag passed in the months of September and October, 1900, with intere payable one-half on October 1st, one-half in April, are not voi because no provision was made in the ordinances for levy of a tax pay the interest on the same for the year 1900, since no interest fe due in that year.

Same—Same—Enjoining Issuance—Necessary Parties.

Where a bill by a taxpayer against a sanitary district to enjoi issuance of its bonds was amended so as to charge that the bon were collusively sold to a certain bank, such bank was a necessar party defendant.

Magruder, J., dissenting.

Appeal from circuit court, Cook county; C. G. Neele Judge.

Suit by John Lussem against the sanitary district of Chicag Decree for defendant, and plaintiff appeals. Affirmed.

Wood & Oakley, for appellant.

James Todd and P. C. Haley, for appellee.

Abstracts

BLACKMAN *v.* CITY OF HOT SPRINGS.

(*Supreme Court of South Dakota, May 4, 1901.*)

[85 N. W. Rep. 996.]

Appeal—Sufficiency of Evidence—When Reviewable.

Where an appeal is from the judgment alone, and not from the order subsequently made denying a new trial, no question of the sufficiency of the evidence to justify the finding can be reviewed.

Warrants—Bona Fide Holders—Evidence.

Where, in an action against the city on its warrants, there was no claim that the transfer of the warrants to plaintiff was without notice, or before maturity, the admission of evidence that the agent of the plaintiff at the time of the purchase of the warrants had never heard of any defense to them, though erroneous, was not prejudicial to defendant.

Same—Failure to Pay in Order of Presentation—Misappropriation of Fund—Evidence.

Where, in an action on city warrants, plaintiff based his right to recover on the fact that defendant had failed to levy taxes to pay the general fund warrants issued by the city, and had used money belonging to that fund in paying other warrants, instead of applying it to the proper payment of warrants in the order of their presentation, plaintiff could show on cross-examination of defendant's witnesses that moneys had been so appropriated by the city to the current fund, instead of being applied to warrants as presented.

Appeal—Evidence—Presumption of Sufficiency.

Where the evidence cannot be reviewed, it will be presumed that the findings of the court were based on sufficient evidence.

Appeal from circuit court, Fall River county; Levi McGee, Judge.

Action by Frank Blackman against the city of Hot Springs. Judgment for plaintiff. Defendant appeals. Affirmed.

G. M. Cleveland, for appellant.

Eben W. Martin and Norman T. Mason, for respondent.

PORTER *v.* CITY OF NEW WHATCOM.

(*Supreme Court of Washington, May 11, 1901.*)

[65 Pac. Rep. 197.]

Warrants—Payable Out of Special Fund—Whether Recourse May Be Had to General Fund after Special Fund Is Exhausted.

Where warrants issued for street improvements exceeded the amount which could be lawfully assessed against the property benefited, and the city levied an assessment for the full lawful amount, and there were a sufficient number of outstanding warrants antedating those of plaintiff to absorb the entire assessment, the city was not liable for the payment of plaintiff's warrants out of its general fund, since it neither contracted to pay them, nor misappropriated any fund collected for their payment.

Same—Suit to Enforce Payment—Appeal—Insufficiency of Special Fund Cannot Be Raised for First Time on Appeal.

Where an assignee of city warrants sued the city to enforce collection, without first complaining to the city council that the assessment was not sufficient to pay the warrants, the sufficiency of the assessment cannot be inquired into on appeal.

Appeal from superior court, Whatcom county; H. E. Hadley, Judge.

Action by A. Porter against the city of New Whatcom.

From a judgment in favor of plaintiff, defendant appeals. Reversed.

C. H. Hurlbut, T. E. Cade, and Newman & Howard, for appellant.

S. A. Callvert, for respondent.

HULL *v.* AMES, City Treasurer, *et al.*

GLADWIN *v.* SAME.

(*Supreme Court of Washington, Oct. 11, 1901.*)

[66 Pac. Rep. 391.]

Municipal Indebtedness—Restrictions—Necessary Expenses—Salaries.

Where a city is in debt beyond the limit of 1½ per cent. authorized by its charter and the constitution, warrants issued for the salaries of its policemen, marshal, and treasurer are not invalid, since such salaries are necessary expenses incurred in maintaining the existence of the municipality.

Warrants for Salaries—Preference of Subsequent Warrants—Injunction.

Where a city has outstanding warrants for the salaries of its necessary officers, and insufficient funds to pay all warrants, its mayor, treasurer, and clerk may be enjoined from paying warrants subsequently issued until such warrants for salaries are paid.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Actions by J. S. Hull against A. L. Ames, treasurer of the city of Cheney, and others, and R. S. Gladwin against the same defendants. From judgments for defendants, plaintiffs appeal. Reversed.

Danson & Huneke and Winfree & McCroskey, for appellants.

Robertson & Miller, for respondents.

HUBBELL *v.* TOWN OF CUSTER CITY.

(*Supreme Court of South Dakota, Oct. 2, 1901.*)

[87 N. W. Rep. 520.]

Warrants—Negotiability.

A municipal warrant, though negotiable in form, is not a negotiable instrument, so as to exclude an inquiry as to the legality of its issuance when in the hands of a bona fide holder, or preclude defenses which are available as against the original payee.

Same—Same—Defenses.

Where there is no recital in a municipal warrant that any or all of the requirements of the law with reference to its issuance have been complied with, the corporation is not estopped from showing its want of power.

Incurring Debts—Petition of Citizens—Sufficiency.

Comp. Laws, § 1048, requires a petition by the resident owners of five-eighths of the taxable property of a municipality, and the signatures verified by affidavit, to authorize the city to borrow money or incur debt. A petition of the resident owners of five-eighths of the taxable property in a town prayed that the board of trustees at once call a meeting to let contracts for certain internal improvements,

necessary to be made by the town; stating that, in the citizens' opinion, $3,000 will be necessary to meet the requirements of such outlay, and that such amount can be expended to the benefit of the town: *held*, that such petition was sufficient to advise the board that a sufficient number of qualified persons desired to incur a municipal debt of $3,000 for a specified purpose.

Same—Power to Contract—Recovery on Warrants.

A resolution of a town board of trustees stated that a petition signed by a sufficient number of qualified electors of the taxable property of the town, as provided for in Comp. Laws, § 1048, praying for certain specified improvement, and that a certain sum be spent therefor, having been presented and granted, and that the committee to select a site having made a favorable report, and recommended a site therefor, it was resolved by the board to contract for the erection of a building, to be used as an electric light plant and other purposes, with some reliable person, and that the town pay a certain sum, in city warrants, therefor, and to create a sinking fund for the liquidation of the debt and accruing interest, and that a levy be made as provided by law and section 1048. In conformity with a contract made pursuant to law and section 1048, the payee named in the warrant made the basis of this action erected a building, which was duly accepted by defendant. There was no evidence that it had been transferred, or that plaintiff ever knew that it was to be used for a purpose other than that of an electric light plant. There was evidence that no steps were taken towards a transfer until after the completion of the building and the warrant issued in payment therefor: *held*, that the facts failed to show any want of authority on the part of the town to contract the debt, and that a judgment for the town in an action on the warrants was erroneous.

Appeal from circuit court, Custer county; Levi McGee, Judge.

Action by Francis M. Hubbell against the town of Custer City. From a judgment in favor of defendant, and from an order overruling a motion for a new trial, plaintiff appeals. Reversed.

Ed. L. Grantham, for appellant.

Buel R. Wood, for respondent.

STATE (OUTWATER, Prosecutor) *v.* MAYOR, ETC., OF BOROUGH OF CARLSTADT *et al.*

(*Supreme Court of New Jersey, June 10, 1901.*)

[49 Atl. Rep. 533.]

Municipal Contracts—City Map—What May Be Included in Contract for.

The borough act of 1897 (P. L. p. 285) authorizes the council "to cause an assessor's map of the borough to be made, among other things showing the location and width of each street, road or avenue and of each individual lot of land and premises, and cause the same to be numbered or otherwise designated thereon"; and a resolution and contract for such a map may fairly include as incidental thereto, if not actually within the terms of the act, the furnishing of lists of property owners for 5 years, and furnishing the location of not more than 15 monuments.

Same—Same—Power to Contract for Map.

That an imperfect map, covering but part of the borough, was already in existence, did not prevent the council from causing to be made such a map as was authorized by the borough act.

City Council—Quorum—Majority—Resolution—Validity.

When the borough act provided that three councilmen and the

mayor shall constitute a quorum for the transaction of business, a resolution passed by the votes of three councilmen and the mayor, who has a vote only in case of a tie, will be sufficient, notwithstanding a by-law of the borough that no resolution involving the expenditure of money should be passed without the votes of two-thirds of all the members of the board.

By-Laws.

A by-law cannot control a general law of the state.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of John Henry Outwater, against the mayor and council of the borough of Carlstadt and others, to review the action of the council in letting a contract for an assessment map and list, etc. Writ dismissed.

Argued February term, 1901, before VAN SYCKEL, GARRISON, and GARRETSON, JJ.

Anderson Price, for prosecutor.

Shafer & Conkling and Copeland, Luce & Kipp, for respondents.

ROOT *v.* CITY OF TOPEKA.

(*Supreme Court of Kansas, June 8, 1901.*)

[65 Pac. Rep. 233.]

Contracts—Action at Law—Liability of City for Legal Services Rendered in Unauthorized Action.

The fact that individual members of a city council may have suggested to or encouraged an attorney in the bringing of an action to which the city was not a party, and in which it had no direct concern, gives such attorney no authority to act for the city, and does not make the city liable for the services performed by him in such action.

Same—Same—Same—Ratification.

Nor does the fact that the city council thereafter instructed the city attorney to assist the attorney bringing the action, and contributed money towards the expense of obtaining testimony in such case, operate as a ratification of the unofficial action of the individual members of the council, or render the city liable for the legal services of the attorney bringing the action.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by H. C. Root against the city of Topeka. Judgment for defendant, and plaintiff brings error. Affirmed.

A. C. Markley and H. C. Root, for plaintiff in error.

Chas. F. Spencer, City Atty., for defendant in error.

CITY OF LOUISVILLE *v.* GOSNELL *et al.**

(*Court of Appeals of Kentucky, March 20, 1901.*)

[61 S. W. Rep. 476.]

Contract Creating Debt in Excess of Income—Appropriation for Street Repairs—Part of Contract Price to Cover Future Repairs.

Under Ky. St. § 2820, providing that the executive boards of cities

*For former opinion, see 6 Mun. Corp. Cas. 158.

Abstracts

of the first class and their officers shall not have power to bind the city to any extent beyond the amount of money at the time "already appropriated" by ordinance for the purpose of the department under the control of said board, where a part of the contract price of the original construction of a street was intended to cover future repairs the contractor was entitled to recover of the city that part of the price to be paid out of the appropriation for street repairs, no more specific appropriation being necessary.

Same—Pleading—Necessary Averments.

To invalidate a contract by a city on the ground that it creates an indebtedness in excess of the income and revenue provided for the year, in violation of Const. § 157, the facts showing that such is the effect of the contract must be alleged.

"Not to be officially reported."

Petition for modification of opinion. Granted.

For former report, see 60 S. W. 411.

CITY OF PARIS *v.* LILLESTON.

(Court of Appeals of Kentucky, Feb. 15, 1901.)

[60 S. W. Rep. 919.]

Contracts—Breach of Agreement to Close Passway — Action — Misjoinder—Alternative Prayer for Relief.

In an action to recover damages for breach of a contract by defendant city to close a passway over plaintiff's land, a prayer in the alternative for the value of land sold by plaintiff to defendant for a street in consideration of the agreement to close the passway was not the statement of another cause of action, and there was, therefore, no misjoinder.

Same—Same—Same—Conditions Precedent to Right to Sue.

It was not necessary for plaintiff, before suing, to tender to defendant a deed to the ground occupied by the street, as the closing of the passway according to the petition was the consideration of the contract, and was to be performed before the deed was made.

Same—Parol Evidence.

As plaintiff's written proposal to the city council to give the land for a street was silent as to the agreement to close the passway, parol testimony is not admissible to show that that was the consideration of the contract, in the absence of an allegation of fraud or mistake.

Same—Agreement to Close Passway—Not Authorized by Power to Pave Streets.

It seems that the power given to a city by its charter to pave and macadamize its streets does not authorize a contract by the city to close a private passway, but, in any event, such an unusual contract cannot be imputed to the city without clear evidence that it was made.

Same—Same—Evidence.

A written proposal by plaintiff to the council to grade and macadamize the street for a certain price, and stipulating that the passway was to be closed, on which was indorsed in the handwriting of the clerk a motion that it be accepted, followed by the word "Carried," was not sufficient to show that the proposal was accepted by the council, though plaintiff did grade and macadamize the street, as there is no record of any action of the council in the matter, and the only evidence that the paper was ever among the papers of the city is plaintiff's statement that he presented it to the council and that his attorney, since deceased, told him he found it among the city's papers.

Same—Unauthorized Contract—Benefits Received—Liability of City.

While the city cannot, without paying therefor, retain a benefit received under a defectively executed or unauthorized contract, it

cannot be held liable on that ground, as it received no benefit except the paving of the street, for which it paid a full, fair price.

Same — Agreement to Close Passway—Evidence—Validity — Want of Consideration.

The fact that the city attorney, having been ordered by the council to investigate and report as to the contract claimed by plaintiff, reported in favor of closing the passway, which was done, is not sufficient to show that there had been a previous contract to close the passway, or to bind the city to keep the passway closed, there being no consideration for the assumption of such a liability by the city at that time.

Appeal from circuit court, Bourbon county.

"Not to be officially reported."

Action by Shelby Lilleston against the city of Paris to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

McMillan & Talbott, for appellant.

GODDARD *et al. v.* CITY OF LOWELL *et al.*

(*Supreme Judicial Court of Massachusetts, Middlesex, Sept. 5, 1901.*)

[61 N. E. Rep. 53.]

Contracts—Department of Supplies—Validity of Ordinance Directing Printing Contract with Certain Person.

Under St. 1896, c. 415, providing for a department of supplies under supervision of a chief, and directing that neither the council nor either branch thereof shall take part in the making of contracts, an ordinance directing with whom a contract for printing shall be made is invalid.

Same—Health Board Contracting under Invalid Ordinance—Validity.

Where a board of health in awarding a contract do not exercise their untrammeled judgment, but are controlled by an illegal ordinance, which they supposed binding on them, such contract is not legal.

Report from superior court, Middlesex county; Henry N. Sheldon, Judge.

Bill by Charles R. Goddard and others against the city of Lowell and others to enjoin the performance of an alleged illegal contract. Reported to supreme judicial court for decision. Decree for plaintiffs.

H. A. Brown, for plaintiffs.

Francis W. Qua, for defendants.

CHICAGO BRIDGE & IRON CO. *v.* CITY OF WEST BAY CITY.

(*Supreme Court of Michigan, Dec. 3, 1901.*)

[87 N. W. Rep. 1032.]

Contracts—Bids for Water Pipes—Approval of Contract—Deposits with Bids—Recovery.

In answer to an advertisement of the water commissioners, plaintiff proposed to furnish to defendant water pipe of either of three sizes at a specified price for each size, and deposited $1,200 with its bid. The commissioners, after considerable delay, presented a contract for signature providing for furnishing pipe of one of the sizes, which plaintiff declined to sign because the time therein limited was too short. The city council did not approve the contract, or agree on

the size of pipe to be used: *held*, under Local Laws 1899, p. 115 (chapter 26, § 7, West Bay City Charter), providing that before such a contract is entered into by the city it shall be submitted to and approved by the council, that no legal contract was tendered to plaintiff; hence the city had no right to retain the deposit.

Error to circuit court, Bay county; Theodore F. Shepard, Judge.

Action by the Chicago Bridge & Iron Company against West Bay City. From a judgment for defendant, plaintiff brings error. Reversed.

Frank S. Pratt, for appellant.

S. G. Houghton (Lee E. Joslyn, of counsel), for appellee.

DICKERSON *v.* CITY OF SPOKANE.

(*Supreme Court of Washington, Oct. 17, 1901.*)

[66 Pac. Rep. 381.]

Claim against City—Equitable Assignment—Validity.

An order by a municipal contractor filed by the payee with the proper accounting officer of the city constitutes an equitable assignment of so much of the moneys owing the contractor as will equal the amount of the order.

Same—Same—Suit by Assignee—Sufficiency of Complaint.

A complaint in an action against a city on a written order given by a municipal contractor which recites that it was given in payment of labor performed for the latter is not defective in not alleging a consideration for such order.

Same—Same—Right of Assignee to Sue at Law.

An action at law may be maintained against a city on an order given on the city by a municipal contractor, though such order constitutes an equitable assignment of a fund owing the latter.

Pleading—Nonjoinder of Parties—Objections.

The objection that there is a nonjoinder of parties defendant cannot be raised by an objection to the introduction of testimony.

Same—Averment of Presentation of Claim—Sufficiency.

Where the complaint in an action against a city on an order against it given by a municipal contractor alleges its presentation to the comptroller, it will be inferred, as against a general objection, that he was the officer required to be served with notice of such order.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by William Dickerson against the city of Spokane. From a judgment in favor of defendant, plaintiff appeals. Reversed.

James Dawson, for appellant.

A. G. Avery, for respondent.

HAFNER *et al. v.* CITY OF ST. LOUIS.

(*Supreme Court of Missouri, Division No. 1, March 12, 1901.*)

[61 S. W. Rep. 632.]

Real Estate—Power to Acquire Land Outside of City for Wharf Purposes—Construction of Charter.

Under the general power given a city by Rev. St. 1845, c. 34, § 1, to hold, purchase, and convey such real estate as its purposes shall

require, it may, where necessary, acquire land outside its limits for wharf purposes, though its charter, reciting that it may purchase, receive, and hold real estate outside the city for certain purposes, does not mention wharf purposes.

Same—Power of City to Acquire and Hold—Who May Question—State.

Neither a grantor of land to a city, nor those claiming under him, but only the state, can question its power to acquire and hold the land.

Same—Quitclaim of Equitable Title to City—Inurement of Legal Title to Benefit of City.

Where land is conveyed to persons to hold in trust for the sale, use, and benefit of W., and to manage and dispose of it as W. may direct, and W. and her husband quitclaim it to a city, the legal title subsequently acquired by the trustees, conveying it to her, inures to the benefit of the city.

Appeal from St. Louis circuit court; Selden P. Spencer, Judge.

Suit by Julia A. Hafner and others against the city of St. Louis. Judgment for defendant. Plaintiffs appeal. Affirmed.

E. P. Johnson and H. M. Pollard, for appellants.

B. Schnurmacher and Chas. C. Allen, for respondent.

CONSOLIDATED ICE CO. *v.* MAYOR, ETC., OF CITY OF NEW YORK.

(*Court of Appeals of New York, Feb. 26, 1901.*)

[59 N. E. Rep. 713.]

Adverse Possession—Finding of Fact—Not Reviewable.

Where the title resting on adverse possession and location of certain land is determined by the trial court, which determination is affirmed by the appellate division, the court of appeals will not review the question.

Deeds—Reservations for Streets—Land under Water—Whether Covered by Reservation—Compliance with Charter Requirements.

A reservation in a grant of land from New York City saved so much of the premises granted as might form any part of any street or streets that might then or thereafter be "assigned, designated, or laid out through such premises." A parcel of land under water on such premises was granted to the city by the state for the express and single purpose of making a street. The city took steps to lay out such streets, which were required by the grant, but these were not in conformity with its charter requirements anent the laying out of streets: *held*, that such parcel of land was covered by the reservation, since it was at least assigned and designated as a street, if not laid out as such according to law.

Action against City to Quiet Title—Easements of Plaintiff—New York Statute.

Under Code, §§ 1638-1650, authorizing a person who has been in possession of land for one year, claiming it in fee, to maintain an action against any other person to determine any claim adverse to that of the plaintiff, including claims in the nature of easements therein, etc., an action cannot be maintained for the purpose of obtaining an adjudication of whether the plaintiff has easements or rights of any character in the lands of another, and, on the plaintiff's failure to maintain his title to certain lands in an action under the

statute, the trial court properly refused to determine whether plaintiff had any easements therein.

Same—Adverse Possession—Evidence—Levy of Taxes and Assessments by City—Admissibility.

In an action against the city to determine its rights to a certain piece of land, evidence that the city had levied taxes and assessments on the premises for years was not admissible on the question of adverse possession by reason of the fact that it was the defendant who levied such taxes, since the assessors are not the agents of the city, but independent state officers, and the city, strictly speaking, did not levy such taxes.

Appeal from supreme court, appellate division, First department.

Action by the Consolidated Ice Company against the mayor, aldermen, and commonalty of the city of New York. From a judgment of the appellate division affirming a judgment in favor of defendant (65 N. Y. Supp. 912), plaintiff appeals. Affirmed.

James A. Deering, of appellant.

John Whalen, Corp. Counsel (Theodore Connoly, of counsel), for respondent.

STATE *ex rel.* LEHMAN *v.* BRIDGES, Land Com'r.

(*Supreme Court of Washington, March 30, 1901.*)

[64 Pac. Rep. 518.]

Public Lands—Tide Lands—First and Second Classes—Land in Front of Bay—Land on Side of City—Construction of Statute.

Under Laws 1897, p. 229, § 39, dividing the tide lands of the state not reserved for sale into first and second classes, and providing that all such lands not in front of any incorporated city or town, or within two miles therein, on either side, shall be second-class lands, tide lands lying across a bay in front of a city are second-class lands, since the provision in the statute that lands in front of a city shall be first-class lands is to be considered as also requiring the lands to adjoin the city.

Same.

Under Laws 1897, p. 229, § 39, dividing the tide lands of the state not reserved for sale into first and second classes, and providing that all such lands not in front of any incorporated city or town, or within two miles thereof, on either side, shall be second-class lands, tide lands across a bay in front of a city, and within two miles of the city limits, which is in the center of such bay, are not first-class lands, as being within two miles of the side of the city, since the land included within such boundaries, within the meaning of the act, is that situated along the shore line, and within two miles of the city boundaries extending inward from the shore line.

Mandamus by the state, on the relation of Robert B. Lehman, against Robert Bridges, commissioner of public lands, to compel the issuance of a contract of sale of second-class tide lands. Peremptory writ ordered.

B. F. Hueston, for relator.

T. M. Vance, for respondent.

Abstracts

CITY OF PORTLAND *v.* GASTON.

(*Supreme Court of Oregon, March 11, 1901.*)

[63 Pac. Rep. 1051.]

Eminent Domain—Condemning Land for Street Purposes—Compensation—Award—Appeal.

Under Sess. Laws 1898, p. 146, §§ 112-114, providing that an owner whose property has been condemned for use as a street may appeal from the action of the council as to the amount of damages awarded to the circuit court, and that its decision shall be a final and conclusive determination of such assessment, no appeal lies from the circuit to the supreme court, since an appeal is not a matter of common right, but may be regulated and restricted by legislative action.

Appeal from circuit court, Multnomah county.

Action by the city of Portland against Mary W. Gaston. From a judgment awarding damages, defendant appeals. Motion to dismiss. Granted.

D. Solis Cohen, for the motion.

Seneca Smith, opposed.

GREEN *et al. v.* CITY OF EVERETT.

(*Supreme Court of Massachusetts, Middlesex, May 24, 1901.*)

[60 N. E. Rep. 490.]

Widening Streets—Compensation—Settlement of Claim—Subsequent Petition for Damages—Evidence.

Where petitioners' land was taken by a city to widen a street, and some two years after the taking they made an offer to settle their claim for damages, which was accepted by the council, such proposal and acceptance did not constitute a completed settlement, so as to be competent evidence in subsequent proceedings on a petition for damages, since St. 1884, c. 226, provides that the city council can incur no liability in behalf of a city unless such council has duly voted an appropriation sufficient to meet the liability, and the council was therefore without authority to accept the proposal to settle.

Same—Same—Value of Land Taken—Evidence of Betterment Assessment Inadmissible.

In determining the damage resulting from taking petitioners' land to widen a street, the only question at issue was the value of the land at the time it was taken, and hence evidence of the amount of a betterment assessment against the remaining land was irrelevant.

Exceptions from superior court, Middlesex county; John H. Hardy, Judge.

Petition by Richard T. Green and others, as trustees, against the city of Everett, for an assessment of damages occasioned by the widening of a street. Judgment for plaintiffs for less than the relief demanded, and plaintiffs bring exceptions. Exceptions overruled.

Elder, Wait & Whitman, for petitioners.

Thomas J. Boynton, for respondent.

BOARD OF PARK COM'RS OF LOUISVILLE *v.* DU PONT *et al.*

(*Court of Appeals of Kentucky, May 2, 1901.*)

[62 S. W. Rep. 891.]

Eminent Domain—Condemnation of Land for Park—Repeal of Statute—Failure of New Statute to Prescribe Course of Procedure.

Act May 6, 1890, authorizing the condemnation of property for park

Abstracts

purposes, and specifically providing how the condemnation proceeding should be instituted and conducted, was repealed by the charter of cities of the first class, which authorizes the board of park commissioners to condemn property, without prescribing the course of procedure further than to require that the proceeding shall be instituted by the filing of a petition.

Same—Same—Validity of Statute Which Fails to Prescribe Course of Procedure.

Ky. St. § 2852, part of charter of cities of the first class, which provides that the board of park commissioners may order the condemnation of property, is valid, though the course of procedure is not prescribed further than to require that the proceeding shall be instituted by the filing of a petition; the court having power to regulate the additional procedure according to the course of the common law.

Guffy, J., dissenting.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Proceeding by the board of park commissioners of Louisville against T. C. Du Pont and others to condemn property. Judgment for defendants, and plaintiff appeals. Reversed.

H. L. Stone, for appellant.

H. R. Phillips, Humphrey & Burnett, and J. T. O'Neal, for appellees.

ANTHONY *et al. v.* GRANGER, City Treasurer.

(*Supreme Court of Rhode Island, Jan. 25, 1901.*)

[47 Atl. Rep. 1091.]

Eminent Domain—Platted Land—Condemnation for Park Purposes—Ownership of Streets—Assignment of Interest—Res Judicata.

Complainants' ancestor platted certain lands, and conveyed the lots to T. Subsequently the city condemned the lands for park purposes, and T. and complainants appealed from the award of damages, complainants claiming ownership of the streets. The jury found the title to the streets to be in T., and that the value of the land covered by the streets was nothing. Pending a motion for a new trial, T. quitclaimed the land in the streets to complainants, and the new trial was afterwards denied: *held*, that complainants could not maintain any action for compensation for the land in the streets, since T.'s deed conveyed no land, the land having been condemned by the city, and, as an assignment of a cause of action, it passed nothing, the right of recovery as to the streets being res judicata.

Same—Agreement with Third Party to Release City—Mistake—Equitable Relief.

Where complainants made a mistake in entering into the agreement with T. by which he released the city, such mistake afforded no ground for equitable relief against the city.

Action by Charles A. Anthony and others against D. L. D. Granger, as city treasurer. Demurrer to the bill sustained.

Edmund S. Hopkins and Irving Champlin, for plaintiffs.

Francis Colwell and Albert A. Baker, for defendant.

CITY OF ALAMEDA *v.* COHEN.

(*Supreme Court of California, May 22, 1901.*)

[65 Pac. Rep. 127.]

City Streets—Condemnation Proceedings—Laying Damages.

In proceedings for the condemnation of land for a public street,

the owner must allege and prove damages for improvements, if such damages are claimed.

Same—Same—Effect of Judgment.

Under St. 1889, p. 70, providing that streets may be laid out in municipalities, and property condemned therefor, a property owner, refusing to accept from the commissioners the amount awarded her, is bound by the judgment in subsequent condemnation proceedings, though the amount awarded therein is less than the amount of assessment on the land.

Same—Same—Action to Condemn—Regularity of Proceedings—Proof.

St. 1889, p. 70, § 18, provides that if any owner of land to be taken for a public street does not accept the warrant drawn in his favor for damages, or objects to the report of the necessity of taking his lands, proceedings for the condemnation thereof shall be taken, as provided by law, under the right of eminent domain. The complaint need not set forth the proceedings therein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of the necessity of taking the land: *held* that, if the resolution and ordinance are passed as in the law provided, authority exists to bring an action condemning property for a public street under the right of eminent domain, without proof of the regularity of the proceedings for levying assessments thereon.

Same—Same—Right of City to Condemn Not Affected by Irregularity of Assessment.

Where a municipality proceeds to enforce its right to condemn land for a public street, the fact that a property owner's land is irregularly assessed does not affect the right of the municipality to condemn the land.

Department 1. Appeal from superior court, Alameda county; W. E. Green, Judge.

Condemnation proceedings by the city of Alameda against Emilie G. Cohen. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Alfred H. Cohen, for appellant.

Geo. T. Wright and J. W. Goodwin, for respondent.

PINE *et al. v.* MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit, October 30, 1901.)

[112 Fed. Rep. 98.]

Waters—Appropriation under Power of Eminent Domain—Injury to Riparian Owners in Another State.

A state cannot, in the exercise of its power of eminent domain, authorize one of its municipalities to divert the waters of a nonnavigable interstate stream, to the injury of riparian owners on such stream in another state. The right of such owners to the use of the water flowing in its natural channel is not an easement dependent upon servitudes upon lands above, in the other state, which such state may extinguish on making constitutional compensation, but is inseparably annexed to the soil, and is parcel of the land itself; and the diversion of the water in the state above is a taking of property outside the limits of the state, and beyond its jurisdiction.

Same—Remedy for Unlawful Diversion—Injunction.

Where a city in New York, acting under authority of a state statute, is proceeding to divert the waters of a nonnavigable stream in that state for municipal purposes, to the injury of riparian owners below, whose lands are situated in Connecticut, such owners are not confined to the remedy given by the New York statute to obtain compensation for the injury; but, the act being a tortious taking of their property

in Connecticut without authority of law, they may maintain a suit in equity to enjoin the same.

Wheeler, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 103 Fed. 337.

George L. Stirling, for appellants.

Charles C. Marshall, for appellees.

Before WALLACE, Circuit Judge, and WHEELER and THOMAS, District Judges.

SOMO LUMBER CO. *v.* LINCOLN COUNTY *et al.*

(*Supreme Court of Wisconsin, April 30, 1901.*)

[85 N. W. Rep. 1023.]

Municipal Corporations — Special Charter Cities — Reorganization under General Law—Wisconsin Statute.

Laws 1889, c. 326, being the general charter law for municipal corporations, provided that it should not affect cities then incorporated under special charters, unless adopted in a prescribed manner, but made no provision for its adoption by a special charter city incorporated after the passage of the act. Laws 1893, c. 312, § 72, provided that any city then organized under special charter could adopt any power or franchise conferred on cities organized under the general charter laws, but that no such city should be deemed to have surrendered its special charter, and organized under the general laws, unless it adopted the provisions of the latter law in full: *held*, that the latter act authorized a city organized by special act after the passage of the first act to surrender its special charter, and adopt the general charter law.

Same—Same—Same—Taxation—Limitation—What Law Governs.

A city having a special charter, which abandoned its charter, and accepted the provisions of the general charter act in 1896, became subject to the Laws of 1895, c. 199, amending the general charter act as amended by Laws 1897, c. 138, prohibiting the tax levy from exceeding 3 per cent. of the assessed valuation, and hence taxes levied by the city in excess of such rate in 1897 were invalid.

Taxation—Limitation—Uncertainty of Statute—Validity.

Rev. St. 1898, § 925, subsec. 142a, prohibiting the common council of cities organized under the general charter law from levying a tax for any year in excess of 3 per cent. of the assessed value of the real and personal property of the city, is not void for uncertainty.

Same — Same — Constitutionality of Statute Restricting Municipal Powers to Tax.

Such act is authorized by Const. art. 11, § 3, authorizing the legislature to provide for the organization of cities, and to restrict their power of taxation, in order to prevent abuses in assessments and taxation.

Appeal from circuit court, Lincoln county; W. C. Silverthorn, Judge.

Injunction of the Somo Lumber Company against Lincoln county and others to restrain the collection of certain taxes. From a decree in favor of plaintiff, defendants appeal. Affirmed.

F. J. Smith (Curtis, Reid, Smith & Curtis, of counsel), for appellants.

John Barnes, for respondent.

Abstracts

CHICAGO & A. RY. CO. *v.* PEOPLE *ex rel.* RAYMOND, County Treasurer.

(*Supreme Court of Illinois, April 18, 1901.*)

[60 N. E. Rep. 69.]

Highways—Special Tax—Validity—Illinois Statute.

Hurd's Rev. St. 1899, c. 121, § 119, provides that, if the highway commissioners shall give notice before the annual town meeting that a larger sum will be required for constructing and repairing roads in the town than can be realized from the authorized tax to be assessed by the commissioners, the legal voters present at such meeting may authorize an additional amount to be raised by taxation: *held*, that a record of a town meeting reciting merely that the request of the highway commissioners to stone and gravel certain roads was granted is insufficient to show the levy of a special road tax; hence the town clerk's certificate, based thereon, cannot warrant the county clerk in extending the tax.

Same—Same—Same—Same.

Under Township Organization Act, § 120 (Rev. St. 1898, p. 1508), providing that the board of auditors shall meet at the town clerk's office for auditing the town accounts semiannually on certain days, a tax based on a certificate of claims audited on days other than those specified is illegal, when objected to by the taxpayer, since the time fixed for such board's meetings is mandatory.

Same—Same—Same—Same.

Taxes on claims audited at meetings adjourned from meetings called on the days prescribed are valid.

Same—Same—Same—Same.

1 Starr & C. Ann. St. c. 34, § 23, provides that the powers of the county "shall be exercised by a county board, to wit: In counties under township organization (except Cook county) by the board of supervisors; * * * in Cook county by a board of county commissioners." Section 61, par. 65, requires the board of Cook county to hold regular meetings on the first Monday of December, January, February, March, June, and September in each year: *held*, that though it was not expressly provided that the county board of Cook county should meet on the first Monday in September, annually, such a meeting was contemplated, and hence, under Rev. St. 1898, p. 1508, requiring the board of town auditors to meet semiannually "every half year," once on the Tuesday preceding the town meeting, and again on the Tuesday preceding the annual meeting of the county board, a tax based on a certificate of claims audited at a meeting of the town board held on the Tuesday before the September meeting of the Cook county board was valid.

Same—Same—Objections—Validity.

The objection that a town tax was illegal because the town auditors did not certify the claims allowed against the town to the town clerk within the time required for such certificate could not avail on application of the county treasurer for judgment for sale of land for taxes, the objection not being to the substantial justice of the tax.

Appeal from Cook county court; Orson H. Gilmore, Judge.

Proceeding by the people, on relation of Samuel B. Raymond, county treasurer and ex officio collector of Cook county, for judgment for sale of lands for delinquent taxes. Objections by the Chicago & Alton Railroad Company to the entry of judgment against its property were overruled, and it appeals. Reversed in part and remanded.

M. J. Scrafford and William Brown, Jr., for appellant.

Frank L. Shepard, Ass't Co. Atty., and George W. Hess (Julius A. Johnson, Co. Atty., of counsel), for appellee.

Abstracts

PEOPLE *ex rel* FREISE, County Collector, *v.* CHICAGO, B. & Q. R. Co.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. Rep. 946.]

Taxation—Railroads—Appropriation and Levy Ordinances—Irregularities—Sufficiency of Objection—Pleading.

Where a railroad objected to enforcement of a corporation tax for 1899 that no appropriation ordinance was passed, as required by statute, within the first quarter of the fiscal year of the city, on which to base the tax-levy ordinance, and therefore the tax was illegal and void, such objection was insufficient to raise the question of the validity of the ordinances because they stated that they were for the fiscal year beginning January 1, 1900, since it did not specify in writing the particular cause of objection, as required by Revenue Act, par. 193 (3 Starr & C. Ann. St. p. 3470).

Same—Same—Same—Objections—Compliance with Statute.

On application for confirmation of a corporation tax for 1899, it was stipulated that appropriation ordinances were passed during the first quarter of each of the fiscal years 1895 to 1899, inclusive, each of which specified that it was for the subsequent fiscal year; that levy ordinances were passed in each fiscal year from 1887 to 1899, inclusive, for the current fiscal year; and that the levy for the fiscal year 1899 was made and the tax extended under the levy ordinance of 1899 on the assessed valuation for that year: *held*, that a railroad objecting to confirmation because the appropriation and levy ordinances of 1899 stated they were for the subsequent fiscal year was not entitled to judgment, since the stipulation admitted the passage of an appropriation ordinance and a levy for the current year, all in strict compliance with the statute.

Same—Same—Same—Same—Evidence—Failure to Introduce Evidence—Effect.

Where the objector to confirmation of a city corporation tax claimed that the appropriation ordinance under which it was levied was invalid because it stated that it was for the subsequent fiscal year, but did not introduce the ordinance in evidence, relying merely on proof as to the substance of it, and the levy ordinance reciting that the appropriation was made for the current year, he is not entitled to judgment denying the confirmation of the tax, since he has not sustained the burden of proving the ordinance invalid.

Same—Same—Same—Harmless Mistake Cured by Statute.

Where the appropriation and levy ordinances of a city passed in the current year for the current expenses of that year were based on the assessed valuation for that year, but by mistake the ordinances stated that they were for the subsequent fiscal year, the error will not avoid the tax, but is cured by Rev. St. c. 120, § 191, providing that no error or informality in the proceedings of any of the officers connected with the assessment, levying, or collecting of taxes, not affecting the substantial justice of the tax, shall vitiate it.

Appeal from Mercer county court; W. T. Church, Judge.

Application by the people, on relation of Charles A. Freise, for confirmation of a corporation tax against the Chicago, Burlington & Quincy Railroad Company. From a judgment sustaining an objection thereto, relator appeals. Reversed.

John E. Mardock, for appellant.

Grier & Stewart (Chester M. Dawes, of counsel), for appellee.

Abstracts

REED *et al. v.* CITY OF LOUISVILLE.

(*Court of Appeals of Kentucky, Feb. 28, 1901.*)

[61 S. W. Rep. 11.]

Ordinance—Publication—Charter Provision—Whether Mandatory or Directory.

Ky. St. § 2773,—part of charter of cities of the first class,—requiring the proceedings of the two boards of the common council to be published in a newspaper, is directory merely, and the failure to publish the proceedings does not invalidate an ordinance.

Tax Bill—Authentication—Signature of Assessor—Prima Facie Proof under Kentucky Statute.

Under Ky. St. § 2996,—part of charter of cities of the first class,—a tax bill authenticated by the assessor by his signature is prima facie proof that all steps have been taken to make it binding.

Same—As Creating a Debt under Kentucky Statute—Personal Judgment against Married Woman.

Under Ky. St. § 2998,—part of charter of cities of the first class,—providing that uncollected tax bills against any person "not under the disability of infancy, coverture or unsound mind," shall be deemed a debt from such person, it is error to render a personal judgment against a married woman for taxes.

Married Women—Personal Judgment for Taxes—Clerical Misprision.

A personal judgment against a married woman for taxes, prayed for in the petition, is not a mere clerical misprision.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the city of Louisville against Ella F. Reed and another to enforce a lien for taxes. Judgment for plaintiff, and defendants appeal. Modified.

W. W. Thum and H. M. Lane, for appellants.

John Mason Brown, for appellee.

TOWN OF FAIRPLAY *v.* BOARD OF COM'RS OF PARK COUNTY.

(*Supreme Court of Colorado, Oct. 7, 1901.*)

[67 Pac. Rep. 152.]

Taxation—Colorado Road Tax Law—Constitutionality.

Mills' Ann. St. § 3953, providing that the commissioners of the respective counties may levy a tax for road purposes, and shall order that such proportion of the tax levied on property located in any city or incorporated town as to the commissioner shall seem just shall be paid to the corporate authorities of such city or incorporated town in the same manner and at the same time that city or town taxes are paid, which shall be used for the sole purpose of improving the streets, etc., is not unconstitutional, in that it attempts to exempt towns from the payment of taxes levied by the county commissioners.

Same—Proceedings to Enforce Collection—Laches.

Laches in a municipal corporation in bringing proceedings to enforce its right to taxes collected by the county commissioners is not ground for demurrer.

Same—Apportionment between City and County—Not Enforcible by Action.

Under Mills' Ann. St. § 3953, providing that the county commissioners may levy a tax for road purposes, and that they shall order that such proportion "as the commissioners shall deem just and proper" of the tax levied on property in any city or incorporated town

Abstracts

shall be paid to such city or town, the entire subject of apportioning the tax among the towns is within their discretion, and an action by a town will not lie against the county for failure to make such distribution.

Error to district court, Park county.

Action by the town of Fairplay against the board of county commissioners of Park county. From a judgment of the court of appeals affirming a judgment for defendant, plaintiff brings error. Reversed.

C. A. Wilkin, for plaintiff in error.

August Pease, for defendant in error.

FULLER *v.* CITY OF MONTPELIER.

(*Supreme Court of Vermont, Washington, Feb. 9, 1901.*)

[50 Atl. Rep. 544.]

Taxation — Illegal Appraisal — Payment under Protest — Action to Recover—Statute Legalizing Appraisal—Effect on Pending Suit.

Under V. S. c. 28, providing that no act of the general assembly shall affect a suit pending at the time of its passage, Acts 1898, No. 305, legalizing the quadrennial appraisal of 1894 of the city of Montpelier has no effect on a suit to recover taxes based on such appraisal, and paid under protest, where such suit was pending when the act of 1898 was passed.

Exceptions from Washington county court; Tyler, Judge.

Suit by D. L. Fuller against the city of Montpelier. From a judgment for defendant, plaintiff brings exceptions. Reversed.

The plaintiff paid to the treasurer of the defendant town, under protest, his taxes for the years 1897 and 1898, amounting to the sum of $270.72. The quadrennial appraisal of real estate for the city of Montpelier for the year 1894 was sworn to before a notary public, and was not verified by oath before a justice of the peace. The grand lists of 1897 and 1898 were based upon such appraisal.

Argued before TAFT, C. J., and MUNSON, START, WATSON, and STAFFORD, JJ.

T. J. Deavitt and Edward Deavitt, for plaintiff.

Frederick P. Carleton, for defendant.

AYRES *v.* GOSS.

(*Supreme Court of New Hampshire, Merrimack, Oct. 4, 1901.*)

[51 Atl. Rep. 253.]

Taxation—Treasurer's Extent against Collector—Validity.

Under Pub. St. c. 66, § 1, providing that extents issued by a public treasurer shall be deemed to be executions, a town treasurer's extent for taxes due from a collector must be strictly construed, and, if issued for a larger amount than is due, it is void.

Same—Same—Same—Settlement of Collector's Bill—Arrest of Collector.

Where a collector retains his list and warrant for $50 of taxes in arrears, which he accepts, by agreement with the selectmen and

treasurer, in payment for his bill as collector, and subsequently collects $30 of the amount, the treasurer's successor cannot justify his arrest of the collector under an extent for $50 for unpaid taxes, on the ground that the settlement was unauthorized, as the extent is invalid, both as to collected and uncollected taxes, as being for too large a sum.

Same—Same—Demand.

A treasurer's extent against a collector for unpaid taxes, which is not preceded by an express demand for the taxes, is invalid.

Exceptions from Merrimack county.

Action by Daniel C. Ayer against Nathan J. Goss. There was a judgment for plaintiff, and from an order denying defendant's motions for a nonsuit, and that verdict be directed for him, he brings exceptions. Exceptions overruled.

Martin & Howe, for plaintiff.

Edward A. Lane, for defendant.

MILLSAPS *et al.* *v.* CITY OF JACKSON.

(*Supreme Court of Mississippi, Jan. 7, 1901.*)

[30 So. Rep. 756.]

Taxation—Situs of Personalty of Decedent.

Stocks and bonds of a testator in the hands of executors during administration should be assessed for municipal taxes at the domicile of the testator, and not at the respective domiciles of the executors.

Same—Same.

Stocks and bonds of a testator in the hands of executors, as trustees, after the termination of their duties as executors, should be assessed for municipal taxes at the respective domiciles of the executors.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by the city of Jackson against Reuben W. Millsaps and others. Judgment for plaintiff, and defendants appeal. Reversed in part.

Alexander & Alexander and Green & Green, for appellants.

Harper & Potter, for appellee.

CITY OF DALLAS *v.* KRUEGEL.

(*Supreme Court of Texas, Nov. 7, 1901.*)

[64 S. W. Rep. 922.]

Taxes—Payment under Protest—Recovery—Statute of Limitations.

Where a city purchased land, but, before final payment, required the vendor to pay certain taxes, to enjoin the collection of which the plaintiff had an action pending, and the plaintiff paid such taxes under an agreement by which he received receipts merely stating that the money was paid under protest, and the injunction proceedings were finally decided in plaintiff's favor, but not until after the statutory limitation of his action for the recovery of the money paid under protest had expired, his right of action therefor was barred.

Error from court of civil appeals of Fifth supreme judicial district.

Action by Herman Kruegel against the city of Dallas.

Judgment in plaintiff's favor, and defendant brings error. Reversed.

W. T. Henry and Jas. J. Collins, for plaintiff in error.

A. E. Firmin and M. L. Robertson, for defendant in error.

PACIFIC SHEET METAL WORKS *v.* ROEDER, County Treasurer, *et al.*

(*Supreme Court of Washington, Oct. 2, 1901.*)

[66 Pac. Rep. 428.]

Incorporation—Boundaries—Description—Shores—Meander Line.

Where a city was located on a donation and land claim the western boundary of which was the government donation meander line along the shores of a bay, and on incorporation the boundary was described as beginning at a point in said line, and finally as running "along the shore to the place of beginning," but neither the high nor low water line would close with the place of beginning, the language meant "along the shore of the donation meander line," and the city could not tax property lying along the shore outside of said line.

Taxation—Property Outside of Corporate Limits.

The fact that a city extended its streets outside of its corporate limits, and that a property owner subjected them to certain uses with the consent of the city, did not give the city authority to levy taxes on the property so situated.

Appeal from superior court, Whatcom county; H. E. Hadley, Judge.

Proceedings by the Pacific Sheet Metal Works against Victor A. Roeder, county treasurer, and another, to enjoin the collection of taxes. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

A. E. Mead, Kerr & McCord, and Jesse A. Frye, for appellants.

Dorr & Hadley, for respondent.

BIDWELL *v.* CITY OF TACOMA.

(*Supreme Court of Washington, Dec. 7, 1902.*)

[67 Pac. Rep. 259.]

Tax Sales—Payment of Redemption Money to Purchaser Who Has Assigned Certificate—Rights of Holder.

Under the charter of the city of Tacoma (section 121), providing that money paid to the treasurer for redemption of property sold for taxes shall be paid over to the purchaser or his assigns on surrender of the certificate of purchase, where the treasurer paid such money to a purchaser who had assigned his certificate without the surrender of such certificate, the want of notice to the city of the assignment is no defense to an action brought by the assignee to recover such redemption money.

Same—Same—Failure to Surrender Certificate Assigned as Collateral.

Though a purchaser at a tax sale, assigning his certificate as collateral security, stipulates that he may take up such certificate, and substitute another therefor, such agreement does not justify the city in paying the redemption money to such purchaser, as a holder, without requiring a surrender of such certificate, when its charter requires such surrender as a condition of the payment.

Abstracts

Same—Same—Recovery by Assignee—Limitation of Action.

Under the charter of the city of Tacoma (section 121), providing that money received by its treasurer for the redemption of property sold for taxes shall be paid to the purchaser or his assigns on surrender of the certificate of purchase, limitations do not commence to run against an action to recover such money until the owner of the certificate has offered to return the same and demanded the money.

Appeal from superior court, Pierce county; Thad Huston, Judge.

Action by William L. Bidwell against the city of Tacoma. From a judgment for plaintiff, defendant appeals. Affirmed.

William P. Reynolds and Emmett N. Parker, for appellant.

Stiles & Nash, for respondent.

GOVE *v.* CITY OF TACOMA.

(*Supreme Court of Washington, Dec. 4, 1902.*)

[67 Pac. Rep. 261.]

Delinquent Tax Sales—Illegal Certificates—What Are—Tacoma City Ordinance Construed.

City of Tacoma Ordinance No. 781, providing that all certificates of sale for delinquent municipal taxes "that shall have been illegally or erroneously issued, or issued on property for a double assessment on a misdescription, or on city, school, church or otherwise exempt property," shall be declared illegal under operation of this ordinance, and permitting the purchaser thereof to recover the purchase price, includes certificates illegally or erroneously issued, and does not merely include the two classes of (1) certificates issued on property for a double assessment on misdescription; (2) on city, school, church, or otherwise exempt property.

Same—Same—Recovery of Purchase Money—Sufficiency of Grounds Alleged.

In an action under Ordinance No. 781 of the city of Tacoma, providing that a purchaser of a certificate of sale for delinquent taxes may recover the purchase price if such certificate was illegally or erroneously issued, allegations that the assessor did not fix a true value on the property, but, for the purpose of increasing the debt limit of the city in order that certain bonds might be issued with an appearance of legality, he intentionally and fraudulently assessed the property at least four times its true value, stated a cause of action.

Same—Same—Same—Limitation of Actions—Ordinance Construed.

City of Tacoma Ordinance No. 781, providing that the purchaser of a certificate of sale for delinquent taxes illegally or erroneously issued may recover the purchase price, and declaring that the city comptroller, on discovering such an error as would place the certificate under the operation of the ordinance, shall cause notice to be given to the holder of such certificate, the statute of limitations does not run against the right to recover until the giving of such notice.

Appeal from superior court, Pierce county; W. H. Snell, Judge.

Action by Royal A. Gove against the city of Tacoma. From a judgment for defendant, plaintiff appeals. Reversed.

B. F. Henston, for appellant.

William P. Reynolds and Emmett N. Parker, for respondent.

Abstracts

MILLER *v.* WILLIAMS *et al.*

(*Supreme Court of California, Dec. 23, 1901.*)

[67 Pac. Rep. 788.]

Tax Sales—Selling Land for More Than Is Due—Applicability of Maxim De Minimis.

Where at a tax sale the lands were sold for more than was due for taxes, percentage, and costs,—in the sale for taxes by the city the excess being 8 cents, and in the sale by the county tax collector the excess being $1.60,—the case is one in which the maxim of de minimis cannot be applied, and the sale is void.

Assessment—Sufficiency of Description.

Under a statute requiring that the description of property in an assessment list shall be by city and town lots, naming the city or town, and the number of the lot and block, according to the system of numbering in the city, an assessment which describes the land as belonging to certain named tracts, and does not refer to any city map, is insufficient.

Same—Same.

A tax assessment which describes the land as parts of certain tracts, and does not state in what city or town they are located, is insufficient.

Tax Deed—Sufficiency of Description.

A tax deed which describes the land as "lots 18 and 19 in block C" is insufficient; it appearing that in the tract there are many lots numbered 18, and many numbered 19.

Tax Sales—Redemption Proceedings—Notice—Affidavit—Sufficiency.

Under Pol. Code, § 3785, directing the service of notice of redemption from tax sale in case of unoccupied property to be made by posting a notice in a conspicuous place upon the property, and filing an affidavit with the tax collector showing that such notice had been given, an affidavit filed eight days after the date appointed for the purchaser's application for a deed, stating that the property "is entirely unoccupied property," is insufficient, as failing to refer to the time of the service of notice.

Department 2. Appeal from superior court, Santa Cruz county; Lucas F. Smith, Judge.

Action by W. E. Miller, as executor, etc., against E. L. Williams and others. From a judgment for defendants, plaintiff appeals. Reversed.

J. H. Logan, for appellant.

Joseph H. Skirm, for respondents.

STATE (HARNED, Prosecutor) *v.* CITY OF CAMDEN.

(*Supreme Court of New Jersey, Aug. 9, 1901.*)

[49 Atl. Rep. 1082.]

Taxation—Power to Sell Lands—When Must Be Exercised.

Unless otherwise provided, the power to sell land for taxes must be exercised within the period during which such taxes remain a lien upon the land to be sold.

Tax Liens—Enforcement—Statute.

The thirteenth section of the Martin act does not extend the duration of tax liens in those cities which have accepted its benefits; it merely provides an additional method of enforcing such liens.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of John F.

Harned, against the city of Camden, to review a sale of land for unpaid tax assessment. Proceedings vacated.

Argued February term, 1901, before GUMMERE and FORT, JJ.

John F. Harned, pro se.

H. M. Snyder, Jr., for defendant.

AHLRICHS *v.* CITY OF CULLMAN.

(*Supreme Court of Alabama, June 4, 1901.*)

[30 So. Rep. 415.]

Ordinances—Violation—Sufficiency of Complaint.

An affidavit made before the mayor of a municipality, in which the affiant states that he "has probable cause for believing, and does believe," that a specific offense prohibited by an ordinance of the municipality has been committed by the defendant, is sufficient as a complaint for the violation of a municipal ordinance.

Same—Same—Appeal to Circuit Court—Sufficiency of Affidavit to Support Declaration.

In the prosecution for the violation of a municipal ordinance, an affidavit or complaint made before the mayor of a municipality, though subject to demurrer for too meager description of the offense charged, is sufficient to support a declaration filed by the municipality on appeal by the defendant to the circuit court; and the trial on appeal being de novo, it is of no consequence if a demurrer interposed to the complaint in the mayor's court had been improperly overruled.

Same—Same—Lawyer Practicing without License—Pleading—Departure of Declaration from Original Complaint.

Where an affidavit made before the mayor of a city charges that the affiant believes that "the offense of engaging in the business of practicing law in said city, for which a license is required, without having first procured and paid for such license, and contrary to law, was committed by" the defendant, on appeal by the defendant to the circuit court, a complaint filed by the city, which charges that "the defendant engaged in the business or profession of practicing law without having first procured and paid for a license therefor, a license to carry on such business being required by ordinance duly adopted," etc., is not a departure from the cause tried by the mayor.

Same—Same—Same—Sufficiency of Complaint.

On an appeal to the circuit court by a defendant from a judgment of conviction by the mayor for violating a municipal ordinance, a complaint filed in the circuit court which charges that "the defendant, being a lawyer, engaged in the business or profession of practicing law in said city, without having procured and paid for a license therefor, a license to carry on such business or profession being required by ordinance of said city duly adopted," etc., is sufficient, and not subject to demurrer.

Same—Same—Same—Charging Jury—Affirmative Charge Not Sustained by Evidence.

Where a municipal ordinance imposes a license tax on the occupation of engaging in and carrying on the practice of an attorney as a business in said municipality, in a prosecution filed by said ordinance, where there is no evidence of the fact that the defendant's place of business was in said municipality, or that he resided there, and held himself out as a practicing lawyer before that bar, but the only evidence adduced was that he was a lawyer, and as such practiced in the trial of three cases during the month specified in the complaint, the offense charged against the defendant is not made out, and the general affirmative charge is improperly given for the plaintiff.

Abstracts

Appeal from circuit court, Cullman county; Ed. B. Almon, Judge.

Alvin Ahlrichs was convicted of violating a municipal ordinance prohibiting any person from practicing law in the city of Cullman without having first paid a license, and he appeals. Reversed.

J. B. Brown, for appellant.

Brown & Curtis, for appellee.

JOHNSON *v.* MAYOR, ETC., OF CITY OF MACON.

(*Supreme Court of Georgia, Dec. 19, 1901.*)

[40 S. E. Rep. 322.]

License Tax—Ordinance—Amendment—Effect.

A municipal tax ordinance for a particular year, which is plainly and unequivocally broad enough in its terms to cover given occupations, is not rendered inoperative as to persons carrying on the same because the legislative municipal body, whether composed of the same or different members, adopted an amendment to the ordinance so as to expressly include such occupations by name. This latter action would not bind the courts to hold that the original ordinance was not intended to apply to these occupations.

Same—Vehicles—Power to Impose License Tax.

Under the charter of the city of Macon, its municipal authorities have the power to impose a license tax on all vehicles used for business purposes, whether such vehicles are used by common carriers in transporting freight or passengers for pay, or are simply used by merchants for the purpose of delivering goods to their customers.

Same—Enforcement—Imprisonment.

While the municipal authorities of the city of Macon cannot enforce the collection of a license tax by imprisonment, nor punish a person for his mere failure to pay the same, they have the power to pass and enforce an ordinance making it an offense to do business in the city without procuring the license or licenses required by a valid municipal ordinance.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Holmes Johnson was convicted of violating the license ordinance of the city of Macon. A writ of certiorari to the superior court was overruled, and he brings error. Affirmed.

Guerry & Hall, for plaintiff in error.

Minter Wimberly, for defendant in error.

GAST *v.* BUCKLEY.

(*Court of Appeals of Kentucky, Oct. 10, 1901.*)

[64 S. W. Rep. 632.]

License to Buy Claims—Of Whom May Be Required—Validity of Ordinance.

A city ordinance requiring the payment of a license tax for the privilege of buying claims is void to the extent that it requires a person to pay such tax for the privilege of buying claims for himself and not as a broker, though that may be his "business."

Broker—Who Is Not.

A person who buys claims for himself is not a broker.

Abstracts

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Jacob Gast against R. M. Buckley for a writ of prohibition. Judgment for defendant, and plaintiff appeals. Reversed.

For former report, see 49 S. W. 1113.

Lane & Harrison, for appellant.

THOMAS *v.* SNEAD.

(*Supreme Court of Appeals of Virginia, Sept. 12, 1901.*)

[39 S. E. Rep. 586.]

Authority of City to Exempt from License Tax—Cannot Be Implied.

Acts 1895–96, p. 213, § 3, authorizes the city of L. to tax real and personal property in the city, corporations, and all stocks in incorporated joint-stock companies doing business therein, and section 5 provides that manufacturers may be taxed whether taxed by the state or not, and that the council might lay a direct tax, or require a license tax under such regulations as it might prescribe: *held*, that the council could not exempt the capital of certain joint-stock companies and of one partnership from taxation, the power to exempt not being capable of implication.

License Tax—Of Whom May Be Required—Constitutionality of Virginia Statute.

Const. art. 10, § 1, provides that all taxation shall be equal and uniform, and all property be taxed in proportion to its value, and section 4 authorizes the general assembly to levy a tax on licenses to persons engaged in certain designated employment and on all other business which cannot be reached by the ad valorem system. Acts 1889–90, pp. 201, 214, impose a property tax on capital stock of corporations and capital of individuals engaged in manufacturing: *held*, that Acts 1895–96, p. 213, empowering the city of L. to lay a direct tax or license tax on the business of manufacturing, was void, and ordinances passed in pursuance of this power, imposing a license tax on manufacturers, were inoperative, the same being taxed under the ad valorem system.

Error from circuit court of city of Lynchburg.

Action between one Thomas and one Snead. From the judgment, Thomas brings error. Reversed.

John G. Haythe and Harrison & Long, for plaintiff in error.

S. C. Manson, Jr., and Blackford, Horsley & Blackford, for defendant in error.

LOUISVILLE STEAM FORGE CO. *v.* MEHLER *et al.*

CITY OF LOUISVILLE *v.* GOSNELL *et al.*

(*Court of Appeals of Kentucky, June 22, 1901.*)

[64 S. W. Rep. 396.]

Street Improvements—Action to Enforce Contractor's Lien—Defences.

In an action by a contractor to enforce a lien for the cost of a street improvement, the fact that defendant has been damaged by a change in the grade of the street, and that no steps were taken to fix the damage before the injury was done, constitutes no defense.

Abstracts

Same—Same—Same—Assessment District Improperly Defined.

Where an ordinance for the construction of a street fixed the depth on either side to which the tax district should extend on the theory that the contiguous territory was not bounded by principal streets, when in fact it was so bounded, that provision of the ordinance was void as in conflict with the statute imposing the burden on the property in the quarter squares contiguous to the improvement; but as the apportionment actually made was against the property which ought to have been subjected, and in proper proportion, the only error being in the amount of the costs which was apportioned, it was proper for the chancellor to enforce the lien for the correct amount.

Same—Liability of Abutting Owner for Cost of Extending Street under Railroad.

A statute providing for original construction of streets at the cost of abutting property owners applies only to the ordinary and usual construction of streets, and therefore abutting property owners cannot be charged with the cost of constructing a street to the extent such cost was increased by constructing the street under the tracks of a railroad, as that is a burden which must be borne by the city.

Same—Undertaking by Contractor to Repair—Giving Security—Who Liable for Costs—City or Property Owners.

Where a contract for a street improvement requires the contractor to deposit bonds amounting to 10 per cent. of the original contract price, to secure only such repairs as may be necessary by reason of defective work or material, the entire cost should be borne by the property owners, and it is error to render judgment against the city for 10 per cent. of the cost.

Guffy, J., dissenting.

Appeals from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Actions by Charles Mehler and others against the Louisville Steam Forge Company and George W. Gosnell and others against the city of Louisville to enforce a lien for the cost of a street improvement. Judgment for plaintiffs, and defend ants appeal. Reversed.

Pinckney F. Green and H. L. Stone, for appellants.

H. M. Lane, for appellees.

GORMAN *et al. v.* STATE *ex rel.* KOESTER.

(*Supreme Court of Indiana, June 27, 1901.*)

[60 N. E. Rep. 1083.]

Local Assessments—Board of Public Works—Duty to Prepare Assessment List—Mandamus.

Acts 1893, §§ 73–82 (Burns' Rev. St. 1894, §§ 3977–3986), and Acts 1895, §§ 18–21 (Burns' Supp. 1897, §§ 3977, 3978, 3981, 3985), provide that after an improvement has been completed, and the estimate of its cost submitted, the board of public works shall prepare an assessment list assessing the abutting real estate for its cost according to its frontage. When the list is completed the board shall fix a time when objections will be heard, and give a certain notice thereof, and on the day appointed may modify or confirm the assessment. After such hearing the board shall deliver the assessment roll, as modified or confirmed, to the department of finance: *held* that, in the absence of statute, there was no duty resulting from their office which warrants the issuance of mandamus to compel the board to make a new assessment after the assessment roll had been delivered to the department.

Abstracts

Same—Objections by Property Owner—Failure to Attend Hearing after Notice—Estoppel.

When a person is summoned to appear and object to an assessment on his property for improvements, he cannot avoid the effect of non-attendance by averring in a subsequent proceeding by him to compel a change in the assessment that he was misled as to the tribunal's intended course of action, especially if he relies on hearsay and rumor.

Appeal from superior court, Vanderburg county; John H. Foster, Judge.

Application for mandamus by the state, on relation of Louis Koester, against Michael Gorman and others, constituting the board of public works of the city of Evansville, and the city of Evansville. From a judgment in favor of relator, and from orders overruling demurrers to the application and a motion for a new trial, defendants appeal. Reversed.

D. C. Givens and Gilchrist & De Bruler, for appellants.
James T. Walker, for appellee.

MAYOR, ETC., OF HAGERSTOWN *v.* STARTZMAN.

(*Court of Appeals of Maryland, June 13, 1901.*)

[49 Atl. Rep. 838.]

Local Assessments—Collector's Right to Commissions on Assessments.

A municipal charter provided that the compensation of the city tax collector should be fixed at the date of his appointment. A collector's commission was fixed by resolution at a certain per cent. "on all taxes collected by him." Subsequently, in addition to the levy of the municipal taxes, ordinances were passed levying assessments on certain abutting lot owners for paving. Some of these ordinances declared that these paving costs were to be collected as other city taxes, and others recited that the collector should proceed as in assessments for opening streets or alleys, which provisions accorded strictly with recitals in the corporate charter: *held*, that the collector was entitled to his ordinary commissions on all such assessments for street paving collected by him.

Same—Same—Evidence—Admissibility of Ordinances.

Municipal ordinances relating to paving streets, and prescribing the duty of the tax collector as to such assessments, are admissible in an action by a collector for his commissions for collecting such assessments.

Same—Same—Same—Written Resolutions—Intention of Council.

Evidence that members of a city council who voted for a written resolution fixing the tax collector's commissions at a certain per cent. "on all taxes collected by him" did not intend to include street-paving assessments is incompetent in an action by such collector for commissions therefor.

Appeal from circuit court, Washington county; Edward Stake, Judge.

Action by Harry K. Startzman against the mayor and council of Hagerstown. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

J. A. Mason, for appellants.
A. C. Strite and W. J. Witzenbacher, for appellee.

Abstracts

DELKER *et al. v.* CITY OF OWENSBORO *et al.*

(*Court of Appeals of Kentucky, March 19, 1901.*)

[61 S. W. Rep. 362.]

Street Assessments—Duty of Tax Collector to Collect—Liability of Sureties.

Street assessments are "taxes," within Ky. St. § 3412, making it the duty of the tax collector of a city of the third class to collect "all taxes" levied by the city; and the sureties in the tax collector's bond are liable for such assessments collected by him.

Same—Same—Same—Bond of Sureties—Validity.

A tax collector's bond, binding him to perform all duties required of him "by law or ordinance," though not good as a statutory bond to the extent that it binds the collector to perform duties required only by ordinance, is good as a common-law bond as to such duties, and therefore sufficient to bind the sureties for street assessments collected by the principal pursuant to an ordinance imposing upon him that duty, whether or not such assessments be regarded as taxes.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by the city of Owensboro and others against John G. Delker and others on an official bond. Judgment for plaintiffs, and defendants appeal. Affirmed.

Little & Little, Geo. W. Jolly, and R. A. Miller, for appellants.

J. D. Atchison, for appellees.

PEOPLE *ex rel.* RAYMOND, County Treasurer, *v.* WHIDDEN *et al.*

(*Supreme Court of Illinois, June 19, 1901.*)

[61 N. E. Rep. 133.]

Local Assessments—Street Improvements—Compliance with Specifications—Objections to Foreclosure.

An ordinance for a street improvement provided that the curb walls should be plastered on their street face for 5 feet; the plaster to be made of Portland cement and sharp sand. The pavement was to be 12 inches thick; the concrete foundation to be of Portland cement, sharp sand, and broken limestone. Cement other than Portland was used, and limestone screenings instead of sand. In places the pavement was not more than 11 inches thick, and the curb walls were frequently plastered only from 2½ to 4 feet: *held* that, while the improvement was not made in compliance with the ordinance, it not being a different improvement from that authorized, an objection to the manner in which the improvement was made was not available, on behalf of one assessed for the improvement, on an application for judgment for a sale of real estate.

Magruder and Hand, JJ., dissenting.

Appeal from Cook county court; O. N. Carter, Judge.

Application by the people, on the relation of Samuel B. Raymond, county treasurer of Cook county, for judgment for sale of real estate to satisfy an installment of a special assessment, to which C. L. Whidden and others made objections. From a judgment denying the application, the people appeal. Reversed.

Charles M. Walker, Corp. Counsel, and Denis E. Sullivan (Shope, Mathis & Barrett, of counsel), for the People.

Hamline, Scott & Lord and George E. Newcomb (John H. Hamline, of counsel), for appellees.

Abstracts

SMITH *v.* CITY OF SEATTLE *et al.*

(Supreme Court of Washington, June 21, 1901.)

[65 Pac. Rep. 612.]

Local Improvements—Water System—Local Assessments—Power to Levy—Statutes.

Under Ballinger's Ann. Codes & St. § 734, giving cities power to levy special assessments on property benefited by local improvements, the city of Seattle was empowered to provide by charter (article 8, § 11, subd. 1) that the cost of establishing water mains should be defrayed by assessment on the property specially benefited by such mains.

Same—Assessment Districts—Power to Bond Same—Statutes.

Sess. Laws 1899, p. 234, declares that any city having power to levy special assessments for local improvements may issue bonds to pay for the same. Ballinger's Ann. Codes & St. § 734, authorizes cities to levy special assessments on property specially benefited by local improvements; and Seattle City Charter, art. 8, § 11, subd. 1, declares that the cost of establishing water mains shall be defrayed by special assessment: *held*, that such provisions authorized the city of Seattle to bond the district specially benefited, against which special assessments were levied for the construction of water mains, for the payment of such construction.

Same—Same—Same—Creating Debt in Excess of Limit—Validity.

Const. art. 8, § 6, providing that cities may become indebted to an amount not exceeding 5 per cent. of the taxable property, to supply water, light, and sewers, does not prohibit the use of any other method for payment for water mains than out of the general fund so provided; and hence Sess. Laws 1899, p. 234, authorizing the bonding of assessment districts specially benefited by the construction of water mains, for payment thereof, is not unconstitutional.

Same.

Const. art. 8, § 6, limiting the amount to which cities may become indebted for establishing light, sewer, and water systems to 5 per cent. of the taxable property, applies only to general indebtedness, and does not prevent a city already indebted for such purposes to the extent of 5 per cent. of the taxable property from bonding a local assessment district for the laying of water mains therein, of special benefit to such district.

Water System—Operating for Profit—Does Not Place City on Footing of Private Owner.

The fact that a city owning and operating its system of waterworks furnishes water to consumers so as to make a profit thereon does not place it on the footing of a private water company, so as to deprive it of the power to defray the expense of laying water mains by assessment on the district specially benefited thereby.

Appeal from superior court, King county; Boyd J. Tallman, Judge.

Action by Lyman C. Smith against the city of Seattle and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Clise & King and E. F. Blaine, for appellant.

W. E. Humphrey and Edward Von Tobel, for respondents.

JOYCE *v.* FALLS CITY ARTIFICIAL STONE CO. *et al.*

(Court of Appeals of Kentucky, Oct. 31, 1901.)

[64 S. W. Rep. 912.]

Street Improvements—Assessment Lien—Essentials to Validity.

To create a lien for the cost of a street improvement in a city of

Abstracts

the first class, it is not necessary for the city council to approve the contract made by the board of public works.

Same—Same—Same.

It is immaterial that all of the work specified in the ordinance is not included in one contract, or that part of it is not let at all, unless it appears that the persons complaining were prejudiced thereby; and in that case the court has power to do justice by correcting the apportionment, or making such orders as the equity of the case demands.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the Falls City Artificial Stone Company and others against Adelia A. Joyce to enforce a lien for the cost of a street improvement. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lane & Harrison, for appellant.

Wm. Furlong, for appellees.

McINTOSH *v.* CITY OF PITTSBURG.

(*Circuit Court, W. D., Pennsylvania, December 19, 1901.*)

[112 Fed. Rep. 705.]

Improvement Ordinance—Notice to Property Owners—Nonresidents.

Property within the limits of a city, owned by a nonresident, may be dealt with by the city as though it belonged to a resident, and the owner is bound to take notice of an ordinance affecting such property, when it has been duly promulgated as required by law, whether state or municipal.

Same—Validity—Judgment—Persons Concluded—Nonresidents Who Might Have Become Parties.

A judgment of a state court sustaining the validity of a municipal ordinance for the widening of a street, rendered on an appeal taken from such ordinance by property owners affected, as permitted by a statute under which the decision of the court on such appeal is final, is conclusive not only on the parties, but also on all other property owners similarly affected, and who might have become parties, and is a bar to a suit subsequently brought in a federal court by one of such property owners, who is a citizen of another state, to have the ordinance declared invalid.

In Equity. On bill and plea.

Willis F. McCook and Dalzell, Scott & Gordon, for complainant.

Clarence Burleigh, J. H. Beal, and Johns McCleave, for respondent.

FAY *et al. v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, Dec. 18, 1901.*)

[62 N. E. Rep. 530.]

Street Improvements—Sufficiency of Description Contained in Ordinance Authorizing.

An ordinance for the laying of a combined curb and gutter, providing that the top of the curb shall be at the established grade of the street, and that the curb and gutter shall be 6 inches in thickness throughout, and the gutter flag 18 inches in width, and laid to a pitch

corresponding with the angle towards the crown of the street, is no invalid as failing to state the height of the curb.

Error to Cook county court; R. W. S. Wheatley, Judge

Special tax proceeding by the city of Chicago against Stephen J. Fay and others. From a judgment of the county court confirming the assessment, defendants bring error Affirmed.

James Maher, for plaintiffs in error.

William M. Pindell and Charles M. Walker, Corp. Counse (E. B. Tolman and Robert Redfield, of counsel), for defend ant in error.

CITY OF CHICAGO *v.* HOLDEN *et al.*

(*Supreme Court of Illinois, Dec. 18, 1901.*)

[62 N. E. Rep. 550.]

Street Improvements—Confirmation of Assessments—Objections—Insufficient Description—Evidence.

Where a city ordinance provides that the curbstones on the streets shall be firmly bedded on flat stones, but does not otherwise describe such flat stones, and the confirmation of an assessment for laying such curbing is objected to on the ground that such ordinance is void because of failure to describe such flat stones, it is error to exclude proof that the term "flat stones," as used in the ordinance, had a definite and established meaning in such city with reference to street improvements.

Error to Cook county court; Russell P. Goodwin, Judge.

Proceedings by the city of Chicago to assess certain property of Charles R. Holden and others for street grading, paving, and curbing. From a judgment sustaining the owners' objections to the confirmation of the assessment, the city brings error. Reversed.

Charles M. Walker, Corp. Counsel, and Wm. M. Pindell, Asst. Corp. Counsel, for plaintiff in error.

George W. Wilbur, for defendants in error.

BLANCHARD *v.* LADD.

(*Supreme Court of California, Dec. 26, 1901.*)

[67 Pac. Rep. 131.]

Street Improvements—Diagram—Variance between Copy and Original.

A variance between the recorded copy of the diagram of a street improvement and the original diagram, consisting in the position of the arrow indicating direction, is immaterial, where the error in the direction of the arrow is in the original diagram, and not in the copy.

Same—Insufficient Description—Void Assessment—Failure to Appeal—Effect.

Where the description given by the assessment and diagram of a street improvement is insufficient to identify the land assessed, the assessment, being void on its face, will not be cured by a failure to appeal.

Same—Harmless Error in Diagram—Appeal—Finding of Fact—Review.

Where, in the original diagram of a street improvement, there is error in the position of the arrow indicating direction, but the record on appeal does not show that direction is not correctly indicated in

Abstracts

some other way, the court will not disturb a finding that the lot, as described in the complaint to enforce the lien of the assessment, was in fact assessed.

Same—Same—Arrow Indicating Direction—Unnecessary.

Street Improvement Act (St. 1889, p. 166) § 8, provides that the assessment for street improvements shall have attached thereto a diagram exhibiting each street on which any work has been done, and showing "the relative location of each lot to the work done": *held*, that where the description in the assessment and diagram is sufficient to identify the land assessed, and to show the relative location of each lot to the work done, an arrow or other mark indicating direction is unnecessary.

Department 2. Appeal from superior court, city and county of San Francisco; Jas M. Troutt, Judge.

Suit by J. R. Blanchard against William Ladd to enforce a lien of an assessment for street improvements. Judgment for defendant. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

T. Z. Blakeman, for appellant.

A. G. Eells and H. K. Eells, for respondent.

GRANT *et al. v.* BARBER *et al.*

(*Supreme Court of California, Dec. 24, 1901.*)

[67 Pac. Rep. 127.]

Street Improvements—Specifications—To Be Made by Council—Delegation of Authority.

Under the street improvement act, making it the duty of the common council to describe the work it is authorized to order, and providing that materials used shall comply with the specifications and be to the satisfaction of the street superintendent, a specification for a grading contract providing that the contractor shall provide for drainage under all banks, and put in such culverts as the street superintendent may direct, at his own cost, is void, because an unwarranted delegation of authority to the street superintendent.

Same—Same—Jurisdictional Defects—Not Cured by Descriptions in Specifications.

Where a resolution of intention and a contract in street improvement proceedings provided that the improvement should be made in accordance with the plans and profile and specifications, and the specifications provided that the contractor should "put in such culverts as the street superintendent might direct," while the plans and profile required only two culverts, which were specifically described, the specific description and designation of the two culverts in the plans and profile did not cure the fault of the specifications in giving the street superintendent unwarranted authority with reference to the culverts.

Same—Same—Curing Defects—What Does Not.

The specifications were not rendered unobjectionable by reason of the fact that the culverts were to be put in at the contractor's expense.

Department 1. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by L. A. Grant and others against Margaret S. Barber and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Isidore B. Dockweiler and Dockweiler & Carter, for appellants.

C. W. Chase, for respondents.

Abstracts

DE HAVEN *v.* BERENDES *et al.*

(*Supreme Court of California, Dec. 23, 1901.*)

[67 Pac. Rep. 786.]

Street Improvements—Action to Enforce Assessment—Defences—Abutter Having Work Done by Private Contractor.

By Finlayson, St. Ry. Law, p. 61, § 6; Id., p. 84, § 8,—the owner of land abutting on a street may himself make a proposed improvement in front of his land, and such work shall be excepted from the order for improvement, provided the work done by the owner is on official grade, and satisfactory to the superintendent of streets. Code Civ. Proc. § 1963, subd. 15, and section 1959, enact that official duty shall be presumed to have been regularly performed: *held*, that where an improvement was proposed, and an owner of land abutting on the street employed a contractor to do the work, and subsequently, in a suit by the city contractor to enforce an assessment against the owner, the court found that plaintiff performed no work in front of the property in question, it would be inferred that the work done by the contractor for the owner was embraced in and coextensive with the work subsequently ordered, and that it conformed to the requirements of law, and met the approval of the superintendent.

Same—Performance of Work by Abutter—Allowing Credit for—Statute Construed.

Finlayson, St. Ry. Law, pp. 65, 66 (Street Improvement Act, subd. 10, § 7), provides that the owner of land fronting on any street may, at his own expense, after obtaining permission, do any grading necessary for the improvement, and that he shall be allowed a credit for the work so done: *held*, that under the statute a board of supervisors did not exceed its powers in including in its order for work on a street grading already done by an owner, the statute not excluding the property from a subsequent assessment, but merely allowing a credit.

Same—Same—Liability of Such Abutter to Assessment—Power of Board—Statute Construed.

Finlayson, St. Ry. Law, p. 84, § 8; Id. p. 61, § 6,—enacts that the owner of land abutting on a street may himself make any proposed improvement, and that such work shall be excepted from the order for the improvement, provided it be on the official grade, and satisfactory to the superintendent of streets: *held*, that where work done by an owner is satisfactory to the superintendent, and on the official grade, the action of the board of supervisors in including such work in an assessment against the owner is without authority, and the assessment based thereon void.

Same—Same—Same—Same—Same—Action of Board Not Validated by Failure of Owner to File Remonstrance.

The action of the board was not validated by failure of the owner to avail himself of section 3 of the statute, which gives an abutting owner the right to make petition or remonstrance to the city council on account of any determination of the superintendent of streets, or as to the correctness or legality of the assessment, inasmuch as the statutory remedy does not apply to acts done wholly without authority.

Same—Same—Same—Same—Same—Action of Board Not Validated by Failure of Owner to Appeal.

The action of the board was not validated by the abutting owner's failure to avail himself of section 11 of the statute, giving an appeal to the common council by any one having any objection to the legality of any determination or proceeding of the superintendent of streets, and providing that no assessment shall be held invalidated, save on appeal to the council, for any error or defect in the proceedings; since such remedy applies only to acts of the superintendent of streets, and does not excuse the performance of an act necessary for the acquisition of power to act.

Commissioners' decision. Department 2. Appeal from

superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by Joe J. De Haven against Emma A. Berendes and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Alex G. Eells and H. K. Eells, for appellant.

William J. Herrin, for respondents.

SAN FRANCISCO PAVING CO. *v.* BATES *et al.*

(*Supreme Court of California, Aug. 19, 1901.*)

[66 Pac. Rep. 2.]

Street Assessments—Front-Foot Rule*—Constitutional Law.

The California street assessment law is not repugnant to Const. U. S. Amend. 14, and void, because the expense of the street work is to be assessed in proportion to the frontage of the lots.

Same—Regularity—Burden of Proof.

Under the statute a street assessment and other documents connected therewith are prima facie evidence of its regularity and correctness and of the prior proceedings: hence when they are introduced in evidence the defendant contesting such assessment has the burden of establishing the invalidity or irregularity of the proceedings.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the San Francisco Paving Company against George E. Bates and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Freeman & Bates and Mastick, Van Fleet & Mastick, for appellants.

J. C. Bates, for respondent.

CITY OF LOUISVILLE *v.* TYLER.

TYLER *v.* LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Sept. 24, 1901.*)

[64 S. W. Rep. 415.]

Street Improvements—Assessments—Liability of Abutting Property for Cost of Reconstruction.

As the liability of abutting property owners for the cost of a street improvement is the creature of the statute, and the statute does not create such liability in cities of the first class except for original construction authorized by ordinance, abutting property in such cities cannot be charged with the cost of reconstructing a street, though the original construction may not have been by ordinance, or at the cost of abutting owners.

Same—Reconstruction—What Constitutes.

The fact that no sidewalk was made when a street was originally constructed, or was ever thereafter made, does not prevent a subsequent improvement of the street from being a reconstruction; nor is it material that the street was originally improved by building a

---

*See French *v.* Barber Asphalt Pav. Co., 6 Mun. Corp. Cas. 1, and note, p. 36; also, other United States Supreme Court cases immediately following in same volume.

"turnpike road," as that is well understood to mean a macadam pavement, which is the kind of pavement, at the time of the improvement, in general use in the city.

Same—Kentucky Statute Exempting City from Cost of Improvement—Not Applicable to Reconstruction.

Ky. St. § 2834, part of charter of cities of first class, providing that the city shall not be liable for the original improvement of public ways without the right to enforce it against the property receiving the benefit thereof, has no application to the reconstruction of a street.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Owen Tyler against the Louisville & Nashville Railroad Company and others to enforce a lien for the cost of a street improvement. Judgment dismissing plaintiff's petition as to the Louisville & Nashville Railroad Company and in favor of plaintiff against the city of Louisville, and plaintiff and the city each appeals. Affirmed.

Henry L. Stone and John Mason Brown, for appellant city of Louisville.

Pirtle & Trabue and H. M. Lane, for appellant Tyler.

Helm, Bruce & Helm, for appellee Louisville & N. R. Co.

KIRWIN *et al. v.* NEVIN.

(Court of Appeals of Kentucky, Oct. 8, 1901.)

[64 S. W. Rep. 647.]

Assessment Lien—Enforcement—Misdescription of Property—Illegal Sale—Remedy of Warrant Holder.

Where an apportionment warrant for the cost of a street improvement was issued against a person who was not the owner of the property described therein, and, in an action to enforce the lien, the property was sold as his property, and purchased by plaintiff, the holder of the warrant, and the sale was confirmed, the title passed to plaintiff; and it seems that his claim was thereby extinguished, so as to preclude him from maintaining an action therefor against the original owner of the property against whom he has procured a new warrant to be issued.

Same—Same—Statute of Limitations.

Gen. St. 1883, c. 71, art. 3, § 2, providing that an action upon a liability created by statute when no other time is fixed by the statute creating the liability shall be commenced within five years next after the cause of action accrued, applies to an action to enforce a lien for the cost of a street improvement in the city of Louisville, made when the statute was in force; and, more than five years having elapsed between the time the lien was perfected by the acceptance of the work by the council and the time the action was instituted, the action was barred, though no warrant was issued against the proper person until within five years.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Joseph Nevin against Mary E. Kirwin and others to enforce a lien for the cost of a street improvement. Judgment for plaintiff, and defendants appeal. Reversed.

Matt O'Doherty, for appellants.

H. M. Lane, for appellee.

Abstracts

COTTON *et al. v.* WATSON *et al.*

(*Supreme Court of California, Oct. 28, 1901.*)

[66 Pac. Rep. 490.]

Street Improvements—Assessments—Contractor's Lien—Creation—Recordation of Warrants.

Street Improvement Act, § 9 (St. 1891, p. 205), provides that the warrant of the superintendent of streets authorizing the contractor to collect the assessments for improvements shall be signed by the superintendent and attached to the assessment, and that it shall be "substantially" after a form given, which form makes provision for a date. It further provides that the warrant shall be recorded in the office of the superintendent of streets, after which it may be delivered to the contractor, and the assessment will be a lien on the land. Section 10 of said act (St. 1885, p. 155) provides that, if a contractor fails to return his warrant within 30 days after date, he shall have no lien: *held*, that the statutes contemplated that the date of recording was the date of the warrant, and therefore where the superintendent made a warrant and dated it, but retained it several days before it was recorded, the contractor did not lose his lien by failing to return the warrant within 30 days after the date it was made, but within 30 days after it was recorded.

Department 1. Appeal from superior court, Alameda county; S. P. Hall, Judge.

Action by Ernest J. Cotton and others against John B. Watson and others. From a judgment in defendants' favor, plaintiffs appeal. Reversed.

Davis & Hill, for appellants.

J. C. Bates, for respondents.

MCDONNELL *v.* GILLON.

(*Supreme Court of California, Oct. 11, 1901.*)

[66 Pac. Rep. 314.]

Special Assessments—Construction of Sewers—Resolution of Intention—Description of Work—Sufficiency.

Where a resolution of intention for the construction of certain sewers called for certain manholes to be constructed, but gave no description whatever of them, save their inside diameter, and called for a flush tank to be constructed at the intersection of certain streets, giving no description of the tank, the assessment was void for lack of sufficient description of the manholes and flush tank.

Commissioners' decision. Department 1. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by P. McDonnell against P. Gillon to foreclose a lien for a street assessment for the construction of certain sewers in the city of Vallejo. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Stoney & Stoney, for appellant.

L. G. Harrier and Coghlan & Harvey, for respondent.

LEEDS *v.* DE FREES.

(*Supreme Court of Indiana, Nov. 13, 1901.*)

[61 N. E. Rep. 930.]

Assessment Liens—Enforcement—Sufficiency of Complaint.

Where a complaint to enforce a lien for a street improvement dis-

Abstracts

closes that the municipal authorities performed all the material acts required by the statute to create a lien, and a copy of the assessment roll, so far as relates to the property of defendant, is filed with and made a part thereof, the complaint is sufficient without filing as exhibits copies of all resolutions, ordinances, and orders of the council in the proceedings, or the full assessment roll.

Same—Same—Validity of Assessment—Collateral Attack.

Where an estimate of the cost of a street improvement and an apportionment of such cost on the abutting property are made by the engineer and adopted by the city council, the assessment based thereon is prima facie correct, and not open to the objection in a collateral proceeding that the assessment made was arbitrarily by the front foot.

Special Assessments—Objections—Opportunity for Hearing—Authority of Council to Determine.

Under Burns' Rev. St. 1894, § 4294, providing that in filing the report of the engineer of the estimated cost of a street improvement and apportionment of the cost on abutting property the city council shall give notice of the hearing thereon, a property owner may appear at such hearing, and object to the assessment, and the council has full authority to determine such questions.

Same—Validity of Statute Authorizing—Providing Tribunal to Make Assessment.

The statute providing for assessing property benefited for the cost of street improvements is not unconstitutional, as not providing a tribunal to make such assessment, since it does provide that the city council shall be such tribunal.

Same—Foreclosure of Lien—Personal Judgment.

In an action to foreclose the lien of an assessment on property for a street improvement, a personal judgment for the amount of the assessment should not be entered against the owner.

Same—Same—Same—Appeal and Error.

Where, in an action to foreclose the lien of an assessment for a street improvement; personal judgment is entered against the owner in addition to the decree of foreclosure, and no objection to the form or motion to modify the judgment is made in the trial court, the judgment will not be reversed for such irregularity.

Appeal from superior court, Laporte county; H. B. Tuthill, Judge.

Action by Calvert H. De Frees against Minnie Leeds. From a judgment for plaintiff, defendant appeals. Affirmed.

James F. Gallaher and Smith, Duncan, Hornbrook & Smith, for appellant.

M. T. Krueger and C. R. & J. B. Collins, for appellee.

TRAH *v.* VILLAGE OF GRANT PARK.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 442.]

Street Improvements—Petition of Property Owners—Requisites—Illinois Statute.

Laws 1899, p. 95, § 4, states that in cities, towns, or villages with a population of less than 50,000, no ordinance for making any local improvement to be paid by special assessment, or by special taxation of contiguous property, shall be adopted, unless the owners of one-half the property abutting on the line of the proposed improvement shall petition for the same: provided, that in cities, etc., of 10,000 or less population, no ordinance for making any improvement shall be adopted unless a majority of resident property owners affected by

Abstracts

such improvement shall petition for the same: *held* that, in a city of less than 10,000 population, a petition for a local improvement must not only be signed by a majority of the resident property owners affected by the improvement, but also by the owners of one-half the property abutting on the line of the proposed improvement.

Appeal from Kankakee county court; E. B. Gower, Judge.

Action by Joseph Trah against the village of Grant Park. From a judgment confirming an assessment for local improvements, plaintiff appeals. Reversed.

W. R. Hunter and R. J. Slater, for appellant.

Harrison Loring, for appellee.

NICHOLS *et al. v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 435.]

Street Assessments—Ordinance—Sufficiency.

A street improvement ordinance failing to specify the size or quality of the flat stones on which the curb stones are to be bedded is thereby rendered invalid.

Error to Cook county court; O. N. Carter, Judge.

Proceeding by the city of Chicago against George P. Nichols and others for the confirmation of a special assessment. Judgment for plaintiff, and defendants bring error. Reversed.

William F. Carroll, for plaintiffs in error.

YAGGY *et al. v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 494.]

Street Assessments—Compliance with Statutory Prerequisites—Evidence—Confirmation.

Hurd's Rev. St. 1899, p. 363, provides that with any street improvement ordinance presented by the board of local improvements to the city council shall be presented also a recommendation of the improvement signed by at least a majority of the members, and that such recommendation shall be prima facie evidence that the preliminary requirements of the law have been complied with, and, if a variance be shown, it shall not affect the validity of the proceedings, unless the court shall deem the same willful or substantial: *held*, that where abutting property owners do not show that the city failed to comply with all the preliminary requirements of Act June 14, 1897, § 7, the petition for the improvement, order appointing commissioners to spread the assessment, the order for publication, affidavit of mailing, posting, and publication of notices, and the assessment roll are admissible in evidence in proceedings for confirmation of the assessment.

Appeal from Cook county court; W. F. Hodson, Judge.

Proceedings by the city of Chicago for the confirmation of a street improvement assessment. Levi U. Yaggy and others object. From a judgment in favor of the city, the objectors appeal. Affirmed.

Samuel J. Howe, for appellants.

Charles M. Walker, Corp. Counsel, and Robert Redfield, Asst. Corp. Counsel, for appellee.

Abstracts

BERRY *et al.* *v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 498.]

Street Assessments—Appeal—Objections—Failure to Assign Error.

A contention on appeal from a judgment confirming a street assessment not covered by the objections filed in the trial court, nor included in the assignments of error, will not be considered by the appellate court.

Same—Compliance with Statutory Prerequisites—Evidence.

Hurd's Rev. St. 1899, p. 362, c. 24, § 7, requires an estimate of the cost of a proposed street improvement to be made and incorporated in the resolution passed by the board 10 days before the public hearing; and section 9 provides that a recommendation signed by a majority of the council members shall be presented to the council with the ordinance, which recommendation shall be prima facie evidence that all the preliminary requirements have been complied with. Section 10 prescribes that an estimate of the cost shall be presented to the council with the ordinance and recommendation: *held*, that the prima facie evidence that all the preliminary requirements, including the estimate of the cost, had been complied with, was not overcome by the fact that the estimate attached to the ordinance bore the date of the passage of the same, the estimate being deemed the one required by section 10, and hence the ordinance will be deemed valid.

Appeal from Cook county court; Wm. T. Hodson, Judge.

Proceedings for the confirmation of a special assessment for street improvements by the city of Chicago against F. J. Berry and others. From a judgment confirming the assessment, defendants appeal. Affirmed.

Samuel J. Howe, for appellants.

Charles M. Walker, Corp. Counsel, and Robert Redfield, Asst. Corp. Counsel, for appellee.

CITY OF CHICAGO *v.* NICHOLES *et al.*

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 434.]

Vacation of Judgment—Order Made at Subsequent Term.

An order purporting to vacate a former judgment, which was made at a term subsequent to the one at which the judgment was rendered, is void.

Special Assessments—Vacation of Judgment Confirming—Illinois Statute.

A judgment confirming a special assessment for street improvements, in proceedings commenced before Act 1897, p. 121, went into effect, cannot be vacated, under section 56 of such act, authorizing the vacation of judgments confirming assessments of benefits by abandonment of the construction and dismissal of the proceedings under the ordinance, the act referring only to proceedings commenced thereunder, and the judgment will operate as a bar to a subsequent proceeding.

Appeal from Cook county court; W. T. Hodson, Judge.

Action by the city of Chicago against Eleanor F. Nicholes and others. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

Charles M. Walker, Corp. Counsel, and Denis E. Sullivan, Sp. Assess. Atty., for appellant.

Heren, Robertson & Long, for appellees.

Abstracts

HOUSTON *v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 396.]

Paving Ordinance—Definiteness.

An ordinance authorizing the paving of a street, and providing that at the intersecting streets the curb should turn on the curb line and run back to the street line of the street to be paved, and that at the intersecting alleys the curb should run to the alley line produced, though not in terms fixing the width of the intersecting streets, makes the ascertainment of such width a matter definitely determinable by calculation, and is not void for uncertainty.

Same—Same.

A street-paving ordinance stating the length of a street to be paved, and providing that limestone curbs 4 feet long, 3 feet deep, and 5 inches thick shall be bedded on flat blocks 1 foot in length, 8 inches in width, and 6 inches in thickness, is not invalid because not stating the number or quantity of blocks upon which the curbstones are to be bedded, since, the dimensions of both being given, the ascertainment of number is a mere matter of calculation.

Street Improvements—Petition of Property Owners—Sufficiency.

Under Act 1897 relative to street improvements (section 37), providing that a petition for special assessment for street improvements shall have attached thereto a copy of the ordinance in pursuance of which the petition is filed, and a copy of the recommendation of the board of local improvements and of the estimate of the cost, a petition is not objectionable because failing to allege that the ordinance for the proposed improvement was recommended to the city council and that an estimate of the cost of such improvement was made and approved by the council.

Same—Objection of Property Owner—Jury—Issues Triable.

Under Hurd's Rev. St. 1899, p. 373, providing that, if any property owner assessed for local street improvements objects that the property will not be benefited to the amount assessed thereon, the court shall impanel a jury to try such issue, the jury cannot determine whether the proposed improvement is necessary.

Same—Same—Same—Benefits—Conflict of Evidence—Setting Aside Verdict.

In a special assessment proceeding, where, of the four witnesses called, two testified that the property would be specially benefited to the extent of $8 per foot, and two that such benefits would not exceed $3.50 per front foot, there was such direct conflict in the evidence that the verdict of the jury will not be set aside as against the weight of the evidence.

Appeal from Cook county court; Robt. H. Lovett, Judge.

Special assessment proceeding by the city of Chicago against G. P. Houston. From a judgment confirming the assessment, defendant appeals. Affirmed.

Mason Bros. (Henry E. Mason, of counsel), for appellant.

Charles M. Walker, Corp. Counsel, and Armand F. Teefy and Denis E. Sullivan, Asst. Corp. Counsel, for appellee.

OREGON REAL ESTATE CO. *v.* CITY OF PORTLAND *et al.*

(*Supreme Court of Oregon, Oct. 28, 1901.*)

[66 Pac. Rep. 441.]

Invalid Assessments—Curative Acts—Scope.

Under Sess. Laws 1898, p. 163 (Portland City Charter, § 156), pro-

Abstracts

viding that if, in the completion of any street improvement, when the cost thereof is declared by the common council to be a charge on the adjacent property, any assessments levied are adjudged to be invalid because of defects, the city can bring actions against the owners of abutting property and recover the cost of such improvement properly chargeable thereunder, an assessment void, in that it is made in the face of a remonstrance of a party owning more than one-half of the adjacent property, is not cured, ratified, or confirmed in the absence of an adjudication that the assessment is invalid.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Suit by the Oregon Real Estate Company against the city of Portland and others. From a decree in favor of defendants, plaintiff appeals. Reversed.

M. L. Pipes, for appellant.

R. R. Duniway, for respondents.

BERRY *et al. v.* CITY OF DES MOINES.

(*Supreme Court of Iowa, Oct. 22, 1901.*)

[87 N. W. Rep. 747.]

Special Assessments—Appeal—Review—Rights of Parties Not Appealing.

On an appeal from an assessment for street improvements under Code, § 839, providing that any person affected by the levy may appeal to the district court, and that all questions touching the validity of the assessment, or the amount thereof, shall be determined, such court is confined to a determination of the validity or extent of the assessment against the persons taking the appeal, and cannot make any orders affecting persons interested in the assessment who have not appealed.

Same—Same—Same—Same.

On an appeal from an assessment for street improvements, taken under Code, § 839, a person affected by the assessment, who has not appealed therefrom, cannot appear in the district court, and attack the validity of the assessment.

Same—Same—Same—Same—Street Railway Company.

Since, on an appeal to the district court from an assessment for street improvements, taken under Code, § 839, the court can decide only those questions which go to the validity or extent of the assessment as to the persons taking the appeal, a street railroad company between and along whose tracks the paving has been laid, which has not joined in the appeal, cannot appear and defend against the contention of appellant that he cannot be legally assessed for the portion of the pavement between the street car tracks and one foot on the outside thereof.

Same—Vacation of Assessment Pending Appeal.

Where, pending appeal to the supreme court from an order of the district court on appeal from an assessment the assessment is vacated, its validity will not be determined.

Appeal from district court, Polk county; C. A. Bishop, Judge. Dismissed.

N. T. Guernsey, for appellant.

J. E. Mershon and W. C. Strock, for appellee city of Des Moines.

Bailey, Ballreich & Preston, for appellees Berry and others.

Abstracts

THOMAS *et al. v.* CITY OF PORTLAND *et al.*

(*Supreme Court of Oregon, Oct. 28, 1901.*)

[66 Pac. Rep. 439.]

Street Improvements—Invalid Assessments—Curative Acts—Scope.

Under Sess. Laws 1898, p. 163 (Portland City Charter, § 156), providing that if, on the completion of any street improvement, when the cost thereof is declared by the common council to be a charge on the adjacent property, any assessments levied to defray the cost thereof are adjudged to be invalid, the city may bring actions against the owners of abutting property on which the cost of such improvement might be charged, and recover the cost of such improvement, an assessment defective in that the improvement was made without the petition of property owners as prescribed by Sess. Laws 1893, p. 842 (Portland City Charter 1893, § 98), is not cured, ratified, or confirmed, in the absence of an adjudication that the assessment is invalid, and hence the jurisdiction of a court of equity to annul such assessment is not barred.

Same—Same—Enjoining Collection—Dismissal of Suit.

Suit to restrain the collection of such assessment and to declare the same void will not be dismissed, without prejudice to another, on the ground that it might stand in the way of the action under the charter, since a decree is not a bar to a new remedy or proceeding.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Suit by E. A. Thomas and others against the city of Portland and others. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

R. R. Duniway, for appellants.

W. M. Gregory, for respondents.

CITY OF PORT ANGELES *et al. v.* LAURIDSEN *et al.*

(*Supreme Court of Washington, Sept. 17, 1901.*)

[66 Pac. Rep. 403.]

Special Assessments—Validity—Res Judicata.

A decision of a competent court that a municipal assessment is invalid is conclusive as to such fact in a suit to foreclose a reassessment, though the assessment on the particular property involved in the latter proceedings was not in issue in the former.

Same—Reassessments—Validity—Estoppel.

Where a property owner has not paid a municipal assessment or a reassessment, he will not be heard to deny the validity of the reassessment on the ground that the original assessment was valid.

Appeal from superior court, Clallam county; Jas. G. McClinton, Judge.

Action by the city of Port Angeles against G. M. Lauridsen and others to foreclose a municipal reassessment. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Geo. C. Hatch, for appellants.

James Stewart and Preston & Embree, for respondents.

GREGORY *v.* CITY OF ANN ARBOR *et al.*

(*Supreme Court of Michigan, July 10, 1901.*)

[86 N. W. Rep. 1013.]

Dedication of Street—Acceptance—Validity.

Under a city charter requiring all resolutions of the council to be

Abstracts

adopted by a vote of the majority thereof, a resolution accepting the dedication of a street, which receives the affirmative votes of less than a majority of the council, does not constitute a valid acceptance thereof.

Same—Dedication by Deed—Failure of Mortgagee to Join in Deed.

A deed dedicating a city street, which is not joined in by a mortgagee of the land, confers no right on the city as against the mortgagee.

Same—Dedication on Conditions—Failure to Perform.

Where the dedication of a city street is on condition that the city forthwith make certain expenditure thereon, and the city fails so to do, the dedication is invalid.

Same—Filing Plat—Withdrawal of Plat before Acceptance.

A plat dedicating a city street 42 feet wide, was filed, but was withdrawn before its acceptance, but a resolution declaring a street 45 feet wide to be a necessity was afterwards passed by the council: *held*, that the city acquired no rights by the filing of the plat.

Special Assessments—Objection on Merits as Waiver of Irregularities in Notice.

Where property owners appear before the board of assessments, and object on the merits to a municipal special assessment, it is a waiver of any irregularity in the service of the notice to appear.

Same—Misdescription of Property Assessed.

The fact that property subject to a special assessment is assessed by the description of a different property is not ground for the owner of the latter property to object to the assessment on the ground that his property is twice assessed, when the owner of the first property has paid the assessment.

Appeal from circuit court, Washtenaw county, in chancery; Edward D. Kinne, Judge.

Suit by Samuel R. Gregory against the city of Ann Arbor and another to set aside a special assessment. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Randall & Jones, for appellants.

E. B. Norris, for appellee city of Ann Arbor.

Lawrence & Butterfield, for appellee Gruner.

YOUNG *v.* BORZONE *et ux.*

(*Supreme Court of Washington, Sept. 3, 1901.*)

[66 Pac. Rep. 135.]

Improvement Liens—Constitutionality—Due Process—Washington Statute.

2 Ballinger's Ann. Codes & St. § 5902, giving a lien on the property to any person who, at the request of a property owner, improves a street or road on which such property abuts, is not unconstitutional, as being a taking of property without due process of law.

Improvement Contract—Private Contractors—Reference to Plans of City Engineer—How Far a Part of the Contract.

A contract between a contractor and the owner of property abutting on a street required the former to grade, clean, and sidewalk the street according to the plans of the city engineer, and under his directions, but the plans were not attached to the contract: *held*, that the working details of the work, which were prepared by the engineer, became a part of the contract, but that it did not include provisions inserted therein by the city engineer forbidding the contractor to assign the contract, fixing a time in which the work should be completed, and providing for a deduction in the contract price if

Abstracts

not completed within such time, as they were not a necessary part of the working details.

Same—Action by Assignee to Establish Lien—Counterclaim by Property Owner.

Under 2 Ballinger's Ann. Codes & St. § 4835, authorizing a counterclaim against the assignor of a chose in action to be pleaded in an action by the assignee thereon, a property owner may counterclaim damages resulting from the act of a paving contractor in placing earth excavated from the streets on the lot of the former, in an action by the assignee of the contractor to establish a lien on the property.

Same—Harmless Alteration of Contract.

Where a contract between property owners and a contractor for the grading of a street provides that each property owner is to pay in proportion to his interest in the abutting property, the interlineation of the clause, "Each party hereto to pay only such part of the total cost as his front footage bears to the total frontage improved in said street,—is not such an alteration as will avoid the contract.

Same—Action to Establish Lien—Excess Paid by Third Person—Right of Defendant to Claim Benefit of.

Where the assessment for paving a street against an abutting property owner is correct, the fact that another abutting property owner has paid more than his share does not entitle the former to a credit for a portion of the excess so paid, in an action by the contractor to establish a lien on the property of the former.

Same—Sufficiency of Notice Filed by Assignee to Establish Lien.

An allegation, in a notice to establish a lien on property abutting on a street for work done in paving a street, that plaintiff's assignor performed the labor at the request of the property owner, is equivalent to an allegation that he was employed by the owner, as required to be stated in such notice by 2 Ballinger's Ann. Codes & St. § 5904.

Appeal from superior court, King county; Boyd J. Tallman, Judge.

Suit by M. H. Young against Frank Borzone and wife to foreclose a lien for paving. From a decree in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Frank P. Lewis and Horace Peter, for appellants.

Preston & Embree, for respondent.

TACOMA BITUMINOUS PAV. CO. *v.* STERNBERG, City Treasurer.

(*Supreme Court of Washington, Sept. 10, 1901.*)

[66 Pac. Rep. 121.]

Street Improvements — Assessment Liens — Deferred Enforcement—Right of Contractor to Interest on Warrants.

A city, having created a local improvement fund to pay for a certain street improvement, adopted a resolution that the time which should thereafter be set at which the assessment roll for such improvement should become delinquent should be at least two years from the improvement's completion. The contract for the improvement, thereafter executed, provided, as to payment, that the city should issue warrants on the local improvement fund to the contractor, and stipulated that the contractor waived all right to have the assessment become due until 2½ years after the completion of the improvement: *held*, that the contractor was not entitled to interest on the warrants up to the time the assessment became delinquent from the special improvement fund.

Abstracts

Appeal from superior court, Pierce county; J. A. Williamson, Judge.

Mandamus by the Tacoma Bituminous Paving Company, a corporation, against W. A. Sternberg, treasurer of the city of Tacoma, to compel the payment of interest on certain street improvement warrants. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. E. Buell, for appellant.

William P. Reynolds and Emmett N. Parker, for respondent.

SHANK *et al. v.* SMITH *et al.*

(*Supreme Court of Indiana, Nov. 15, 1901.*)

[61 N. E. Rep. 932.]

Assessment Lien—Action by Contractor to Enforce—Defenses—Failure to Perform Contract to Repair

Where one who contracted with a town for the pavement of a street sues abutting owners to enforce his lien for the work, and the answer sets up that the work was done under a contract whereby the contractor was to construct the pavement, and also to maintain the same in repair for seven years, without any compensation in addition to that expressed in the contract, and that he had guarantied such repairs for the period of seven years, the contract not being pleaded in terms in the answer, it will be assumed, as against the answer, that the contract called for the construction of a pavement which in form and quality of material and workmanship would withstand ordinary uses and climatic changes for the period of seven years.

Public Improvements—Guaranty of Work—Assessment for Repairs—Construction of Contract.

A contract for the paving of a street provided that a certain per cent. of the contract price should be retained therefrom on the completion of the work, to constitute a repair guaranty fund, and that the contractor should maintain the pavement in repair for the period of seven years from the time of its approval, and that on his failure to do so the cost of repairs made might be deducted from such guaranty fund: *held*, that an assessment for the work was not invalid as in part one for repairs, but that the provisions of the contract as to repairs was merely a guaranty that the improvement should be executed as the contractor had engaged to make it.

Assessment Lien—Action by Contractor to Enforce—Defenses—Refusal of Hearing to Object to Assessments—Sufficiency of Answer.

Where one who had constructed a pavement under a contract with a town board sued abutting owners to enforce his lien, and the answer set up that defendants appeared before a special committee having the engineer's report under consideration at the time and place specified in the notice, and objected to the report on the ground of excessive assessments against their property, and demanded a hearing to enable them to prove it, but that the committee and also the board of trustees denied the hearing, it not appearing whether defendants offered to testify before the committee, or that their offer to produce other competent witnesses concerning their benefits was denied, or whether they appeared before the board of trustees, as they had a right to do, and demanded a hearing, or whether there was a verbal objection to the report and a demand for the hearing at some reasonable and definite time, or before a jury, or at a time or on terms named by the defendants,—the answer was insufficient, as failing to show by its averments whether a hearing was denied.

Same—Same—Same—Estoppel of Abutting Owner to Set up Refusal of Town Trustees to Hear Objections.

Where, on an assessment for a street improvement, the board of

Abstracts

trustees of the town refuses to grant a hearing to abutting owners as to the reasonableness of the assessments against them, such owners may not waive their right to bring mandamus to compel a hearing or injunction against the approval of the engineer's report until such hearing has been accorded, and make the denial of a hearing available as a defense in an action to collect the assessment.

Public Improvements—Adjusting Assessments to Benefits—Judicial Discretion—Collateral Attack.

On an assessment for a street improvement the right of the board of trustees of the town to consider the engineer's report and adjust the assessments to benefits, being a quasi judicial power, where the proper notices are given, so that the board has jurisdiction of the person and subject-matter, their judgment cannot be collaterally attacked.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Action by William C. Smith and others against Clara L. Shank and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Chambers, Pickens & Moores and R. F. Davidson, for appellants.

Harvey, Pickens, Cox & Kahn, for appellees.

HORNE *et al.* *v.* MEHLER.

MEHLER *v.* HORNE *et al.*

CITY OF LOUISVILLE *v.* MEHLER.

(*Court of Appeals of Kentucky, Oct. 29, 1901.*)

[64 S. W. Rep. 918.]

Street Improvement—Assessing Entire Cost on Abutting Property—Guaranty of Materials by Contractor.

The entire cost of a street improvement may be assessed against abutting property owners, though the contractor, by his contract, guarantied the workmanship and materials, and may, by reason of that fact, have increased the contract price.

Same—Same—Cancellation of Advantageous Contract—Right of Abutter to Abatement.

The fact that the city, without right, canceled a contract for the improvement, and made a new contract with plaintiff, by which the cost of the work was increased, does not entitle defendant, as against plaintiff, to any abatement of the amount assessed.

Same—Validity of Ordinance—Failure to Specify Material.

The fact that the ordinance for the improvement did not specify the material to be used, except to designate it as vitrified brick, did not render the ordinance void.

Same—Same—Reference to Nonexisting Plans and Specifications.

The fact that the ordinance directed the work to be done in accordance with plans and specifications on file in the office of the board of public works, when there were no plans and specifications on file, did not render the ordinance void.

Same—Assessments—Objections—Void Ordinance Requiring License Fee of Contractor.

The existence of a void ordinance requiring all contractors to pay a license tax does not constitute a valid objection to the assessment.

Same—Same—Apportionment Warrants—Objections—Irregularities.

Under Ky. St. § 2839, authorizing the board of public works to make out the apportionment warrants, the allegation that the board

Abstracts

of public works made out the warrants is prima facie sufficient, and, if defendant wishes to rely upon a failure to comply with a city ordinance requiring the apportionment to be approved by the council before the warrants are issued by the board, both the ordinance and the failure to comply with it must be alleged.

Judicial Notice of Ordinances.

The courts cannot take judicial notice of city ordinances.

Appeals from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by Charles V. Mehler against E. C. Horne and others to enforce a lien for the cost of a street improvement. Judgment for plaintiff against E. C. Horne and others for 90 per cent. of plaintiff's claim and against the city of Louisville for the other 10 per cent., and plaintiff and defendants both appeal. Affirmed.

W. W. Thum and S. E. Sloss, for Horne and others.

L. H. Stone, for city of Louisville.

Bodley, Baskin & Morancy, for Mehler.

BELSER *v.* ALLMAN.

(*Supreme Court of California, Oct. 26, 1901.*)

[66 Pac. Rep. 492.]

Street Assessments—Enforcement of Lien—Defenses—Irregularities—Burden of Proof.

Where a complaint sufficiently states a cause of action for the enforcement of a lien of a street assessment, and the assessment, with the documents connected therewith, and the affidavit of demand and nonpayment, are introduced in evidence thereunder, the burden is on defendant to allege and prove any defect or irregularity in the proceedings subsequent to the ordering of the work.

Same—Same—Same—Sufficiency of Notice Inviting Proposals.

Street Improvement Act, § 5, provides that, before the awarding of any contract by the city council, it shall cause notice to be posted for five days inviting proposals, and notice of the posting of such notice shall be published for two days: *held*, that a notice inviting proposals was not vitiated because the clerk of the city council, and not the city council, fixed the time within which proposals might be presented.

Same—Same—Same—Harmless Error.

In an action on a street assessment, where the judgment recited that the defendants sued by fictitious names were dismissed from the action, and the court found that defendant was at all times the owner of the land described in the complaint, the failure to amend the complaint by striking therefrom the names of the fictitious persons is not prejudicial.

Department 1. Appeal from superior court, Alameda county; S. P. Hall, Judge.

Action by one Belser against one Allman. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

R. M. F. Solo, for appellant.

J. C. Bates, for respondent.

Abstracts

HAMILTON *v.* PEOPLE *ex rel.* RAYMOND, County Treasurer.

(*Supreme Court of Illinois, Dec. 18, 1901.*)

[62 N. E. Rep. 533.]

Public Improvements—Bids—Alien Labor Clause in Contract—Effect on Assessments.

Where a contract for street improvement contained a clause that the contractor would not employ any persons other than citizens of the United States, and no such requirement was in any ordinance or in the advertisement for bids, and it was not shown that the clause was known to the bidders or in any way affected the bidding, it was no defense in proceedings to collect a special assessment against an owner.

Appeal from Cook county court; O. N. Carter, Judge.

Proceedings by the people, on the relation of S. B. Raymond, county treasurer, against Luther E. Hamilton, for the collection of a delinquent first installment of a special assessment. From a judgment for plaintiff, defendant appeals. Affirmed.

Josiah Cratty (E. J. Hamel, of counsel), for appellant.

Edgar Bronson Tolman and Charles M. Walker, Corp. Counsel (Robert Redfield and William M. Pindell, of counsel), for appellee.

GIVENS *v.* PEOPLE *ex rel.* RAYMOND, County Treasurer.

(*Supreme Court of Illinois, Dec. 18, 1901.*)

[62 N. E. Rep. 534.]

Street Improvements—Bids—Alien Labor Clause in Contract—Effect on Assessments.

Where a contract for street improvements contained a clause that the contractor would not employ any persons other than citizens of the United States, and no such requirement was in any ordinance or in the advertisement for bids, and it was not shown that the clause was known to the bidders or in any way affected the bidding, it was no defense in proceedings to collect a special assessment against an owner.

Same—Same—Stifling Competition—Monopoly—Control of Material.

In proceedings to collect a special assessment for street improvements, defendant offered to show that the successful bidder controlled all the "slag" in the market, and dictated the price of such material at the time of the bidding, and refused to sell to other contractors unless they would agree not to oppose the using of slag on the streets, on which condition alone it was possible for other contractors to bid on slag paving, and that the bidder was the only bidder on this improvement: *held*, that such facts were no defense to the collection of an assessment for the work performed; such testimony not tending to show that the amount paid was more than a fair contract price, nor disclosing when the owner received knowledge of the facts.

Appeal from Cook county court; O. N. Carter, Judge.

Proceedings by the people, on the relation of Samuel B. Raymond, county treasurer of Cook county, against Robert C. Givens, for the collection of a special assessment for street improvements. From a judgment and order of sale, defendant appeals. Affirmed.

Mason & Noyes, for appellant.

Charles M. Walker, Corp. Counsel, Edgar B. Tolman, Robert Redfield, and William M. Pindell, for appellee.

Abstracts

PICKTON *v.* CITY OF FARGO *et al.*

(Supreme Court of North Dakota, Nov. 1, 1901.)

[88 N. W. Rep. 90.]

Local Assessments—Basing Assessments on Engineer's Estimates—Invalid Because of Repeal of Statute.

Construing the provisions of chapter 41, Laws 1897, as amended by chapter 42, Laws 1899: The city engineer of the city of Fargo on April 24, 1899, filed with the city auditor of said city a document embracing an estimate for a special assessment for a tax to cover the cost of paving and other improvements upon certain streets and avenues of said city lying within a district of the city denominated "Improvement District No. 2," in which district the plaintiff owned a certain lot, which is described in the complaint. The city officials of said city in the year 1899, basing their action upon said estimate of the city engineer, and acting and claiming to act under section 7 of the original act, as embraced in said chapter 41, Laws 1897, attempted to assess a special tax upon the several lots and parcels of land situated in said improvement district No. 2, including a tax upon the plaintiff's lot: *held*, that said attempted assessment was illegal and void, for the reason that section 7 of the original act of 1897 had been repealed long prior to the date of the filing of the engineer's estimate for said assessment, and on March 1, 1899, and that such repeal operated to sweep away all power and authority of any city engineer with respect to any such tax, or estimate therefor, which existed under section 7 of the original enactment.

Same—Validity—Amendments.

Held, further, for reasons set out in the opinion, that the attempted assessment of the city officials in 1899 would have been illegal and void if the amendment which took effect on March 1, 1899, had never been enacted.

Same—Contractor's Warrants—Validity—Impairment.

The city council authorized said improvements to be constructed in the year 1898, and on September 20th of that year a contract in writing was entered into between the city and one J. K. whereby the latter agreed to construct the improvements upon terms stated in the contract. Before the commencement of this action said contractor had received under said contract, of the bonds and warrants of said city, an aggregate of $14,449.15: *held*, that the amendment of the original act, as embraced in chapter 42, Laws 1899, did not so operate as to impair the rights of said contractor, nor to impair the validity of said warrants and bonds.

Same—Legal Impediments—Statutes Construed.

The word "forthwith," found in the first line of section 7 of the amended act, construed, and *held* to be directory, merely, and, further, that there was no legal impediment to prevent the city officials from assessing a tax in 1899 under the terms of the amended act, which took effect on March 1st of that year.

Same—Failure of City Officials to Act under Statute Authorizing—Statutes Construed.

The curative provisions of section 17 of the act of 1897 considered, and *held* that said section has no application to the facts of this case, inasmuch as the city officials did not attempt to either assess or levy any special tax under the only law then in force authorizing them to make such an assessment. This record presents a case of total failure to act under the law, and does not present a case of merely irregular action.

Same—Injury to Property Owner Presumed Where Assessment Is Irregular and Illegal.

Held, further, that, under the rule established in this jurisdiction, "substantial injury" and prejudice to the suitor will be presumed, without special evidence being offered for that purpose, in all cases where the taxing authorities attempt to levy or assess a tax either in

Abstracts

the absence of legal authority to do so, or where there are substantial errors or omissions of duty on the part of the officials which are fundamental to the tax.

Passage of Ordinance—Yeas and Nays—Statute Requiring—Mandatory.

Section 2143, Rev. Codes 1899, construed, and *held* that the provision requiring that on the passage of all ordinances the yeas and nays shall be called and entered upon the journal of the proceedings of the city council is mandatory, and not discretionary.

Same—Same—Purpose of Statute Requiring.

Held, further, that the purpose of this requirement is to fix individual responsibility upon members of the council, and, to do so, it is essential that the journal entries shall show not only the number of votes cast, and the fact that the yeas and nays were called, but likewise the names of the members voting upon the passage of the ordinance, and how each voted,—whether yea or nay.

Same—Presence of Members of Council at Time of Passage—Not Presumed from Presence at Roll Call.

Held, further, that the fact that certain members of the council who are named in the journal entries were present when the council meeting assembled, and answered to their names on roll call, will not warrant the presumption that such members remained until a given ordinance was put upon its passage, and voted thereon.

Same—Admissibility of Oral Evidence to Supply Omissions in Journal.

Held, further, that oral evidence is inadmissible, either in lieu of the journal entries, or to supply omissions in the same.

Same—Yeas and Nays—Failure of Journal to Show Individual Votes—Effect.

Held, further, that where, as in this case, the journal entries of the proceedings show only that upon the passage of an ordinance the yeas and nays were called, and a certain number of votes—a majority of the council—were cast, but omit to show the names of members voting, or how each voted, such entries are insufficient to establish the fact that the ordinance was adopted by the city council.

(Syllabus by the Court.)

Appeal from district court, Cass county; Charles A. Pollock, Judge.

Action by Peter Pickton against the city of Fargo and others. Judgment for defendants, and plaintiff appeals. Reversed.

Turner & Lee, for appellant.

H. F. Miller (J. E. Greene, of counsel), for respondents.

CITY OF PHILADELPHIA *v.* STEWART *et al.*

(*Supreme Court of Pennsylvania, Feb. 18, 1901.*)

[48 Atl. Rep. 275.]

Public Improvements—Contractor's Bond—Separate Actions by Material Men.

A bond given by a contractor to a city was conditioned that he should pay to any and all persons all money due for labor and material furnished, and that he should comply with the provisions of an ordinance, which provides that a person entering into a contract of construction with the city shall give a bond that he will promptly pay all persons supplying him with labor or materials in the work; and any person or persons applying therefor, and making affidavit that labor or materials for the work have been supplied by him or them and not paid for, shall be furnished a copy of the bond, on which he or they may bring suit, and prosecute it to judgment and execution,

Abstracts

indemnity against costs first being furnished the city: *held*, that separate actions on the bond can be maintained by different subcontractors, and that recovery of one judgment for part of the amount of the bond, and satisfaction thereof, does not prevent maintenance of actions by others.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia, to the use of Edwin B. Malone, surviving member of the firm of Watson Malone & Sons, against George W. Stewart and another, on a bond. Judgment for plaintiff. Defendant Stewart appeals. Affirmed.

Francis Shunk Brown and Alex. Simpson, Jr., for appellant.

Thomas S. Gates and Frank P. Prichard, for appellee.

BAY ROCK CO. *v.* BELL *et al.*

(*Supreme Court of California, May 31, 1901.*)

[65 Pac. Rep. 299.]

Public Improvements—Sufficiency of Resolution of Intention—Contractor's Lien.

A resolution of intention to perform street work, prescribing that a certain avenue "be graded for its full width to the official lines and grade, curbed, guttered, and macadamized," and also prescribing certain cross walks and a gutter, said work to be done "in accordance with the special specifications adopted for said work by said board on the day the resolution was adopted," was not sufficiently definite to authorize a contract for such work, and the contractor, having performed it, had no lien therefor on the property benefited.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by the Bay Rock Company against James Evelyn Bell and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

R. M. F. Soto and Charles Stewart (Noble Hamilton, of counsel), for appellants.

Wm. Laird Hill, for respondent.

ATTORNEY GENERAL *ex rel.* TRUSTEES OF MATHEWSON ST. M. E. CHURCH *et al. v.* SHEPARD *et al.*

(*Supreme Court of Rhode Island, May 11, 1901.*)

[49 Atl. Rep. 39.]

Highways—Abandonment—Proceedings—Rhode Island Statute.

Gen. Laws, c. 71, § 28, provides that town councils may abandon the whole or any part of any highway, and thereupon like proceedings shall be had, so far as applicable, as are provided "in this chapter in case of taking land and ascertaining damages to the owner of land taken in laying out or in case of abandonment of highways." Sections 2 to 8 prescribe the "proceedings" in case of taking land, and ascertaining the damages caused thereby, and are the only other sections of the chapter applicable to the abandonment of a highway. Section 1 confers authority on town councils to lay out highways, and provides that the board of aldermen of the city of Providence

Abstracts

shall lay out no highway in such city except on request of the city council thereof, but says nothing with regard to abandonment: *held*, that the action of the board of aldermen of the city of Providence in abandoning a highway did not require a previous request from the city council to render it valid.

Same—Same—Petition for Abandonment—Estoppel of Property Owners to Claim Damages.

Where the owner of land through which a highway passed agreed with the board of aldermen that they would claim no damages by reason of its abandonment, and petitioned the board therefor, whereupon the board exercised the power of abandonment according to the prescribed statutory rules, the general public had no standing in court to complain of such abandonment.

Same—Same—Discretion of Town Council.

Under Gen. Laws, c. 71, § 28, providing that town councils may abandon the whole or any part of a highway, the question of abandonment is left to the discretion of the town council or board, irrespective of the question whether or not the highway has ceased to be useful to the public generally.

Suit by the attorney general, on the relation of the trustees of the Mathewson Street Methodist Episcopal Church and others, against John Shepard, Jr., and others. Demurrer to the information sustained.

Edward D. Bassett and Dexter B. Potter, for petitioners. Arnold Green and Comstock & Gardner, for respondents.

COMO *v.* CITY OF WORCESTER.

(*Supreme Judicial Court of Massachusetts, Worcester, Feb. 26, 1901.*)

[59 N. E. Rep. 444.]

Streets—Location—Construction—Compensation to Abutters—Failure to Grade to Full Width.

A decree laying out a street 120 feet wide prescribed the grade along its center line. The construction of the street at the prescribed grade to a width of 60 feet along its center line was completed. The board of aldermen assessed the betterments on abutters, which they could not legally do till the construction was completed: *held*, that the decree did not require construction for the entire width of the road, and the damages to an abutting owner's property outside that location should be assessed according to the actual construction, and not as if the street were graded to the full width of its location.

Same.

Where a street was laid out to a width of 120 feet over a person's land, and was graded to a width of 60 feet in accordance with the decree laying it out, the damages to such person's land lying within the location should be assessed as if the street were graded to the full width of the location, since all damage resulting or to result to land within that location from any proper use thereof as a public street must be compensated for when the street is laid out.

Same—Location—Compensation—Property within and without Location—Statutes.

Pub. St. c. 52, § 15; Id. c. 49, §§ 15, 16, 68,—providing that compensation shall be made to adjoining owners for damages to their property by specific or general repairs on a highway, refer to property outside the location, since the owner is paid for his property within the location, for all uses to which it may at any time be put as a highway or street, when such location is made.

Report from superior court, Worcester county; Elisha B. Maynard, Judge.

Abstracts

Petition by Clement Como against the city of Worcester to recover damages for the opening of a street through the former's land. On report by the superior court, after judgment for petitioner, of all questions of law raised by a referee's report for determination by the supreme judicial court. Judgment reversed.

Marvin M. Taylor, for petitioner.

Arthur P. Rugg, for defendant.

MILLARD *v.* CITY OF WEBSTER CITY.

(*Supreme Court of Iowa, Jan. 31, 1901.*)

[84 N. W. Rep. 1044.]

Streets—Change of Grade—Compliance with Statute—Damages.

A city is liable for injuries to abutting property resulting from cutting down a street on which no grade has been previously established as required by statute, though there has been no trespass or direct encroachment on the property.

Same—Same—Damages—Sufficiency of Answers.

No prejudice results from a refusal to strike out answers requiring simple computations to make them definite answers to questions as to the value of abutting property immediately before and after injury thereto resulting from a street improvement.

Damages—Loss of Trees—Effect on Value of Property—Evidence.

Where it was shown that trees on abutting property had been injured by cutting down a street, and that some of them would die by reason thereof, it was not error to permit defendant's witnesses on the question of value to be cross-examined as to the influence the loss of the trees would have on the value of the property.

Same—Special Damages Because of Age of Abutter—Admissibility in Evidence.

Questions asked for the purpose of showing that an abutting lot owner had suffered special damages from a street improvement because of his age are not prejudicial, where the answers are not responsive, or deny the special injury sought to be shown.

Same—Proof of Value—Comparison with Other Property.

The court may, in its discretion, require the difference and similarity to be shown before receiving proof of the value of other property for the purpose of showing the value of abutting property injured by a street improvement.

Grading Streets—Injury to Property—Estoppel of City to Disclaim Acts of Its Agents.

Where excavations in the principal streets of a city are made under the direction of the street commissioner and his foreman in accordance with a survey and plat made by the city engineer, the city is estopped from claiming that the work was not done by its authority, and that it is not the party responsible for injuries to abutting property.

Appeal from district court, Hamilton county; B. P. Birdsall, Judge.

The plaintiff is owner of 2½ lots in Webster City, abutting on Funk street 132 feet and on Division street 125 feet. During the summer of 1897 these streets were excavated to a depth of from 2 to 3 feet along the lots, though no grade had been established, nor resolution adopted by the city council so ordering; and this is an action for damages occasioned

thereby. Judgment was entered against defendant, and it appeals. Affirmed.

J. H. Richard and Wesley Martin, for appellant.
D. C. Chase, for appellee.

CRAWFORD *v.* ROSS.

(*Supreme Court of Michigan, May 21, 1901.*)

[86 N. W. Rep. 132.]

City Streets—Title—Adverse Possession against City—Charter—Statute of Limitations.

The city charter of Ann Arbor (Loc. Acts 1889, No. 331, § 129), providing that no person shall be deemed to have gained any title, as against the city, by lapse of time, to any street, alley, common, or public square theretofore laid out or platted, or to any part thereof, by reason of any encroachment on or inclosure of the same, which provision was enacted before the last amendment to the statute of limitations, and has been re-enacted several times since the general statute was last amended, is not inoperative, so as to make the statute of limitations a bar to such city's right to land situated in the street and inclosed by abutting property owners.

Same—Same—Validity of Charter Provision Preventing Acquirement of Title by Adverse Possession.

A city charter providing that no person shall obtain any title, as against the city, by lapse of time, to any streets or public squares by reason of any encroachment on or inclosure of the same, is within the power of the legislature.

Error to circuit court, Washtenaw county; Edward D. Kinne, Judge.

Action by Kate L. Crawford against Daniel Ross. From a judgment in favor of plaintiff, defendant brings error. Reversed.

E. B. Norris, for appellant.
Frank E. Jones, for appellee.

SOUTH COVINGTON & C. ST. RY. CO. *v.* NEWPORT, L. & A. TURNPIKE CO.

(*Court of Appeals of Kentucky, April 30, 1901.*)

[62 S. W. Rep. 687.]

Streets—Dedication—Acceptance—Unrecorded Plats—Land Originally without City.

Where, in a suit for the partition of land among devisees in 1868, the land was divided into lots, streets, and alleys, as directed by testator's will, and a copy of the plat thereof was filed in the county clerk's office, and deeds were executed to the devisees referring to the plat and to B. street, as shown thereon, and lots were sold and conveyed by the devisees by deeds referring to the plat and calling for the streets dedicated thereby, there was a dedication of B. street, though the land was not then within the city limits, and though the plat was not recorded, as the law did not then require that to be done, and the subsequent extension of the city limits so as to include a part of B. street, and the original construction of that street at the expense of abutting property owners, pursuant to a city ordinance, are sufficient evidence of acceptance by the city.

Same—Title by Prescription—Adverse Possession by Turnpike Company.

A turnpike-road company could not claim title to B. street by pre-

scription by reason of adverse possession commenced after the street was dedicated, though prior to its acceptance by the city, or by reason of the mere use thereof by the public as a highway.

Appeal from circuit court, Campbell county.

"To be officially reported."

Action by the Newport, Licking & Alexandria Turnpike Company against the South Covington & Cincinnati Street-Railway Company for a mandatory injunction. Judgment for plaintiff, and defendant appeals. Reversed.

S. C. Bailey and Court T. Baker, for appellant.

C. B. Simrall, John Galoin, and L. J. Crawford, for appellee.

TOWN OF KENT *v.* PRATT.

(Supreme Court of Errors of Connecticut, March 8, 1901.)

[48 Atl. Rep. 418.]

Street Lines—Marking Boundary—Determination of Disputed Bounds—Authority of Selectmen.

Pub. Acts 1895, c. 286, § 5, provides that any person owning land on a highway may apply in writing for bounds to be placed on such described land. Selectmen of a town, on application of defendant, established the boundary of a street in front of defendant's property, and erected iron bounds, which defendant subsequently removed, and claimed that the bounds did not mark the line as previously established: *held*, that the act of 1895 did not authorize the selectmen to determine the location of disputed street lines, but was merely to enable landowners to have undisputed street lines marked so as to designate their location.

Same—Same—Same—Mandamus to Prevent Interference with Boundary—Scope of Issue.

The selectmen of a town, on application of defendant, an abutting property owner, marked the boundaries of a street, and the bounds were removed by defendant, who contended that the highway as marked included a strip belonging to defendant; and the selectmen, in mandamus proceedings to prevent defendant's interference with the boundary, alleged that the highway in question was laid out by proceedings in the county court in 1828, and that the bounds as marked by them were on the correct lines, and both allegations were denied by the answer: *held*, that the question whether the strip claimed by defendant had become a part of the highway by dedication was within the issues raised by the pleadings.

Same—Dedication of Highway—Finding of Fact.

The highway in question, as laid out by proceedings in the county court in 1828, was three rods wide, and the west line, as surveyed, ran through the center of M.'s house; and soon after M. built a fence six feet in front of his premises, which left the highway but two rods in width. M. also owned the property on the east side of the street, which he sold in 1830 to C.; and it was stipulated in the deed that C. should never build on the new road, and that M. should never build within two rods of the west line of the conveyed premises. In 1868 C. sold the premises, subject to the same agreement; and the grantee built a fence on the east side of the highway, which remained until 1895: *held*, that the facts were sufficient to show that the road as designated by the fence built by M. on the west side, and by C.'s grantee on the east, was dedicated to the public.

Same—Change of Lines by Acts of Abutters—Public Barred by Lapse of Time.

Under the evidence, lines of the highway as fixed by the layout of 1828 were changed by the conduct of the property owners, and by

Abstracts

public use with the knowledge and acquiescence of the owners, so that the public has lost, by lapse of time, and adoption of highway as bounded by the fence, the right to open a street according to the original layout.

Appeal from superior court, Litchfield county; Milton A. Shumway, Judge.

Action by the town of Kent against Birdsey G. Pratt to restrain defendant from building a fence within the limits of a highway. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Leonard J. Nickerson and J. Henry Roraback, for appellant.

Arthur D. Warner and James Huntington, for appellee.

DAVIS *v.* CITY OF APPLETON.

(*Supreme Court of Wisconsin, March 19, 1901.*)

[85 N. W. Rep. 515.]

Action against City—Presentation of Claim—Nature of—Condition Precedent or Statute of Limitations—Pleading.

Laws 1885, c. 441, subc. 5, § 24, providing that no action shall be maintained against a city, on any claim or demand of any kind whatsoever, until such claim shall have been presented to the council, is not a condition precedent to the right of action, but is in the nature of a statute of limitations, and hence plaintiff need not allege compliance with it, but defendant must allege failure to comply, or the point will be waived.

Presentation of Claim—Action for Equitable Relief.

Such statute does not apply to an action solely for equitable relief.

Adverse Possession—What Necessary to Support Title.

Allegations and findings that a party had actual and continuous occupancy of land for more than 40 years, and erected valuable buildings thereon, do not support a title by adverse possession, there being no allegation or finding that such possession was adverse or under claim of any exclusive right.

Same—Failure to Improve Street to Entire Width—Estoppel.

That a city surveyed a street, and fixed its supposed width, and constructed a sidewalk on the line surveyed, does not estop it to claim an additional strip as part of the street, as against one who made no expenditures nor erected buildings in reliance on the city's action.

Streets—Obstruction—Water Tank—Right of City to Erect in Street.

A city has no right to erect and maintain a water tank or other permanent structure on a street which does not aid public travel, and which injuriously affects the beneficial enjoyment of the premises of an abutter, or his means of ingress or egress.

Appeal from circuit court, Outagamie county; John Goodland, Judge.

Suit by Ellen Davis against the city of Appleton. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas H. Ryan and Lyman E. Barnes, for appellant.

A. M. Spencer and Henry D. Ryan (John Bottensek, of counsel), for respondent.

Abstracts

BLAIN *v.* STAAB.

(*Supreme Court of New Mexico, Feb. 25, 1901.*)

[65 Pac. Rep. 177.]

Servitudes.

Servitudes were as well known to the civil law as easements were to the common law.

Contracts—Intention of Parties—When Intention Governs.

Where by the terms of a contract the intent of the parties is clear and free from ambiguity and doubt, the intention must govern, rather than the strict signification of the language employed.

Public Streets—Abandonment—Extinguishes Servitude.

The abandonment of a public street, where the municipality had the right to use it for street purposes only, will operate to extinguish the servitude.

Same—Same—Same—Rights of Owner of Fee.

On the extinguishment of such a servitude, the owner of the fee is entitled to the immediate possession of the premises embraced within the street.

(Syllabus by the Court.)

Error to district court, Santa Fe county; before Justice John R. McFie.

Action by Abraham Staab against John H. Blain. Judgment for plaintiff, and defendant brings error. Modified.

A. B. Renehan, for plaintiff in error.

E. L. Bartlett, for defendant in error.

In re CITY OF SEATTLE.

BRUHN *et ux. v.* NORRIS.

(*Supreme Court of Washington, Dec. 14, 1901.*)

[67 Pac. Rep. 250.]

Streets—Change of Grade—Damages—Persons Entitled to Recover—Purchaser of Foreclosure.

The right to damages done real estate by the regrading of a street is personal to the owner thereof, and will not pass by a subsequent sale of the premises under foreclosure, unless expressly so ordered by the decree.

Appeal from superior court, King county; Wm. Hickman Moore, Judge. Reversed.

Ralph Simon, for appellants.

Allen & Allen, for respondent.

FULLERTON, J. It has been uniformly held that the right to damages for an injury to property is a personal right belonging to the owners of the property, which will not pass by deed unless expressly conveyed. McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681; Losch's Appeal, 109 Pa. 72; King v. City of New York, 102 N. Y. 171, 6 N. E. 395; Porter v. Railroad Co., 120 N. Y. 284, 24 N. E. 454; Railroad Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Railroad Co. v. Strange, 63 Wis. 178, 23 N. E. 432. On like principles it will not pass by a sale under a decree of foreclosure unless expressly so ordered and directed by the decree. Undoubtedly, had there been a deficiency remaining

after the mortgage sale, the respondent would have been entitled to this award up to the amount of such deficiency. But his right against the mortgagors was the right only to have the mortgage debt paid in full, and, where this was paid by a sale of the mortgaged premises in their damaged condition, all his claims against the property of the debtors were satisfied. The right to collect these damages was the appellants' property, their personal right, subject to the payment of the mortgage debt so long as it existed, becoming absolute after the debt was satisfied.

The judgment is reversed, and the cause remanded, with instructions to enter a judgment for the appellants.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

W. N. EISENDRATH & CO. *v.* CITY OF CHICAGO *et al.*

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 419.]

Streets—Adverse Occupancy—What Is Not.

Occupancy of a public street under lease from the municipality is not rendered adverse by the fact that the municipality had no power to authorize the obstruction of the street.

Same—Dedication and Acceptance—Filing Plat—User.

Where the owner of land platted the same showing a street, and land was subsequently conveyed with reference to such street, the city claiming it as a street, leasing it as such, and levying no taxes upon it after it was platted, there was an acceptance of the offer to dedicate.

Appeal from circuit court, Cook county; E. J. Burke, Judge.

Petition by W. N. Eisendrath & Co. against the city of Chicago and others. From a decree in favor of defendants, petitioner and another appeal. Affirmed.

Pence & Carpenter, for appellant.

Charles M. Walker, Corp. Counsel (Granville W. Browning, of counsel), for appellee city of Chicago.

Rubens, Dupuy & Fischer, for appellee Paepcke-Leicht Lumber Co.

CITY AND COUNTY OF SAN FRANCISCO *v.* CENTER *et al.*

(*Supreme Court of California, Aug. 13, 1901.*)

[66 Pac. Rep. 83.]

Appeal—Finding of Fact—Review.

On appeal, a finding sustained by evidence will not be disturbed, though the preponderance of evidence is against the same.

Streets—Maps—Uninclosed Spaces—Whether Parts of Streets.

A recorded map showed a certain street as running at one end east and west, and that thereafter it curved to the south, and ran at right angles to its former course. The northwest side of the curve was continuous, but the inner side was not made parallel therewith, the blocks within the curve retaining their rectangular form, being simply shortened at the northern ends. The result was to leave a series of angular spaces. Lots and blocks on the map were com-

pletely inclosed by heavy lines, and each had its separate number. These angular spaces were not so inclosed. Where these spaces appeared a certain navigable stream filled a large portion of the streets, which without such spaces would have made certain blocks inaccessible: *held*, that the open angular spaces were parts of the connecting streets.

Same—Quieting Title—Modification of Decree—Construction—Reference to Maps—Ordinance.

Title to certain land having been quieted in certain parties, in an action against a city, on appeal the decree was modified by adding the declaration that nothing therein should be deemed to impair the rights reserved in a certain ordinance to the city over lands that "had then been occupied or set apart for streets and squares of the city." The grant made by such ordinance was a pure bounty, and a map accompanying the same was made for the purpose of indicating the location and extent of such reservations by the city, which ordinance was confirmed by the legislature: *held*, that the effect of the modification was that nothing should impair the rights reserved, occupied, or set apart at the time of the confirmation of the ordinance and as shown on the map.

Same—Abandonment—Change in Maps—Effect.

Though the publication of maps by a city as official maps, on which the location and directions of streets are materially changed from those shown on a prior map, may be considered an abandonment of all those streets and parts thereof marked on such prior map and not included in the later maps, the city will not lose title thereto, in the absence of an adverse possession sufficient to give a prescriptive right in another.

McFarland, J., dissenting.

In bank. Affirmed.

For opinion in department, see 63 Pac. 35.

Platt & Bayne and E. S. Pillsbury, for appellants.

James L. Gallagher, Franklin K. Lane, City Atty., and Geo. W. Lane, Asst. City Atty., for respondent.

BUSER *v.* CITY OF CEDAR RAPIDS.

(*Supreme Court of Iowa, Oct. 4, 1901.*)

[87 N. W. Rep. 404.]

Streets—Change of Grade—Damages—Subsequent Change.

The grade of a street was raised a part of the height fixed by ordinance, and a settlement made for damages to plaintiff's abutting property. Ten years later the street was filled in to the height fixed by the ordinance. No proceedings were taken under Code 1873, § 469, to have appraisers appointed after the passage of the ordinance to fix the damages: *held*, that plaintiff was entitled to recover damages for the second raise of the grade.

Appeal.

A point made for the first time on appeal will not be considered.

Streets—Change of Grade—Damages—Subsequent Change—Res Judicata.

Where a street was raised a part of the height fixed by ordinance, and damages therefor allowed, and 10 years thereafter raised to the full height fixed, in an action for damages for such second change, a defense that the payment of damages after the first change was in full of all injury is not tenable, in the absence of a showing that the property owner sued for all damages, and defendant took issue only as to the amount claimed.

Same—Same—Same—Statute of Limitations.

Where, the grade of a street having been raised under an ordinance,

Abstracts

an action for damages therefor is brought, the fact that dirt was hauled in to fill low places before such general change of grade is not a foundation on which to set up limitations as a defense.

Appeal from district court, Linn county; W. G. Thompson, Judge.

Action to recover damages for injury caused to real estate by a change of grade in the streets upon which said property abuts. The case was taken from the jury on defendant's motion, and a judgment rendered in its favor for costs. Plaintiff appeals. Reversed.

Clark & Clark, for appellant.

John N. Hughes and Jamison & Smyth, for appellee.

BLAYLOCK *v.* INCORPORATED TOWN OF MUSKOGEE.

(*Court of Appeals of Indian Territory, Oct. 5, 1901.*)

[64 S. W. Rep. 609.]

Streets—Duty to Repair—Arkansas Statute—Construction by Arkansas Court—Adoption in Indian Territory.

Mansf. Dig. Ark. c. 29, § 737 (Ind. T. Ann. St. 1899, c. 15, § 507), provides that the city council shall have the care and control of streets, and shall cause them to be kept in repair and free from nuisance. The supreme court of Arkansas held that, while it was the duty of incorporated cities to keep their streets in repair, there was no statute making them liable, expressly or by implication, to a private action by an injured party for damages arising from failure to discharge that duty: *held*, that this amounted to a statutory construction, which became binding on the federal courts for the Indian Territory on the adoption by congress of the Arkansas statute law for the government of that territory.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice John R. Thomas, October 31, 1900.

Action by R. J. Blaylock against the incorporated town of Muskogee. From a judgment entered in favor of defendant on sustaining a demurrer to plaintiff's complaint, plaintiff appeals. Affirmed.

Thos. H. Owen, Fears & Crump, and Hutchings & West, for appellant.

Nathan A. Gibson, for appellee.

COE COLLEGE *v.* CITY OF CEDAR RAPIDS.

(*Supreme Court of Iowa, Oct. 3, 1901.*)

[87 N. W. Rep. 444.]

Streets—Dedication—Intention to Dedicate—Designation on Maps.

Under Code 1860, § 1018, requiring a map to be made of realty laid out into a village plat, describing the breadth and courses of the streets, and designating such breadth, failure on laying out a plat to designate a strip as a street and give its width does not negative an intent to dedicate it, where its width was ascertainable from other measurements on the map, and it was marked off in the same way as recognized streets, and adjoined a block which was definitely described.

Same—Same—Same—Same—Cul-de-sac.

In an action to quiet title to a strip claimed as a street, a conten-

tion that it could not have been intended as a street, as it was merely a cul-de-sac, is not sustained, where it went as far as the plat extended, and, if the adjoining land were correspondingly platted, it would constitute a continuous thoroughfare.

Same—Same—Acceptance—Evidence.

A plat designating certain blocks and streets was duly filed, and the general intention indicated by the plat was acted on by the city with reference to the other streets, but a strip in controversy had not been improved as a street. Such strip was used as a public way, and could not be improved as a regular street until a strip cutting it off from a street was acquired by the public, which the city was proceeding to do. Certain ordinances fixing the grade of streets in the locality and fixing house numbers ignored the strip. In paving the intersecting street it did not appear that the cost of paving in front of such strip was assessed to it as private property: *held* insufficient to negative an acceptance by the city of such strip as a street.

Appeal from district court, Linn county; H. M. Remley, Judge.

Action to quiet title to a strip of land 80 feet wide included in Greene and College addition to the city of Cedar Rapids. After hearing the evidence the lower court dismissed plaintiff's petition and rendered judgment for defendant. Plaintiff appeals. Affirmed.

Heins & Heins and Deacon & Good, for appellant.

Milo P. Smith and J. N. Hughes, for appellee.

GRACE *v.* WALKER *et al.*

(*Supreme Court of Texas, Nov. 7, 1901.*)

[64 S. W. Rep. 930.]

Streets—Dedication and Acceptance—Petition—Ordinance.

A petition by abutting property owners for the establishment of a highway within the city, and agreeing to donate sufficient land for this purpose, which was acted on by an ordinance directing the establishment of the road of a certain width, amounts to a complete dedication and acceptance.

Same—Same—Same—Consent of Petitioners.

That a highway was established by ordinance on the request of certain landowners, and their agreement to donate land for the purpose, will be deemed sufficient evidence to show that one of the petitioners consented to the use of his land for the road.

Same—Same—Ordinance—Time of Taking Effect.

An ordinance fixing the course and limits of a certain road in præsenti will be deemed to establish the road; there being nothing to prevent its taking effect at once.

Same—Same—Want of Consent of Owners—Who May Plead in Action for Obstructing Highway.

Persons not interested in land over which a highway was constructed cannot interpose the defense that the consent of the owners had not been obtained for the highway, in an action for the obstruction thereof.

Same—Changing Width—Consent of Abutters—Estoppel.

Where an ordinance passed on the request of certain abutting land owners changed the width of a street, the fact that certain owners did not agree to the greater width did not prevent the ordinance operating against those who consented.

Abstracts

Same—Boundaries—Directions—Construction of Ordinance.

Where an ordinance fixed the direction of a street "north" along the west line of K. and G.'s property, which would require the street to pass through G.'s land, the word "north" will be deemed to give only the course of the street, being controlled by the further descriptions.

Same—Same—Same—Sufficiency of Description.

An objection that an ordinance fixing a street did not specify that the street was to run wholly on F.'s land, and that the description would permit it to be partly on that and partly on G.'s land, was without merit, where the ordinance located one side of the street as G.'s west line, and fixed the other line by the width, which would require the road to be on F.'s land.

Same—Establishment—Abutter Bound by Acts of Predecessor in Title.

Persons claiming title to property under a petitioner for a road across the land will be bound by his acts regarding the same.

Error from court of civil appeals of Third supreme judicial district.

Proceedings by C. D. Grace against Emily Walker and others to enjoin the obstruction of a street. From a judgment of the court of civil appeals (61 S. W. 1103) affirming a decree in favor of defendants, complainant brings error. Affirmed as to the defendant Shain, and reversed as to the others.

P. C. Thurmond and Chas. D. Grace, for plaintiff in error.

Richd. B. Semple, for defendants in error.

HEGAN *et al. v.* PENDENNIS CLUB *et al.*

(Court of Appeals of Kentucky, Sept. 27, 1901.)

[64 S. W. Rep. 464.]

Alley—Dedication—Rights of City Lost by Adverse Use.

Where an alley, dedicated for the common use of two lots abutting thereon, had been adversely used by the owner of one of the lots for more than 40 years, the right of the city and of the other owner was barred by the statute of limitations.

Conveyance of Lands Held Adversely by Another—Statute Forbidding Not Applicable to Easements.

Ky. St. § 210, providing that all sales or conveyances of any lands of which any other person has adverse possession shall be null and void, does not apply to conveyances of private passways and easements, though section 458 provides that the word "land" shall be construed to mean "lands, tenements, and hereditaments, and all rights thereto and interests therein, other than a chattel interest."

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by the city of Louisville against the Pendennis Club, S. W. Hegan, and others to have a strip of ground declared to be an alley, and to cause obstructions to be removed. Judgment dismissing cross petition of defendants S. W. Hegan and others, and they appeal. Affirmed.

C. B. Seymour and Laf. Joseph, for appellants.

Louis N. Dembitz, Ernest Macpherson, St. John Boyle, and Lewis Rogers Yeaman, for appellees.

Abstracts

JORGENSON *et al. v.* CITY OF SUPERIOR.

(*Supreme Court of Wisconsin, Oct. 15, 1901.*)

[87 N. W. Rep. 565.]

Streets—Changing Grade—Preliminary Proceedings—Damages—Wisconsin Statute.

Laws 1891, c. 124 (Superior City Charter, c. 13) § 113, gives the right to recover damages to owners of abutting property injured by a change of grade in the adjacent street in the manner set forth in this chapter. Section 119 provides that, before any established grade shall be changed or any work shall be ordered done on any street in whole or in part at the expense of the abutting or adjacent real estate, the board of public works shall view the premises and determine the benefits and damages which shall accrue to each parcel of real estate by such change or alteration of grade, etc.: *held*, that a city incorporated under this law had no power to change the established grade of a street without liability to abutting lot owners, when no assessment of benefits and damages had been made.

Same—Same—Same—Wisconsin Statute Construed.

Laws 1891, c. 124, § 119, provides that, before any established grade shall be changed or any work shall be ordered done on any street in whole or in part at the expense of the abutting or adjacent real estate, the board of public works shall view the premises and determine the damages and benefits which shall accrue to each parcel of such real estate by such change of grade, etc.: *held*, that the clause "in whole or in part at the expense of the abutting or adjacent real estate" should be construed as referring to its immediate antecedent, 'before any work shall be done on any street," and not to the disjoined clause, "before any established grade shall be changed."

Same—Same—Damages—Remedy of Property Owner—Wisconsin Statute.

The right given by Laws 1891, c. 124, § 113, to the injured property owner to recover damages "in the manner set forth in this chapter," does not confine such owner exclusively to the remedies therein provided, where the city does not conform to the prerequisites established by section 119 for changing the grade of streets.

Same—Same—Preliminary Proceedings—Failure to Assess Benefits—Remedy.

Where the city changed the grade of a street without complying with Laws 1891, c. 124, § 119, abutting owners whose property was damaged by such change were not required to obtain mandamus to compel the assessment therein specified, and, if not satisfied with such assessment, to appeal therefrom, but would have their action for damages after the injury.

Same—Same—Want of Authority—Damages—Estoppel.

Where a city changes the grade of a street without authority, and the adjoining property owners receive no benefit therefrom, they will not be estopped from claiming damages by the fact that they stood by and saw the work done without objection.

Appeal from superior court, Douglas county; C. Smith, Judge.

Action by Halvor Jorgenson and another against the city of Superior. From a judgment for defendant, plaintiffs appeal. Reversed.

John Brennan and L. K. Luse, for appellants.

Archibald McKay and Geo. B. Hudnall, for respondent.

Abstracts

ROUGHTON *v.* CITY OF ATLANTA.

(*Supreme Court of Georgia, July 20, 1901.*)

[39 S. E. Rep. 316.]

Change of Grade—Injuries to Property—Measure of Damages.

When a city, in the exercise of its corporate powers, changes the grade of one of its streets, and as a result the premises of an adjoining lot owner are rendered less valuable, he is entitled to just compensation for the injury thus sustained; the measure of damages being the diminution in the market value of his property.

Same—Same—Liability of City for Torts of Servants.

A municipality is not, however, in such a case, liable in damages for tortious acts of its servants which are not proximately connected with the work incident to the making of the public improvement.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by J. F. Roughton against the city of Atlanta. Judgment for defendant, and plaintiff brings error. Reversed.

H. M. Patty, for plaintiff in error.

J. A. Anderson, J. T. Pendleton, J. L. Mayson, and W. P. Hill, for defendant in error.

PEOPLE *ex rel.* PUMPYANSKY *v.* KEATING, Highway Com'r.

(*Court of Appeals of New York, Nov. 12, 1901.*)

[61 N. E. Rep. 637.]

Obstruction of Street—Newspaper Stand—Right of Taxpayer to Mandamus to Compel Removal.

A citizen and resident of the city of New York may maintain an application for a peremptory writ of mandamus commanding the commissioner of highways of the city to remove a stand for the sale of newspapers from a street of said city.

Same—Same—Power of Council to Regulate—New York Statute Construed.

Laws 1897, c. 378, §§ 1608–1610, declare that the charter is not a new enactment, but a continuation of the consolidation act and its amendments, and that omission therefrom of any of the previous acts relating to or affecting the municipal corporations thereby consolidated shall not be a repeal thereof: *held*, that the omission from the charter of the provisions of the consolidation act (Laws 1882, c. 410, as amended by Laws 1896, c. 718), authorizing the common council to grant permits for the erection and maintenance of news stands under stairways of elevated railroad structures, did not operate as a repeal of such provisions, and the common council had power to enact an ordinance providing for and regulating the erection of such news stands.

Same—Newspaper Stand under Stairway of Elevated Railway—Removal—Mandamus—Refused.

An application of a citizen of the city of New York for a peremptory writ of mandamus to compel the commissioner of highways to remove a news stand under a stairway of an elevated railroad structure will be denied, where the encroachment by such news stand on the sidewalk used by the public is very slight and only in part.

Appeal from supreme court, appellate division, First department.

Application by the people, on the relation of David

Pumpyansky, for a writ of mandamus against James P. Keating, commissioner of the department of highways of the city of New York. From an order of the appellate division (71 N. Y. Supp. 97), reversing an order denying the writ and commanding defendant to remove a booth or stand for the sale of newspapers from the southwest corner of Sixth avenue and Twenty-Third street, defendant appeals. Reversed, and order of special term affirmed.

John Whalen, Corp. Counsel (Theodore Connoly and Chas. Mellen, of counsel), for appellant.

Otto H. Droege, for respondent.

OVERPECK *et al. v.* CITY OF RAPID CITY.

(*Supreme Court of South Dakota, May 4, 1901.*)

[85 N. W. Rep. 990.]

Defective Highway—Injury to Horse—Measure of Damages.

Where a city was liable for injuries to a horse by falling into an open ditch in the highway, the measure of damages was the difference in value of the horse before the injury and after he was cured, and, in addition thereto, the cost of care and medicine in restoring the horse.

Same—Injury to Buggy—Measure of Damages.

Where a buggy is injured by defects in a highway for which a city is liable in an action to recover therefor, plaintiff can prove the costs of repairs, the amount to be recovered being only the actual cost value of such necessary repairs.

Same—Excavations—Failure to Properly Guard—Question for Jury.

Whether excavations in a street were properly made and properly guarded so as to render a city not liable for injuries caused thereby, was for the jury.

Same—Injury to Horse and Buggy—Contributory Negligence—Question for the Jury.

The question of contributory negligence of a driver, where horse and buggy were injured by defect in a highway, is for the jury.

Appeal from circuit court, Pennington county; Levi McGee, Judge.

Action by Areli L. Overpeck and Alemath E. Overpeck against the city of Rapid City. Judgment for plaintiffs, and defendant appeals. Affirmed.

Chauncy L. Wood and Charles J. Buell, for appellant.

James W. Fowler, for respondents.

VAN CLEAVE *v.* CITY OF ST. LOUIS.

(*Supreme Court of Missouri, Division No. 1, Feb. 12, 1901.*)

[60 S. W. Rep. 1091.]

Defective Street—Injury to Horse—Sufficiency of Complaint.

Where a complaint against a city, filed before a justice, alleged that a horse was injured while crossing a roadway negligently constructed by the defendant city across certain street-railway tracks, such complaint was sufficient to reasonably advise the defendant of the nature of the claim, and was good, in absence of a motion to make more definite.

Abstracts

Same—Same—Same—Objections—When Must Be Raised.

Where a complaint filed before a justice alleged defendant's negligence in very general terms, but the case went to trial, and judgment in the justice court, and again in the circuit court, objection to the generality of the complaint would not be heard on appeal, since the defect was cured by verdict and judgment.

Appeal from St. Louis circuit court; S. P. Spencer, Judge.

Action by J. W. Van Cleave against the city of St. Louis and others. From a judgment in favor of plaintiff and other defendants, the city of St. Louis appeals. Affirmed.

B. Schnurmacher and Alex. Nicholson, for appellant.

W. A. Alderson, for respondent.

ST. GERMAIN *v.* CITY OF FALL RIVER.

(*Supreme Judicial Court of Massachusetts, Bristol, Feb. 26, 1901.*)

[59 N. E. Rep. 447.]

Defective Streets—Injuries to Traveler—Contributory Negligence—Due Care.

Plaintiff was driving a slow horse along the street between the curb and the street-car tracks. The horse crowded himself towards the curb to avoid going over a black cover over a waterworks gate. Plaintiff, thinking the horse was going to stop, and to get him out of the gutter, which was very rough, struck him with the whip. After going two or three feet, the wheel struck a hydrant standing near the curb, and plaintiff was injured: *held*, that it could not be said, as a matter of law, that plaintiff, as to his method of driving, was not in the exercise of due care.

Same—Same—Same—Knowledge of Obstruction.

The fact that plaintiff knew of the existence of the hydrant will not defeat his right to recover, since he may never have been near enough to observe that it was so erected as to be hit by the rim of a wheel coming near the curbstone.

Same—Hydrant Projecting beyond Curb.

Between a street-car track and a curbstone there was a well-constructed road, about 22 feet in width, the part near the curb being a paved gutter, on any part of which a traveler might be reasonably expected to go. A hydrant had stood close to the curb for about 25 years, a nut attached thereto projecting over the curbing from one to three inches. It was small, and the projection so slight that the danger therefrom might escape attention: *held*, in an action for injuries caused by a wheel striking the nut, that it was not error to hold that the hydrant was a defect in the street.

Same—Same—Liability of City for Acts of Water Commissioners.

Where, under an act authorizing a city to take and distribute water, commissioners are appointed by the city council to carry out the powers granted to the city, and were subject to such ordinances and regulations as the city council might ordain, such commissioners are not public officers, but are agents of the city in placing a hydrant in the street so as to be a defect therein, and the city is liable for injuries caused thereby.

Exceptions from superior court, Bristol county; John A. Aiken, Judge.

Action for injuries by Joseph St. Germain against the city of Fall River. From a judgment in favor of plaintiff, defendant brings exceptions. Overruled.

H. A. Dubuque, for plaintiff.

A. S. Phillips, for defendant.

Abstracts

ROBINSON *v.* MILLS.

(*Supreme Court of Montana, June 7, 1901.*)

[65 Pac. Rep. 114.]

Excavation in Street—Nuisance.

An unauthorized excavation of a city street is a nuisance per se.

Same—Failure to Replace Street in Safe Condition.

The failure to replace a city street in its former safe condition after the purpose of an authorized excavation has been accomplished constitutes a nuisance.

Same—Same—Degree of Care Required.

Under Pol. Code, § 4800, subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as formerly existed by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc.

Same—Same—Liability of Water Company to Person Injured.

Under Pol. Code, § 4800, subd. 73, a water company authorized to make an excavation is liable to an individual for injuries received through its negligence in failing in its duty to restore the street to its former safe condition.

Same—Same—Liability of Receiver of Water Company Making Excavation.

A receiver of a water company, appointed after the excavation has been filled, but before the occurrence of an accident resulting from its negligence in making the fill, is liable for such injuries, though he has no notice of the defect, since the appointment cast on him the duty of repairing the street, and he is presumed to have knowledge of the defect.

Same—Same—Same—Suing Receiver Appointed by Federal Court.

Under 25 Stat. 435, § 3, authorizing suits against federal receivers without the consent of the appointing court in respect to any act of the receiver in carrying on the business, an action may be brought without consent against the receiver of a water company, who continues its business, for his failure to put a street in a safe condition, though it was excavated and defectively filled by the company before his appointment.

Same—Same—Duty to Restore Street to Safe Condition—Instructions.

An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, and required by Pol. Code, § 4800, subd. 73, to place the street in as good condition as before the excavation, that it is incumbent on the company to restore the street to as good condition as before the excavation, is not erroneous on the ground that the exact restoration of the street is impossible, but is to be construed as only requiring its restoration to its former safe condition.

Same—Same—Same—Degree of Care—Whether Company Making Excavation an Insurer—Instructions.

An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, that it is liable for injuries resulting from its failure to put the street in its former condition, as required by Pol. Code, § 4800, subd. 73, is not erroneous in imposing the liability of an insurer, when considered in connection with other instructions only requiring the exercise of the highest degree of care.

Error—Contradictory Instructions—Liability of Receiver of Company Making Excavation—Not Dependent on Notice.

Where a receiver is appointed for a water company which has negligently failed to properly fill an excavation made in the street, and

Abstracts

suit is brought against the receiver for an injury resulting therefrom, after his appointment, error in contradictory instructions, some of which state his liability as dependent on notice and others as being absolute, does not authorize the reversal of a judgment for plaintiff, since the liability is not dependent on notice, and it is immaterial whether the question of notice was considered by the jury.

Liability of Receiver—Knowledge of Defect—What Constitutes Notice.

Where a receiver of a water company continues employees of the company who have formerly made and negligently filled an excavation in the street, and who attempt to remedy the defect after his appointment, their knowledge of the defect, or of facts sufficient to impart notice thereof, constitutes notice to the receiver.

Appeal from district court, Lewis and Clarke county; S. H. McIntire, Judge.

Action by Lou M. Robinson against James H. Mills, as receiver of the Helena Consolidated Water Company. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, the defendant appeals. Affirmed.

Wm. Wallace, Jr., and Clayberg & Gunn, for appellant.

T. J. Walsh, for respondent.

MAY *v.* CITY OF ANACONDA.

(*Supreme Court of Montana, Dec. 2, 1901.*)

[66 Pac. Rep. 759.]

Personal Injuries—Defective Street—Liability of City.

A city is liable for injuries resulting from its negligently permitting its streets to be and remain in a dangerous condition.

Municipal Torts—Implied Exemption of City from Liability—Statute.

The fact that Pol. Code, § 5036, declares that every city is responsible for injuries to property within its limits by mobs or riots, does not indicate a legislative intent to exempt cities from liability for all other torts.

Defective Street—Negligence of City—Finding Sustained by Evidence.

Where a bowlder remains in a city street for many months, constituting a dangerous obstruction, a finding that the city was negligent in so permitting the obstruction to continue is justified.

Evidence—Objections—Failure to Except—Appeal—Review.

Where no exception is taken to the ruling of the court in admitting evidence over defendant's objection, the error, if any, cannot be reviewed on appeal.

Personal Injuries—Estoppel of City to Deny Existence of Street at Place of Accident.

Under Comp. St. 1887, Gen. Laws, div. 5, § 320, providing that the fee of streets shown on a city plat shall be vested in the city for the use of the public, a city which by ordinance has accepted and has improved such a street, when sued for injury resulting from a defect in the street, cannot escape liability by denying that the locality is a street.

Same—Bowlder in Highway—Contributory Negligence.

Where plaintiff was injured by collision with a bowlder in an unlighted city street, which had been used and traveled for years, while he was driving slowly along the center of the street on a dark night,—he having no knowledge of the bowlder,—such act was not contributory negligence.

Appeal from district court, Deer Lodge county; Theo. *Brantly, Judge.*

Abstracts

Action by W. B. May against the city of Anaconda. From a judgment for plaintiff, defendant appeals. Affirmed.

T. O'Leary, for appellant.

Rodgers & Rodgers, for respondent.

SNOOK *v.* CITY OF ANACONDA.

(*Supreme Court of Montana, Dec. 2, 1901.*)

[66 Pac. Rep. 756.]

Personal Injuries—Permitting Street to Remain Unsafe—Liability of City.

A city organized under Comp. St. 1887, Gen. Laws, div. 5, c. 22, being authorized to provide means by taxation to improve its streets, and by section 325 to establish and improve streets, and by section 435 given exclusive control of its streets, is responsible for damages occasioned by reason of its negligently permitting its streets to become and remain in a dangerous condition.

Same—Same—Proximate Cause—Pleading.

Where, in an action for damages occasioned by a defect in a street, the complaint alleges the defect, and the city's knowledge thereof and neglect to repair, and that while lawfully riding on the street, and without knowledge of the defect, plaintiff was injured thereby, plaintiff need not allege that the proximate cause of the injury was not his own act.

Same—Same—Contributory Negligence—Pleading.

Where, in an action against a city for damages resulting from a defective street, the complaint, after alleging defendant's negligence, alleges that the injury was received "without fault or negligence on plaintiff's part," contributory negligence is a matter of defense.

Same—Same—Notice to City—Evidence—Harmless Error.

Where, in an action against a city for damages resulting from a defective street, it is admitted that the city, through its mayor and council and police, had personal knowledge of the defect before the accident, the error, if any, in admitting evidence that the overseer of streets said several days after the accident that he knew of the defect, and had intended to repair it, was without prejudice.

Same—Same—Same—Same.

In an action against a city for injuries resulting from a defective street, questions asked defendant's overseer of streets as to its rules in relation to doing street work on Sunday were properly excluded.

Same—Same—Liability of City Where Day Following Accident Is Sunday.

Where a bridge in a city street is destroyed, the duty of the city to repair the street or give warning of the danger to travelers is not affected by the fact that the day after the defect was caused happens to be Sunday.

Same—Same—Damages—Probable Consequences of Injuries.

In an action for injuries resulting from a defective street, a charge that the jury may take into consideration as an item of damages the probable consequences, so far as proved, of the personal injuries received by the plaintiff, if any are proved, is proper.

Appeal from district court, Deer Lodge county; Theo. Brantly, Judge.

Action by George A. Snook against the city of Anaconda. From a judgment for plaintiff, defendant appeals. Affirmed.

T. O'Leary, J. R. Boarman, and H. R. Whitehill, for appellant.

Rodgers & Rodgers, for respondent.

Abstracts

CITY OF SALEM *v.* WEBSTER.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 323.]

Evidence—Review—Failure to Except.

Objections to the admissibility of evidence will not be reviewed on appeal in the absence of a ruling by the trial court as to the admissibility thereof, and exceptions to the same, or exceptions taken on the court's refusing to rule.

Excavation in Street—Notice—Admissibility of Evidence—Harmless Error.

Complainant in an action for personal injuries alleged that a city caused a dangerous ditch to be dug across one of its streets, and left the same unguarded. The part played by the city was proved or admitted. Complainant's witness testified, in answer to a question whether the attention of the city authorities had been called to the condition of the ditch, that he told some one, but did not know whether it was a city official or not: *held*, that such answer, though inadmissible, was harmless error, since it was not necessary to show notice.

Personal Injuries—Physical Suffering—Evidence—Testimony of Physicians as to Statements Made by Injured Person.

Where plaintiff sues for injuries, evidence of physicians treating him as to what he said, while being examined and treated, as to his sensations and sufferings, is properly admitted as the opinions of the physicians must necessarily be formed and guided by such statements.

Same—Same—Same—Same—Spontaneous Utterances.

Where, in an action against a city for personal injuries, it appeared that a certain physician was near by when the accident happened, and helped carry the plaintiff to his house, where he ministered to plaintiff as a physician, he may testify as to plaintiff's crying out, and as to what was said while being treated, such evidence being admissible as showing natural expressions of suffering.

Same—Contributory Negligence—Whether Plaintiff Ordinarily a Fast Driver—Evidence.

Where, in an action against a city for personal injuries, caused by plaintiff's driving into an unguarded ditch dug across a road, there is direct testimony as to the rate of speed at which he was driving, evidence as to whether he was ordinarily a rapid driver is inadmissible.

Same—Evidence of Home Treatment of Accused.

In such action, evidence as to whether plaintiff had been pampered and petted at home is not relevant.

Streets—Duty of City to Keep in Safe Condition—Degree of Care.

The duty required of a city regarding the repair of its streets is reasonable care and diligence to keep them in reasonably safe repair and condition for travel.

Same—Same—Same—Erroneous Instruction—Harmless Error.

Where, in an action for personal injuries resulting from a defective street, there was and could be no question as to the city's disregard of its duty regarding repairs, an instruction stating it to be the absolute duty of the city to keep the streets reasonably safe, though erroneous, is harmless error.

Same—Instructions—Failure to Connect Injury with City's Negligence—Harmless Error.

Where, in an action against a city for personal injuries, alleged to have resulted from allowing a ditch crossing a street to remain unprotected, there is no question as to the injury resulting therefrom, an instruction requiring the jury to find that defendant was guilty of negligence in allowing the ditch to remain open, and that plaintiff

was injured, but omitting all connection between the negligent act charged and the injury, though erroneous, is harmless error.

Same—Same—Compensatory Damages—Measure of.

An instruction in a personal injury case, requiring the jury, if they find for plaintiff, to assess his compensatory damages at such amount as the evidence shows will reimburse him for his injuries, is proper, as it is only with regard to awarding exemplary damages that an instruction must be permissive merely.

Same—Same—Unreasonable Number of Instructions Properly Refused.

Where the principles of law applicable to a case are few and simple, a request by one party for the submission of 31 instructions is properly refused, as the court cannot examine and pass on the same within the time usually available at a trial.

Same—Objections—Remarks of Counsel.

Where counsel in an action for personal injuries, while objecting to but one remark of opponent's counsel, which the court allows to stand, lets other and far more objectionable remarks pass, and the evidence on the whole favors the opponent, a judgment for the latter will not be reversed because of the ruling.

Same—Same—Same—Harmless Error.

Where, in an action for personal injuries, objectionable remarks of plaintiff's attorney, made in his address to the jury, are allowed to stand on objection thereto, and a verdict for only double the amount of plaintiff's expenditures to the time of trial is returned, though plaintiff had not yet recovered from the effects of the injury, a refusal to sustain the objection is harmless error.

Appeal from appellate court, Fourth district.

Action by Lee F. Webster against the city of Salem. From a judgment of the appellate court (95 Ill. App. 120) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

George W. Smith, Frank F. Noleman, and John B. Kagy, for appellant.

T. E. Merritt, C. E. Jennings, and L. M. Kagy, for appellee.

STATE *v.* RICHARDS.

(*Supreme Court of Errors of Connecticut, July 23, 1901.*)

[49 Atl. Rep. 858.]

Sidewalk—Reasonableness of Ordinance Requiring Abutter to Repair.

An ordinance imposed a penalty for refusal to repair sidewalks, in compliance with an order of the council, for 30 days after due notice; and section 2 imposed a like penalty for refusal "to comply with such order after such notice for a period of 30 days as prescribed in section 1," and also "for each succeeding neglect of or refusal for each successive period of 30 days thereafter": *held*, that section 2 was void, as being unreasonable, in that it requires work to be completed within the time in which section 1 provides it may be commenced, whatever the nature of the repairs.

Same—Order Requiring Abutter to Repair—Failure to Prescribe Time—Objections.

Charter of New London (Sp. Laws 1893, pp. 683–693) § 13, empowers the common council to make ordinances for the purpose of keeping sidewalks in repair. Section 26 provides that the council may limit the time for repairing sidewalks as it shall deem reasonable. A city ordinance imposed a penalty for refusal to repair sidewalks, under an order of the council, for 30 days after due notice. The council ordered defendant to repair his sidewalk, but did not specify any time: *held*, that defendant would not be heard to complain that no

Abstracts

time was set for the work's completion, since the order construed with the ordinance fixed 30 days.

Same—Same—Sufficiency—Uncertainty.

An order of the common council to a property owner to put sidewalks "in good and sufficient repair, free from defects, and safe and convenient for travel," is insufficient, because of uncertainty as to the manner in which the repairs were to be made.

Appeal from criminal court of common pleas, New London county; Walter C. Noyes, Judge.

George A. Richards was convicted of violating a city ordinance, and he appeals. Reversed.

Abel P. Tanner, for appellant.

Hadlai A. Hull, Pros. Atty., for the State.

TRUSTEES OF HAZELGREEN *et al. v.* MCNABB *et al.*

(*Court of Appeals of Kentucky, Sept. 20, 1901.*)

[64 S. W. Rep. 431.]

Streets—Dedication and Acceptance—User—Construction of Sidewalks—Authority of City.

Where a street, after it was regularly laid out and dedicated to the public use, had been continuously used by the town for more than 20 years, it was completely under the jurisdiction of the town, so as to authorize the town to construct a sidewalk at the cost of an abutting lot owner.

Sidewalks—Necessity—Municipal Discretion—Injunction by Abutter.

An abutting lot owner cannot enjoin the construction of a sidewalk by the town on the ground that he had, prior to the enactment of the ordinance directing the improvement, constructed a partial sidewalk, sufficient to meet the requirements of public travel, as the courts will not interfere with the discretion of trustees of towns as to the necessity of public improvements, or as to their character.

Municipal Records—Degree of Care Required in Keeping.

The courts will not require the same exactness in the keeping of the records of a town as is required in the case of courts of record.

Sidewalks—Improvement Limited to Particular Lot—Right of Abutter to Enjoin.

Where it is manifest that it was the purpose of the municipal governing body to order a specific improvement, that reasonable notice of it has been given to the property owner, and that the owner declines to comply with the ordinance, the city will not be restrained from executing the plan and judgment of its trustees, though the improvement may be limited to one piece of property.

Same—Same—Same—Remedy at Law.

A proposed street improvement will not be enjoined, at the suit of an abutting property owner, on the ground that the town has not complied with the law, as any substantial defect in the proceedings will avail him as defense to a suit to enforce a lien on his property.

Same—Remedy of Abutter—Perpetual Injunction.

Even if injunction was a proper remedy, it was error to perpetually enjoin the town from either requiring plaintiffs to repair or construct sidewalks, or from doing so itself.

Appeal from circuit court, Wolfe county.

"Not to be officially reported."

Action by W. T. McNabb and Eliza McNabb against the trustees of Hazelgreen and another for an injunction. Judgment for plaintiffs, and defendants appeal. Reversed.

J. C. Lykins and J. A. Violett, for appellants.

Abstracts

PHELPS *v.* CITY OF SALISBURY.

(*Supreme Court of Missouri, Division No. 2, March 12, 1901.*)

[61 S. W. Rep. 582.]

Defective Sidewalk—Personal Injuries—Degree of Care Required of Plaintiff—Instructions.

There is no conflict as to the quantum of caution and care required of plaintiff to avoid the accident between an instruction that, though he knew of the unsafe and dangerous condition of the sidewalk, verdict should be for him, provided he was at the time of the accident using ordinary prudence and care to avoid it, and one stating that, if he was not using reasonable care,—that is, such care as a person of ordinary prudence would have used under the same circumstances and with the same knowledge,—verdict should be for defendant.

Same—Same—Damages—Considering Age of Plaintiff—Instructions.

An instruction in an action for personal injuries is erroneous in telling the jury in estimating damages to take into consideration plaintiff's age, where there is no evidence thereof, except his personal presence before the jury at the trial.

Appeal from circuit court, Chariton county; O. F. Smith, Special Judge.

Action by J. W. Phelps against the city of Salisbury. Judgment for plaintiff. Defendant appeals. Reversed.

C. C. Hammond and Stockwell & Lamb, for appellant.

Wm. H. Bradley, for respondent.

CITY OF ROCK ISLAND *v.* STARKEY.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. Rep. 971.]

Appeal—Insufficiency of Abstract of Record.

Where the abstract of the record on appeal did not show the grounds or the affidavits in support of a motion for a continuance or postponement, the order of the trial court overruling the same will be presumed to have been correct.

Defective Sidewalks—Personal Injuries—Evidence—Expert Testimony—Rebuttal and Surrebuttal.

Plaintiff was injured by falling on a defective sidewalk, and claimed that her leg had been paralyzed and was useless. Physicians testified in behalf of defendant that at an examination made 2½ years after the injury, and just before the trial, one of them lifted plaintiff's injured leg, while she was sitting in a chair, to a horizontal position, and that on removing the support she held it in this position for some time, and then let it down slowly, showing that the leg was not paralyzed. In rebuttal plaintiff's physician testified that there was a species of paralysis, known as "spastic" paralysis, in which a leg might be extended a moment before it would fall, and then fall irregularly in little jerks, and that he had noticed such condition in plaintiff about a month before the examination by defendant's physicians: *held*, error for the trial court to refuse to allow the defendant to recall its physicians to testify in regard to this spastic paralysis, since this was new matter, and open to surrebuttal.

Streets—Dedication—Acceptance—Evidence—Long-Continued User—Instructions.

Though an instruction that the acceptance of a street by the city may be shown by proof of long-continued use of the alleged street as a public way is not accurate, it is not reversible error, where there is other evidence of the acceptance besides the use of the street.

Abstracts

Same—Duty to Repair—Instructions.

An instruction that, if the jury found that the street in controversy was a public street of the city, the city was bound to exercise ordinary care to keep it in repair, is not erroneous, for not stating what was necessary to constitute a public street, where the same was contained in another part of the charge.

Sidewalks—Duty of City to Use Reasonable Care—Sufficiency of Instructions.

Where a sidewalk had been built by the adjoining property owner, and a traveler had been injured on it, an instruction that, in considering the obligation of the city to use reasonable care, the jury might consider what kind of a sidewalk it was, was not erroneous, since the jury, in determining the question of the care of the city in regard to the walk, might properly consider the material used, and the manner of construction of the walk, with reference to its decay and probable need of repair.

Damages—Recovery for Permanent Injuries—Failure to Disclose True Condition to Physician—Improper Treatment—Instructions.

An instruction that if plaintiff, after receiving injuries, did not disclose her previous condition to the doctor, so that he did not properly diagnose and treat her injuries, she could not recover for permanent injuries, was properly refused, where the physician was not ignorant of her peculiarities, and there was no evidence in the record that her failure to disclose that she had previously had hysterical attacks affected his treatment.

Dedication of Street—Acceptance—Repairs as Evidence of.

In an action for injuries received on the sidewalk of a street, where the question of the acceptance of the street by the city was in issue, evidence of repairs on the street was properly admitted, as tending to show that the work and repairs were done by the direction of the city.

Damages—Elements of—Previous Nervous Condition Aggravated by Injuries Sustained.

Where plaintiff, who was an hysterical subject, and had nervous diseases before the accident, received injuries by a fall on a defective sidewalk, which aggravated her previous condition, it was error for the court to refuse an instruction that plaintiff could only recover damages which were the natural and proximate result of the fall, and not those caused by plaintiff's pre-existing infirmities.

Magruder, J., dissenting.

Appeal from appellate court, Second district.

Action by Belle Starkey against the city of Rock Island. From a judgment of the appellate court (91 Ill. App. 592) affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

Searle & Marshall and John K. Scott, for appellant.

Jackson & Hurst and Rickel & Crocker, for appellee.

DONNELLY *v.* CITY OF ROCHESTER.

(*Court of Appeals of New York, March 26, 1901.*)

[59 N. E. Rep. 989.]

Sidewalks—Insufficiently Guarded Area Way—Presumption of Notice from Length of Time.

Where a deep area way along the line of the sidewalk on a busy street in a large city is insufficiently guarded, and has existed in such condition for a long period of time, the city is chargeable with knowledge of the danger.

Same—Same—Personal Injuries—Sufficiency of Railing a Question for the Jury.

Where plaintiff's intestate slipped on a sidewalk, and was precip-

itated over a railing 2½ feet high into an area way extending along the line of the sidewalk, the question whether the railing was a sufficient protection to passers-by was for the jury.

Appeal from supreme court, appellate division, Fourth department.

Action by Patrick Donnelly, as administrator of Patrick H. Donnelly, deceased, against the city of Rochester. From a judgment of the appellate division (58 N. Y. Supp. 1140) overruling plaintiff's exceptions ordered to be heard in the first instance by such division, denying a motion for a new trial, and directing judgment for defendant, plaintiff appeals. Reversed.

George H. Harris and John S. Keenan, for appellant.
Porter M. French, for respondent.

RIDER *v.* CLARK *et al.*

(*Supreme Court of California, April 4, 1901.*)

[64 Pac. Rep. 564.]

Vault under Sidewalk—Leaving Doors Open—Personal Injuries—Who Liable—Landlord or Tenant.

The owners of a building constructed a 12-foot walk abutting it, and through such walk built an entrance into their basement, the opening in the walk being covered by iron doors protruding 2 feet above the walk when open, and leaving the surface level when closed. The doors were safely and properly constructed, and left 7 feet of sidewalk always unobstructed. The premises were in the occupation and control of a lessee, who opened such doors on one occasion to use the basement entrance: *held*, that the owners were not liable for injuries sustained by a passer-by, who fell over one of the doors into the excavation.

Same—Authority to Construct—Presumption.

An entrance through a sidewalk to a basement, and the iron doors thereof in the former, would be presumed to have been constructed and placed in position by proper authority, in absence of proof to the contrary.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by E. A. Rider against W. R. Clark and others. From a judgment for plaintiff, W. R. Clark and another appeal. Reversed.

Woods & Levinsky and Nicol, Orr & Nutter, for appellants.
H. V. J. Swain and Jacobs & Flack, for respondent.

BYINGTON *v.* CITY OF MERRILL.

(*Supreme Court of Winconsin, Nov. 29, 1901.*)

[88 N. W. Rep. 26.]

Defective Sidewalk—Personal Injuries—Sufficiency of Complaint.

The complaint, in an action under Rev. St. 1898, § 1339, making a city liable for any damages which shall happen by reason of the insufficiency or want of repairs of any street within its limits, alleging that the sidewalk was in a defective, insufficient, and dangerous condition, is sufficient, as charging that it was not reasonably safe for public use.

Abstracts

Same—Snow and Ice—Unsafe Condition of Walk—Question for Jury.

The evidence showed that the defect consisted of a ridge of hard snow or ice that had formed in the center of the sidewalk, about 4 inches high, and 12 inches wide at the base, sloping from the highest point of the ridge at the center to the edges, and in a rough and slippery condition: *held*, that the evidence tended to establish an insufficiency constituting an actual obstruction to travel, so as to carry the question of whether the sidewalk was reasonably safe for public use to the jury.

Same—Municipal Liability—Construing Statutes.

In construing statutes making a city liable for injuries resulting from defective sidewalks, the meaning of the words employed will not be restrained because of any interference thereof with common-law rights, as the liability of municipalities in such case is wholly a creature of statute.

Same—Duration of Defect—Presumption of Knowledge—Statutory Provisions.

A city charter provided that it should not be liable for damages caused by any defect in a sidewalk, unless previous to the accident one of the aldermen of the ward in which the sidewalk was located had knowledge of such defect, and no knowledge thereof should be presumed unless the defect existed three weeks before such damage occurred. Rev. St. 1898, § 1339, as amended by Laws 1899, c. 305, exempts municipalities from all liability for damages for injuries caused by an accumulation of snow or ice, unless such accumulation had existed for three weeks: *held*, that such statutes took away all liability, unless such defect existed for three weeks immediately prior to the happening of the injury.

Same—Special Verdict—Interrogatories—Instructions.

The jury was asked, first, whether snow had accumulated on the walk in a ridge so as to make it insufficient and out of repair, and render it dangerous, and then, if such question was answered "Yes," had such condition existed for a period of three weeks prior to the accident? The court instructed that the word "condition" referred to the insufficiency mentioned in the first question, the existence of the snow rendering the walk unsafe for travelers using ordinary care, and that, if such condition had not existed for three weeks immediately preceding the accident, the condition mentioned did not exist for three weeks prior to the happening of the injury, within the meaning of the question, and it should, in that event, be answered "No": *held*, that such instruction was proper, as explaining such second question.

Same—Same—Same—Duration of Defect—Subsequent Fall of Snow—Finding Contrary to Evidence.

The evidence showed that in the center of the walk there had formed a ridge of ice about 4 inches high, and 12 inches wide at the base, and in a slippery conditon, but that about two weeks before the injury, a fall of snow covered such ridge to a depth of from 12 to 18 inches, and travel was thereafter confined to the center of the walk. The court instructed that such fall of snow required such second question to be answered in the negative, unless, notwithstanding the ridge was wholly covered by the snow, it still remained dangerous: *held* that, viewing the question with the instruction as submitting the issue so that the jury comprehended that "dangerous" meant the danger arising from the insufficiency of the walk covered by the first question, an affirmative finding was contrary to the evidence.

Special Verdict—Subdivision of Issues.

In framing a special verdict, issues should not be subdivided and covered by several questions, nor should they be submitted in various forms.

Same—Interrogatories Submitted to Jury—Excluding Repetitions.

The court by one question submitted the question whether the walk was insufficient or in want of repair, and, in the event such question was answered in the affirmative, they were asked whether that was the proximate cause of the injury. The court rejected the question as to whether the injury was the result of an accident for which neither

party was in fault: *held* proper, as the answers to the questions submitted necessarily covered the question refused.

Same—Same—Same.

It was not error to reject the question whether the walk was in a reasonably safe condition, as it was a mere element of the issue submitted as to whether the insufficient condition of the walk which caused the accident, if it was so caused, existed for three weeks continuously, immediately prior thereto.

Appeal and Error—Erroneous Instruction Assuming Existence of Defect.

An instruction that if the jury were satisfied "that such defective condition" had existed for such a time that the city authorities, in the exercise of ordinary care, should have known of and remedied it before the accident, etc., was erroneous, as it was calculated to convey the idea the court had determined that the sidewalk was in a defective condition.

Same—Biased Instructions—Reversible Error.

It is reversible error for the court to give general instructions, on any subject involved in a special verdict, well calculated to inform the jury how to answer in order to enable one of the parties to recover.

Same—Special Verdict Contrary to Evidence—Decision in Appellate Court—Ordering New Trial.

Where, in an action for personal injuries, the special findings are contrary to the undisputed evidence, in the absence of a motion in the trial court to correct the answer given a judgment will not be directed on appeal in conformity with the evidence, but a new trial will be ordered.

Appeal from circuit court, Lincoln county; W. C. Silverthorn, Judge.

Action by Mary J. Byington against the city of Merrill. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John Van Hecke, for appellant.

M. G. Hoffman (Curtis, Reid, Smith & Curtis, of counsel), for respondent.

ARCHER *et al. v.* TOWN OF JOHNSON CITY.

(*Supreme Court of Tennessee, Sept. 28, 1901.*)

[64 S. W. Rep. 474.]

Personal Injuries—Fruit Rinds on Sidewalk—Liability of City.

A city is liable for injuries to a traveler on the street, received by a fall on the sidewalk, caused by an accumulation of discarded fruit rinds and decayed vegetables thereon.

Same—Same—Notice to City—Petition—Sufficiency of Allegations.

A petition in an action for injuries received in a fall on a sidewalk, caused by the accumulation of refuse matter thereon, which alleges that for a long time before the date of the injury the nuisance was daily and habitually committed, is a sufficient allegation that the matter had accumulated long enough to charge the city with notice thereof.

Appeal from circuit court, Washington county; H. T. Campbell, Judge.

Action by Nancy Archer and others against the town of Johnson City. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Le Roy Reeves and S. S. Crumley, for appellants.

S. E. Miller, for appellee.

Abstracts

MAUCH *v.* CITY OF HARTFORD.

(*Supreme Court of Wisconsin, Nov. 5, 1901.*)

[87 N. W. Rep. 816.]

City Charter—Amendment.

A change in a special city charter, pursuant to the general law on the subject, has the same effect as would an amendment thereof by direct legislative enactment, if the constitution permitted such an enactment.

Same—Same—Effect upon Pending Causes of Action.

A change in a special city charter, in the manner provided in the general law on the subject, is controlled by section 4974, Rev. St. 1898, as regards its effect upon suits to recover on causes of action dependent in whole or in part upon the provisions of the charter repealed by such change.

Evidence—Photographs—X-rays.

The rule in regard to the use of ordinary photographs upon the trial of a cause, for the better understanding by the jury of the evidence or the merits of the case, applies to photographs taken by the aid of X-rays.

Same—Same—Objections—Appeal—Review.

Whether a photograph is proper or not in any particular situation upon the trial of a case is a matter within the sound discretion of the trial judge, and his determination cannot be disturbed if there was any reasonable ground therefor.

Damages for Specific Injuries—Include What.

In a complaint grounded on negligence, a claim made for damages for a specific injury reaches to and includes injuries directly caused by it and so closely connected therewith as to be rightly considered a part thereof.

Personal Injuries—Specific Injuries—Other Injuries—Sufficiency of Complaint.

A claim made in a complaint for a specific injury "and other injuries" is indefinite and uncertain as to what the term "other injuries" means, but is sufficiently suggestive to render evidence admissible to prove injuries other than the one specifically described.

Same—Defective Sidewalk—Knowledge of Street Commissioner as Notice to City—Evidence.

Evidence by a street commissioner of a city, to the effect that a sidewalk was generally out of repair, both as to the surface thereof and the stringers, some three months before the happening of an accident alleged to have been caused by reason of a defect in the walk at a particular point, is competent for the purpose of showing constructive notice to the city of such particular defect, notwithstanding evidence by the street commissioner that he repaired the walk, so far as practicable, by using the old material and without putting in new stringers, before the accident happened.

Same—Same—Knowledge of Street Commissioner as Actual Notice to City.

Evidence by the street commissioner of a city that he knew by personal examination that the stringers of a sidewalk were "all used up," established actual notice to the city of the defective condition of the walk in that regard at the particular place therein which was in controversy.

Same—Same—Notice to City—Knowledge of Officer—Length of Time.

Knowledge of the officer or officers of a city charged with the immediate duty of repairing its sidewalks, of the insufficient condition thereof in respect to being out of repair after having been once properly constructed, satisfies the element of notice to the defendant of such insufficient condition, in an action against the city to recover damages for a personal injury caused thereby, if such knowledge existed a

sufficient length of time before the injury to have enabled the city, by the exercise of reasonable diligence, to repair the defect.

Bardeen, J., dissenting.

(Syllabus by the Judge.)

Appeal from circuit court, Washington county; James J. Dick, Judge.

Action by Anna Mauch against the city of Hartford. Judgment for plaintiff, and defendant appeals. Affirmed.

Sawyer & Sawyer, for appellant.

J. C. Russell and O'Connor, Schmitz & Wild (Charles E. Estabrook, of counsel), for respondent.

ELLIS *v.* CITY OF HAMMOND.

(*Supreme Court of Indiana, Oct. 10, 1901.*)

[61 N. E. Rep. 565.]

Defective Sidewalks—Personal Injuries—New Trial—Newly-Discovered Evidence.

In an action for injuries received from a defective sidewalk, a new trial for newly-discovered evidence will not be granted plaintiff where such evidence consisted of testimony of physicians as to the character of the injuries, bearing only on the amount of damages, and which could not affect the finding on the alleged cause of action.

Appeal from superior court, Lake county; H. B. Tuthill, Judge.

Action by Albert M. Ellis, by his next friend, against the city of Hammond. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Bruce & Bruce, for appellant.

Borders & Becker, for appellee.

KOHLHOF *v.* CITY OF CHICAGO.

(*Supreme Court of Illinois, Oct. 24, 1901.*)

[61 N. E. Rep. 446.]

Sidewalks—Ordinary Use—Negligence—Personal Injuries.

Where plaintiff was injured by the breaking of a sidewalk while he was moving a heavy safe thereon, and the sidewalk was reasonably safe for use in an ordinary manner, plaintiff cannot recover.

Appeal—Findings of Fact—Review.

The independent findings of material ultimate facts in a case by the appellate court are binding on the supreme court.

Error to appellate court, First district.

Action by Joseph Kohlhof against the city of Chicago. From a judgment of the appellate court reversing a judgment of the trial court in favor of plaintiff, he brings error. Affirmed.

Francis J. Woolley, for plaintiff in error.

Andrew J. Ryan, City Atty. (James J. Kelly, of counsel), for defendant in error.

INDEX TO NOTES.

ANIMALS.

Cross references on subject of municipal liability for personal injuries inflicted by animals, 291.

Liability of city for injuries inflicted by animals running at large in street by reason of policeman's negligence, 291.

Liability of city for personal injuries inflicted by animal owned by city, 291.

Liability of city for personal injuries inflicted by animal where city authorized exhibition or going at large of animals, 291.

Liability of municipality for injuries inflicted by animals running at large in streets, 291.

ATTORNEY GENERAL.

See Contracts.

ATTORNEYS.

See Licenses.

AUCTIONEERS.

See Licenses.

BIDDERS.

See Contracts.

BIDS.

See Contracts.

BUTCHERS.

See Licenses.

CONSTITUTIONAL LAW.

See Contracts.
Officers.
Ordinances.
Public Schools.

Preference of veterans' children in public schools, 76.

CONTRACTS.

Advertising for bids for municipal contracts, 196.

Consent of electors to municipal contract, 236.

Impairment of Obligation by Ordinance.

Contract must be valid, 260.

In general, 260.

Obligation cannot be impaired by ordinance passed in pursuance of existing statute, 260.

Ordinance not invalid because of incidental injuries to contractor's interests where city acting as private corporation, 260.

Restraining Corporate Authorities from Entering into Contract.

In general, 702.

Injunction by attorney general or other officer, 702.

Injunction by person claiming special or exclusive privileges, 702.

Injunction by rejected bidder, 702.

Injunction by taxpayer, 702.

Specific instances in which injunction will be granted or refused, 702.

COURTS.

Summary Proceedings in Municipal Courts.

In general, 172.

Jury of less than twelve, 172.

Pecuniary penalties recoverable in civil action, 172.

Same act giving rise to more than one offense where the offenses are identical in character, 172.

Same act giving rise to more than one offense where the offenses are totally different, 172.

Statutory crimes, 172.

Where constitution declares that trial shall be by jury in all prosecutions, 172.

Where offense is an indictable misdemeanor, 172.

Where ordinance varies from statute, 172.

Where right of appeal to jury trial is given, 172.

DISCRIMINATION.

See Ordinances.

DOUBLE TAXATION.

See Licenses.

EMPLOYEES.
See Officers.

ESTOPPEL.
See Licenses.

FEES.
See Ordinances.

FOOD.
See Municipal Corporations.

HEALTH BOARD.
See Municipal Corporations.

INJUNCTION.
See Contracts.

INSURANCE COMPANIES.
See Licenses.

INTOXICATING LIQUORS.
See Licenses.

JURISDICTION.
See Courts.

LICENSES.
See Municipal Corporations.
Hawkers and peddlers, who are subject to license tax as such, 504.
Revocation or modification of privilege license not an impairment of contract obligations, general rule, 825.

LIQUORS.
See Licenses.

LOTTERIES.
See Licenses.

MANDAMUS.
See Licenses.

MARKETS.
See Municipal Corporations.

MASTER AND SERVANT.
See Officers.

MERCHANDISE.
See Ordinances.

MISDEMEANORS.
See Courts.

MUNICIPAL CONTRACTS.
See Contracts.

MUNICIPAL CORPORATIONS.
See Contracts.
Streets and Highways.
Power to erect and maintain public scales, 668.
Regulation of Food Stuffs.
Bread, power to fix weight and price, 428.
Decaying fruits and vegetables, use of colored netting, 428.
Generally, 428.
Inspection of meat, 428.
Inspection, power to take samples, 428.
Inspection, summary destruction of unwholesome articles, 428.
Milk, inspection, 428.
Milk, power to adopt standard different from that fixed by statute, 428.
Milk, power to fix standard of adulteration, 428.
Milk, power to prohibit sale of milk produced from feeding distillery slops, 428.
Milk, tuberculin test, 428.
Power of health board to enact food regulations, 428.
Power to control location of slaughter houses, 428.
Power to inspect not to be used as subterfuge to tax, 428.
Power to license food dealers, 428.
Public slaughter houses, exclusive privileges, 428.
Regulation of time and place of sale, ordinance must be fair and impartial, 428.
Regulation of time and place of sale, ordinance must not be in restraint of trade, 428.
Regulation of time and place of sale, power to prohibit sales outside of market place, 428.
Selling unwholesome food an offense at common law, 428.
Well on baker's premises, power to prohibit, 428.
Revocation or Modification of Privilege License Not an Impairment of Contract Obligations.
Attorney's license, 825.
Auctioneer's license, 825.
Butcher's license, private market, 825.
Double taxation, 825.

MUNICIPAL CORPORATIONS—*Continued.*
Estoppel of city to revoke licenses, 825.
License accepted subject to condition, 825.
License to sell lottery tickets or to conduct lottery, 825.
Licenses to insurance companies, 825.
Liquor license, 825.
Mandamus to compel issuance of license, 825.
Physician's license, 825.
Pool room license, 825.

MUNICIPAL COURTS.
See Courts.

NEGLIGENCE.
See Ordinance.

OFFICERS.
Preference of Veterans in Appointment to Public Service.
Appointment, applicant must make known fact that he is a veteran, 76.
Appointment, District of Columbia police force, 76.
Appointment, finding of commissioners not reviewable by the courts, 76.
Appointment, officers and teachers of free school, 76.
Appointment, rule fixing age limit not applicable to veterans, 76.
Appointment, second assistant clerk of district court, 76.
Appointment, statute requiring preference to be given not applicable to promotions, 76.
Appointment, street inspectors, 76.
Appointment, veterans to be preferred only when equally qualified with other applicants, 76.
Certification, estoppel of commissioners to repudiate their official acts, 76.
Certification, striking name of veteran from eligible list, 76.
Constitutional law, preferring children of veterans in admission to public schools, 76.
Constitutional law, scope of statute restricted by title, 76.
Constitutional law, special privileges, 76.

OFFICERS—*Continued.*
Constitutional law, special provision in regard to certification, 76.
Constitutional law, special provision regulating removal of public officers, 76.
Remedy, for refusal to give preference in appointment, 76.
Remedy, for wrongful removal, 76.
Removal, abolition of office held by veteran, 76.
Removal, confidential positions, 76.
Removal, de facto officers, 76.
Removal, due process, 76.
Removal, for incompetency and misconduct only, 76.
Removal, miscellaneous offices and employments, 76.
Removal, penal statute forbidding to be construed strictly, 76.
Removal, recovery of wages by veteran wrongfully removed, 76.
Removal, statute applicable only to subordinate positions, 76.
Removal, statute not to be construed retrospectively, 76.
Removal, term of office of position not fixed by law, 76.
Removal, veterans employed by the day, 76.

ORDINANCES.
See Contracts.
Municipal Corporations.
Constitutionality of ordinance requiring merchandise to be weighed on public scales, discrimination, 668.
Power of city to require all coal, grain, etc., to be weighed by public weigh master, 668.
Power to exact fee for weighing on public scales, 668.
Reasonableness of ordinance requiring that articles sold by weight shall be weighed on town scales, 668.
Violation of Ordinance as Affecting the Inter Sese Liability of Individuals.
Affirmative view, 293.
Comparative negligence, 293.
Contrary doctrine, 293.
Contributory negligence, 293.
Qualified doctrine, 293.

PEDDLERS.
See Licenses.

PENALTIES.
See Courts.

PERSONAL INJURIES.
See Ordinances.
Cross references on subject of municipal liability for personal injuries inflicted by animals, 291.
Liability of city for personal injuries inflicted by animal owned by city, 291.
Liability of city for personal injuries inflicted by animals running at large in streets by reason of policeman's negligence, 291.
Liability of city for personal injuries inflicted by animal through negligence of policeman attempting to impound it, 291.
Liability of city for personal injuries inflicted by animal, where city authorized the exhibition or going at large of animal, 291.
Liability of municipality for personal injuries inflicted by animals running at large in streets, 291.

POLICE.
See Personal Injuries.

POLICE POWER.
See Municipal Corporations.
Ordinances.

POOL ROOMS.
See Licenses.

PUBLIC SCALES.
See Ordinances.
Scales.

PUBLIC SCHOOLS.
Preferring children of veterans in public schools, 76.

PURCHASERS.
See Licenses.

SCALES.
See Ordinances.
Power to erect and maintain public scales, 668.

SLAUGHTER HOUSES.
See Municipal Corporations.

STREETS AND HIGHWAYS.
Liability of city for personal injuries inflicted by animals running at large in streets by reason of policeman's negligence, 291.
Liability of municipality for injuries inflicted by animals in streets, 291.
Subjecting street to private use, 419.

TAXATION.
See Licenses.
Exemptions.
Property in annexed territory, 460.

TAXPAYERS.
See Contracts.

VETERANS.
See Officers.
Public Schools.

WAGES.
See Officers.

WEIGHTS AND MEASURES.
See Ordinances.

GENERAL INDEX.

ABANDONMENT.

See Streets and Highways.

ABUTTERS.

See Improvements.
Local Assessments.
Streets and Highways.
Streets and Sidewalks.

ABUTTING OWNERS.

See Streets and Sidewalks.
Telegraphs and Telephones.
Water Supply.

ACTION FOR WRONGFUL DEATH.

Error in directing verdict.
Barker *v.* Boston Electric Light Co. (Mass.), 143.

ACTIONS.

Action on bond of city treasurer, how brought.
Somerville *v.* Wood (Ala.), 842.

ADVERSE POSSESSION.

See Constitutional Law.
Real Estate.
Streets and Highways.

By turnpike company.
South Covington, etc., Ry. Co. *v.* Newport, L. & A. Turnpike Co. (Ky.), 935.

Right of city to alley lost by adverse possession.
Hegan *v.* Pendennis Club (Ky.), 943.

Statute forbidding conveyance of land held adversely by another not applicable to easement.
Hegan *v.* Pendennis Club (Ky.), 943.

What is not adverse occupancy of a street.
W. N. Eisendrath & Co. *v.* City of Chicago (Ill.), 939.

What necessary to support title.
Davis *v.* City of Appleton (Wis.), 937.

ALDERMEN.

See Officers.

ALIEN LABOR.

See Local Assessments.

ALLEYS.

See Adverse Possession.

ANIMALS.

Evidence of animals being at large on former occasions, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

Pleading municipal ordinance prohibiting animals from running at large, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

Violation of ordinance prohibiting animals from running at large as negligence, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

What constitutes violation of ordinance prohibiting animals from running at large.
Decker *v.* McSorley (Wis.), 284.

ANNEXATION OF TERRITORY.

See Boundaries.
Ordinances.
Taxation.

APPEAL BONDS.

See Appeals.

APPEALS.

Appeal bond not to be given where exempt city is real party in interest.
Townsend Gas & Electric Co. *v.* Hill (Wash.), 197.

Estoppel of counsel to request court to withdraw its reason for remanding case.
Board of Public Works of City of Denver *v.* Denver Tel. Co. (Colo.), 15.

Question of insufficiency of special fund to pay warrant cannot be raised for first time on appeal.
Porter *v.* City of New Whatcom (Wash.), 883.

Review.

Decision on former appeal as law of the case.
City of Austin *v.* Bartholomew (C. C. A.), 370.
Nalle *v.* City of Austin (C. C. A.), 370.

APPEALS—*Continued.*
Discretion of trial court in admitting photographs in evidence in action for personal injuries.
Mauch *v.* City of Hartford (Wis.), 959.
Failure to object to order granting mandamus.
Thompson *v.* Troup (Conn.), 107.
Order granting preliminary injunction.
Louisville Home Tel. Co. *v.* Cumberland Telephone & Telegraph Co. (C. C. A.), 43.
Presumption as to why nonsuit was granted.
McDougald *v.* Town of Lumberton (N. Car.), 137.
Proceedings to test validity of incorporation.
People *ex rel.* Bondurant *v.* Marquiss (Ill.), 835.
Record.
Townsend Gas & Electric Co. *v.* Hill (Wash.), 197.
Removal of municipal employees.
People *v.* Brady (N. Y.), 95.
Review by the courts of municipal discretion in fixing amount of license tax.
Woodall *v.* City of Lynchburg (Va.), 697.
Rights of parties sentenced to fine or imprisonment under municipal ordinance to have its legality and constitutionality tested in supreme court.
City of New Orleans *v.* Chappuis (La.), 181.
Rights of parties not appealing from local assessment proceedings.
Berry *v.* City of Des Moines (Iowa), 922.
Sufficiency of evidence of violation of municipal ordinance.
City of New Orleans *v.* Chappuis (La.), 181.
Vacation of assessment pending appeal.
Berry *v.* City of Des Moines (Iowa), 922.
Right of appeal from a war in eminent domain proceedings may be regulated and restricted by legislative actions.
City of Portland *v.* Gaston (Ore.), 892.

APPEALS—*Continued.*
Sufficiency of assignment of error.
McDougald *v.* Town of Lumberton (N. Car.), 137.

ARBITRATION.
Conclusiveness of award.
McManus *v.* City of Philadelphia (Penn.), 730.

ARREST.
See Police.

ASSESSMENTS.
See Local Assessments.
Taxation.

ASSIGNEES.
See Jurisdiction.

ASSIGNMENTS.
See Contractors.

ASSUMPTION OF RISK.
See Fire Department.

ATTORNEYS.
Liability of city for legal services rendered in unauthorized action.
Root *v.* City of Topeka (Kan.), 886.

BANANAS.
See Personal Injuries.

BARBED WIRE.
See Personal Injuries.

BAWDY HOUSES.
See Disorderly Houses.

BENEFITS.
See Local Assessments.

BICYCLES.
See Streets and Sidewalks.

BIDDERS.
See Bonds.
Improvements.

BIDS.
See Contracts.

BILL OF PARTICULARS.
See Criminal Law.

BOARD OF EDUCATION.
See Officers.

BONA FIDE HOLDERS.
See Bonds.

BONDS.
See Appeals.
Constitutional Law.
Local Assessments.
Municipal Corporations.
Municipal Indebtedness.
Officers.
Water Supply.
Authority to levy tax an irrevocable contract with bond holders.
Board of Education of Hawesville *v.* Louisville, etc., Ry. Co. (Ky.), 872.
Authority to refund under Illinois statute.
Coquard *v.* Village of Oquawka (Ill.), 880.
Burden of proof, execution and delivery.
Thompson *v.* Village of Mecosta (Mich.), 877.
Certificate of bonds.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
City not estopped by recitals in bonds from showing that they exceed limit of indebtedness.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Effect of certificate of issue of refunding bonds in pursuance of legislative authority.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Election on question of bond issue, registration under Tennessee statute.
Davis *v.* Town of Rogersville (Tenn.), 881.
Excessive indebtedness immaterial to purchaser of refunding bonds.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Funding bonds create no debt.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Impairing obligation of contract by prohibiting levy of tax to pay township bonds, South Carolina statute.
Padgett *v.* Post (C. C. A.), 873.
Improvement bonds not invalid because not issued at time provided for.
Ellis *v.* Witmer (Cal.), 878.
Interest on state improvement bonds under California statute.
Ellis *v.* Witmer (Cal.), 878.
Issuance of bonded indebtedness not prevented by South Carolina statute limiting municipal indebtedness.
Bray *v.* City Council of Florence (S. Car.), 879.
Issue of bonds for acquisition of park land.
Fritz *v.* City and County of San Francisco (Cal.), 870.
Later general grant of power to issue not limited by prior specific grant.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Liability of city on improvement bonds based upon illegal assessment.
Gable *v.* City of Altoona (Pa.), 871.
Liability on improvement bonds under statute of Michigan.
Thompson *v.* Village of Mecosta (Mich.), 877.
Limitation of action on unauthorized refunding bonds.
Coquard *v.* Village of Oquawka (Ill.), 880.
Mandamus to enforce judgment to recover tax where repeal of statutory provision for payment.
Padgett *v.* Post (C. C. A.), 873.
Mandamus to enforce judgment where levy of tax to pay an arrearage of interest.
Padgett *v.* Post (C. C. A.), 873.
Matured interest coupons as part of bond indebtedness.
Kelly *v.* Cole (Kan.), 875.
Power of board of education to levy tax to pay school bonds.
Board of Education of Hawesville *v.* Louisville, etc., Ry. Co. (Ky.), 872.
Power of city to issue commercial paper.
Coquard *v.* Village of Oquawka (Ill.), 880.
Power to issue bonds under chapter 37, law of South Dakota 1890.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Power to issue refunding bonds included in power to issue bonds for corporate purposes.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Power to issue refunding bonds under Kansas statute.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Power to refund not implied

BONDS—*Continued.*
from original authority to issue.
Coquard *v.* Village of Oquawka (Ill.), 880.
Purchaser for value, who is.
Thompson *v.* Village of Mecosta (Mich.), 877.
Purposes of drainage bonds sufficiently stated in ordinance under sanitary drainage act of Illinois.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.
Purposes of ordinance providing for issuance of drainage bonds sufficiently expressed.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.
Refunding bonds as increasing indebtedness.
City of Pierre *v.* Dunscomb (C. C. A.), 874.
Right of assignee to recover on original indebtedness in action on invalid refunding bonds.
Coquard *v.* Village of Oquawka (Ill.), 880.
Right of bona fide holder to rely on recitals.
Thompson *v.* Village of Mecosta (Mich.), 877.
Right of bona fide purchaser to rely on recitals.
Thompson *v.* Village of Mecosta (Mich.), 877.
Sale of property for payment of assessment bonds.
Ellis *v.* Witmer (Cal.), 878.
Statute authorizing tax to pay bonds, whether private or general.
Board of Education of Hawesville *v.* Louisville, etc., Ry. Co. (Ky.), 872.
Sufficiency of finding as to delivery.
Thompson *v.* Village of Mecosta (Mich.), 877.
Sufficiency of notice of sale of property for payment of bonds.
Ellis *v.* Witmer (Cal.), 878.
Taxation to pay school bonds as affected by change of boundary of district, under Kentucky statute.
Chambers *v.* Adair (Ky.), 871.
Unearned interest coupons not bonded indebtedness.
Kelly *v.* Cole (Kan.), 875.
Validity as affected by failure to advertise for bids.
Roberts *v.* Taft (C. C. A.), 876.

BONDS—*Continued.*
Validity as affected by sufficiency of notice of election.
Smith *v.* Mayor (Ga.), 876.
Valid where same exceed debt limit.
Gable *v.* City of Altoona (Pa.), 871.
Want of notice of invalidity not presumed from fact of purchase.
Thompson *v.* Village of Mecosta (Mich.), 877.

BOUNDARIES.
See Municipal Corporations.
Streets and Highways.
Application of Kentucky statute forbidding the extension of boundaries.
Yancy *v.* Town of Fairview (Ky.), 658.
Necessity for extension.
Yancy *v.* Town of Fairview (Ky.), 658.

BRIDGES.
See Injuries to Property.
Streets and Highways.
Power of city of Chicago to rebuild bridges.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.

BROKERS.
See Licenses.

CERTIFICATES.
See Bonds.

CERTIFICATES OF PURCHASE.
See Taxation.

CERTIORARI.
See Municipal Corporations.

CHANGE OF GRADE.
See Local Assessments.
Public Improvements.
Streets and Highways.

CHARTERS.
See Municipal Corporations.
Water Supplies.
Authority of city organized by special act to surrender special charter and adopt one under the general charter law.
Somo Lumber Co. *v.* Lincoln County (Wis.), 895.

CHARTERS—*Continued.*
Change in special charter having same effect as amendment by direct legislative enactment.
Mauch *v.* City of Hartford (Wis.), 959.
Charter powers of municipal corporations to be strictly construed.
City of St. Paul *v.* Briggs (Minn.), 501.
Effect of amendment of city charter upon pending cause of action.
Mauch *v.* City of Hartford (Wis.), 959.

CHILDREN.
See Streets and Highways.
Contributory negligence of parents, in action for wrongful death of child.
Decker *v.* McSorley (Wis.), 284.
Evidence of expectation of life and pecuniary benefit, in action for death of child.
Decker *v.* McSorley (Wis.), 284.
Sufficiency of evidence to show that drain was a contrivance attractive to children.
City of Rome *v.* Cheney (Ga.), 140.

CITIZENS.
See Mandamus.

CITY ATTORNEY.
See Officers.

CITY COUNCIL.
See Officers.
Streets and Highways.
Admissibility of oral evidence to supply omissions in journal.
Pickton *v.* City of Fargo (N. Dak.), 930.
Effect of failure of journal to show individual votes.
Pickton *v.* City of Fargo (N. Dak.), 930.
Mandamus to compel council to fix salary for city marshal as an attempt to interfere with the exercise of discretionary powers.
State *v.* City of Noblesville (Ind.), 837.
Power to regulate erection and maintenance of news stands, construction of laws of 1897 of N. Y., ch. 378, §§ 1608, 1610.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.
What constitutes quorum to pass resolution for expenditure of money.
State *v.* Mayor (N. J.), 885.
What constitutes quorum under Kentucky statute.
Bybee *v.* Smith (Ky.), 838.
What constitutes two-thirds vote, when attempting to pass ordinance over veto, where members have resigned or died.
Pollasky *v.* Schmid, City Clerk, (Mich.), 839.

CITY MARSHAL.
See Officers.

CITY TREASURER.
See Officers.

CITIZENSHIP.
See Jurisdiction.

CIVIL SERVICE.
See Officers.

CLAIMS.
See Contractors.

CLASSIFICATION.
See Licenses.

COAL CHUTES.
See Streets and Highways.

COAL HOLES.
See Streets and Highways.

COLLECTORS.
See Local Assessments.
Taxation.

COMMISSIONS.
See Local Assessments.

COMMON COUNCIL.
See City Council.
Ordinances.

CONFESSION OF JUDGMENT.
See Municipal Corporations.

CONSOLIDATION.
See Municipal Corporations.
Officers.

CONSTITUTIONAL LAW.

See Bonds.
Elections.
Licenses.
Light Companies.
Local Assessments.
Municipal Corporations.
Municipal Indebtedness.
Officers.
Ordinances.
Statute of Limitations.
Taxation.
Telegraphs and Telephones.
Water Supply.

Authority of Hagerstown to establish lighting plants under Maryland constitution.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.

Authority of probate courts to exercise administrative functions under constitution of Ohio.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 26.

Authority to enact penal law against drunkenness.
Village of Fairmont *v.* Meyer (Minn.), 189.

Constitutionality of charter provision preventing acquirement of title against city by adverse possession.
Crawford *v.* Ross (Mich.), 935.

Constitutionality of New York statute providing that no veteran shall be removed from employment except for incompetency or misconduct.
Stutzbach *v.* Coler, City Comptroller, (N. Y.), 72.

Construction of statutes in determining their constitutionality.
Mayor, etc., of Town of Morgantown *v.* City of Morgantown (W. Va.), 834.

Distribution of powers of government.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 30.

Effect of statute fixing character of powers as judicial on distributions of powers of government.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 30.

Impairment of obligations of contract by amendment to charter requiring bond to be given by defendant in action against city.
Oshkosh Waterworks Co. *v.* City of Oshkosh (Wis.), 263.

Impairment of obligations of contract by change made in mode of service of process on city.
Oshkosh Waterworks Co. *v.* City of Oshkosh (Wis.), 263.

Impairment of obligations of contract to construct lighting plant where contract gives option to renew.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.

Obligation of contract not impaired by statute giving water company option of selling its property to city.
Newburyport Water Co. *v.* City of Newburyport (Mass.), 734.

Power of city to refuse use of streets to second telephone company where franchise of first company is not, in terms, exclusive.
State *ex rel.* Spokane & B. C. Telephone & Telegraph Co. *v.* City of Spokane (Wash.), 20.

Retrospective legislation providing for local assessments.
City of Grand Rapids *v.* Lake Shore, etc., R. Co. (Mich.), 741.

What constitutes due process of law with respect to instituting and prosecuting proceedings in court.
City of Zanesville *v.* Zanesville Telephone and Telegraph Co. (Ohio), 30.

What constitutes exercise of judicial function.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 30.

Whether impairment of obligation of contract to require light companies to seek payment out of another fund than that provided for by contract.
Townsend Gas & Electric Co. *v.* Hill (Wash.), 197.

CONTRACTORS.

See Improvements.
Local Assessments.

Equitable assignment of contractor's claim against city.
Dickerson *v.* City of Spokane (Wash.), 889.

CONTRACTORS—*Continued.*
Failure to perform contract to repair as a defence in action by contractor to enforce assessment lien.
Shank *v.* Smith (Ind.), 926.
Harmless alteration of contract for street improvement.
Young *v.* Borzone (Wash.), 924.
Right of assignee of contractor's claim against city to sue at law.
Dickerson *v.* City of Spokane (Wash.), 889.
Right of contractor to interest on street work warrants.
Tacoma Bituminous Pav. Co. *v.* Sternberg (Wash.), 925.
Separate actions on contractor's bond.
City of Philadelphia *v.* Stewart (Pa.), 931.
Sufficiency of averment of presentation of claim in action by assignee of contractor's claim.
Dickerson *v.* City of Spokane (Wash.), 889.
Sufficiency of complaint in action against city by assignee of contractor's claim.
Dickerson *v.* City of Spokane (Wash.), 889.

CONTRACTS.
See Improvements.
Licenses.
Light Companies.
Municipal Corporations.
Municipal Indebtedness.
Public Improvements.
Streets and Highways.
Warrants.
Water Supply.
City may have list of property owners furnished under its power to contract for map of city.
State *v.* Mayor (N. J.), 885.
Implied contracts of municipal corporations.
City of Austin *v.* Bartholomew (C. C. A.), 370.
Nalle *v.* City of Austin (C. C. A.), 370.
Liability of city for legal service rendered in unauthorized action.
Root *v.* City of Topeka (Kan.), 886.
Measure of damages where recovery as on a quantum meruit against municipal corporation for materials.

CONTRACTS—*Continued.*
Wentink *v.* Board of Chosen Freeholders of Passaic County (N. J.), 387.
Presumption that parties contracted with reference to existing law.
Graves County Water Co. *v.* Ligon (Ky.), 653.
Ratification of unauthorized contract for legal service.
Root *v.* City of Topeka (Kan.), 886.
Recovery as on a quantum meruit on defective contract with municipal corporation.
Wentink *v.* Board of Chosen Freeholders of Passaic County (N. J.), 387.
Restraining illegal municipal contract.
Barto *v.* Board of Sup'rs of City and County of San Francisco (Cal.), 700.
Right of city to retain deposits with bids where contract was invalid because not submitted to and improved by council.
Chicago Bridge & Iron Co. *v.* City of West Bay City (Mich.), 888.
Sufficiency of petition to have meeting of board of trustees called to let contracts for internal improvements, construction of South Dakota statute.
Hubbell *v.* Town of Custer City (S. Dak.), 884.
Validity of agreement by city to close passway, sufficiency of evidence.
City of Paris *v.* Lilleston (Ky.), 887.
Validity of contract entered into by health board under invalid ordinance.
Goddard *v.* City of Lowell (Mass.), 888.
Validity of contract with corporation in which councilmen are stockholders.
Duncan *v.* City of Charleston (S. Car.), 343.
Peiper *v.* City of Charleston (S. Car.), 343.
Validity of ordinance directing printing contract with certain person, under Mass. St. 1896, ch. 415.
Goddard *v.* City of Lowell (Mass.), 888.

CONTRIBUTORY NEGLIGENCE.
See Children.
Personal Injuries.
Streets and Sidewalks.

COUNTERCLAIM.
See Water Supply.

COUPONS.
See Bonds.

COURTS.
See Police Courts.

CRIMINAL LAW.
See Ordinances.
Bill of particulars.
City of New Orleans *v.* Chappuis (La.), 181.
Effect of submission of law and facts to court.
Bailey *v.* Com. (Ky.), 187.

CROSSINGS.
See Dedication.

CUL-DE-SAC.
See Streets and Highways.

DAMAGES.
See Children.
Eminent Domain.
Injuries to Property.
Local Assessments.
Personal Injuries.
Streets and Highways.
Streets and Sidewalks.
Interest in action for injury to property.
Coan *v.* Brownstown Tp. (Mich.), 796.

DEATH BY WRONGFUL ACT.
See Children.

DEDICATION.
See Streets and Highways.

DE FACTO OFFICERS.
See Officers.

DEFECTS.
See Personal Injuries.

DELINQUENT TAX SALES.
See Taxation.

DEMURRER.
See Pleading.

DEPARTMENT OF SUPPLIES.
See Contracts.

DEPOSITS.
See Contracts.

DETACHMENT OF TERRITORY.
See Municipal Corporations.

DIAGRAMS.
See Improvements.
Local Assessments.

DIRECTION OF VERDICT.
See Death by Wrongful Act.

DISORDERLY HOUSES.
Effect of statute regulating punishment of misdemeanors on procedure to punish violation of ordinance to restrain disorderly houses.
Ogden *v.* City of Madison (Wis.), 161.
Power to suppress and restrain includes power to fine.
Ogden *v.* City of Madison (Wis.), 161.
Requirement of appeal bond not a denial of constitutional guaranty of jury trial to one convicted of keeping bawdy house.
In re Kinsel (Kan.), 643.

DOGS.
See Taxation.

DRAINS AND SEWERS.
See Local Assessments.
Liability of city for death caused by dangerous sewer.
City of Rome *v.* Cheney (Ga.), 140.
Sufficiency of evidence that drain was a contrivance attractive to children, in action for wrongful death.
City of Rome *v.* Cheney (Ga.), 140.

DRUNKENNESS.
See Ordinances.

DUE PROCESS.
See Local Assessments.

EASEMENTS.
See Adverse Possession.
Mill privilege not lost by nonuser.
Gloucester Water Supply Co. *v.* City of Gloucester (Mass.), 325.

EDUCATION.
See Officers.

ELECTIONS.
See Bonds.
Officers.
Street Lighting.
Water Companies.
Presumption that votes were properly rejected in election to determine question of incorporation.
State *v.* Lammers (Wis.), 115.

ELECTRIC LIGHT COMPANIES.
See Light Companies.

EMINENT DOMAIN.
See Streets and Highways.
Water and Watercourses.
Water Companies.
Damages.
Proof of value from comparison with other property.
Millard *v.* City of Webster City (Iowa), 934.
Damages for improvements must be alleged and proved.
Anthony *v.* Granger (R. I.), 893.
Evidence as to value of land taken to widen street.
Green *v.* City of Everett (Mass.), 892.
Evidence in subsequent petition for damages where land has been taken by city to widen street.
Green *v.* City of Everett (Mass.), 892.
Irregularity of proceedings, sufficiency of evidence.
City of Alameda *v.* Cohen (Cal.), 893.
Mistake of entering into agreement with landowner to release city from claim on account of land acquired for street purposes no ground for equitable relief against city.
Anthony *v.* Granger (R. I.), 893.
Property owner refusing to accept award of commissioner bound by judgment in subsequent proceedings for less amount.
City of Alameda *v.* Cohen (Cal.), 893.
Right of appeal from award may be regulated and restricted by legislative action.
City of Portland *v.* Gaston (Ore.), 892.
Right of city to condemn not affected by irregularity in assessment.
City of Alameda *v.* Cohen (Cal.), 893.
Special damages from change of grade caused by age of abutter.
Millard *v.* City of Webster City (Iowa), 934.
Validity of New York statute which fails to prescribe course of procedure for condemnation of land for park purposes.
Board of Park Com'rs of Louisville *v.* Du Pont (Ky.), 892.

EMPLOYEES.
See Fire Department.
Municipal Corporations.
Officers.

ENCROACHMENTS.
See Streets and Highways.

EQUITABLE ASSIGNMENTS.
See Contractors.

EQUITABLE RELIEF.
Mistake of entering into agreement with landowner to release city from claim on account of land required for street purposes no ground for equitable relief against city.
Anthony *v.* Granger (R. I.), 893.

EQUITY.
See Jurisdiction.
Local Assessments.

ESTOPPEL.
See Appeals.
Bonds.
Personal Injuries.
Streets and Highways.
Ultra Vires.
Warrants.

EVIDENCE.
See Children.
City Council.
Local Assessments.
Ordinances.
Personal Injuries.
Real Estate.
Streets and Highways.
Mortality tables.
Decker *v.* McSorley (Wis.), 284.
Parol evidence to show consider-

EVIDENCE—*Continued.*
ation for agreement by city to close passway.
City of Paris *v.* Lilleston (Ky.), 887.
Photographs as evidence in action for personal injuries.
Mauch *v.* City of Hartford (Wis.), 959.
X-ray photographs as evidence in action for personal injuries.
Mauch *v.* City of Hartford (Wis.), 959.

EXCAVATIONS.
See Personal Injuries.

EXCESSIVE INDEBTEDNESS.
See Municipal Indebtedness.

EXEMPTIONS.
See Licenses.
Local Assessments.

EXTENTS.
See Taxation.

FEDERAL COURTS.
See Jurisdiction.

FEDERAL QUESTIONS.
See Light Companies.

FEES.
See Officers.
Ordinances.

FELLOW SERVANTS.
See Personal Injuries.

FINES.
See Disorderly Houses.

FIRE DEPARTMENT.
Acceptance of statute relating to police and fire department in towns, construction of Mass. statute.
Ray *v.* De Butts (Mass.), 839.
Assumption of risk when repairing fire alarm, plaintiff's knowledge of danger presumed.
Wagner *v.* City of Portland (Ore.), 598.
Assumption or risk when repairing fire alarm wire where city failed to furnish rubber gloves.
Wagner *v.* City of Portland (Ore.), 598.
Board of fire commissioners a

FIRE DEPARTMENT—*Cont'd.*
city agency for whose acts the city is responsible.
Wagner *v.* City of Portland (Ore.), 598.
City not liable for personal injuries because of failure to prescribe rules regulating details of work of repairing fire alarm wires.
Wagner *v.* City of Portland (Ore.), 598.
City not precluded from insisting on lack of evidence to show necessity for rules to regulate work of repairing fire department, in action for personal injuries.
Wagner *v.* City of Portland (Ore.), 598.
Doctrine of fellow servant may be invoked by city in action for personal injuries to its employee.
Wagner *v.* City of Portland (Ore.), 598.
Repair of fire alarm a ministerial duty where city workman is injured while engaged therein.
Wagner *v.* City of Portland (Ore.), 598.

FIREMEN.
See Officers.

FIRES.
See Water Supply.

FOOD.
See Ordinances.

FORECLOSURE.
See Local Assessments.

FOREIGN LABOR.
See Local Assessments.

FRANCHISES.
See Municipal Corporations.
Telegraphs and Telephones.

FRIGHTENING HORSES.
See Personal Injuries.

FRONTAGE RULE.
See Local Assessments.

FRONT-FOOT RULE.
See Local Assessments.

FRUIT RINDS.
See Personal Injuries.

FUNDS.
See Municipal Corporations.

FUNERALS.
See Ordinances.

GAMING.
See Ordinances.

GAS COMPANIES.
See Light Companies.

GOVERNMENTAL DUTIES.
See Personal Injuries.

GROUND RENT.
See Taxation.

GUARANTY.
See Water Supply.

HACKS.
See Ordinances.

HAWKERS.
See Licenses.

HEALTH BOARD.
See Contracts.

HEALTH DEPARTMENT.
City not liable for death of one contracting disease and dying because of failure to disinfect smallpox hospital.
Nicholson *v.* City of Detroit (Mich.), 613.
Sufficiency of ordinance providing for the issuance of drainage bonds under sanitary drainage act of Illinois.
Lussum *v.* Sanitary Dist. of Chicago (Ill.), 881.

HIGHWAYS.
See Personal Injuries.
Streets and Highways.

HORSE RACING.
See Ordinances.

HOUSES OF ILL FAME.
See Disorderly Houses.

HYDRANTS.
See Personal Injuries.

ICE.
See Personal Injuries.

IMPRESSING HORSES.
See Ultra Vires.

IMPROVEMENTS.
See Bonds.
Public Improvements.
Abutter having had work done by private contractor, defence in action to enforce assessment.
De Haven *v.* Berendes (Cal.), 914.
Action of board of supervisors in assessing property where improvement has been made by abutter not validated by his failure to appeal.
De Haven *v.* Berendes (Cal.), 914.
Action of board of supervisors in assessing property where improvement has been made by owner not validated by failure of owner to file remonstrance.
De Haven *v.* Berendes (Cal.), 914.
Allowing credit for work performed by abutter under California statute.
De Haven *v.* Berendes (Cal.), 914.
Assessing entire cost on abutting property where contractor guarantees materials.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.
City of Louisville *v.* Mehler (Ky.), 927.
Assessment not invalid as in part one for repairs where the provisions of the contract as to repairs are merely a guaranty that the improvement should be properly executed.
Shank *v.* Smith (Ind.), 926.
Burden of proving irregularities in assessment proceedings in action to enforce liens.
Belser *v.* Allman (Cal.), 928.
Collateral attack on action of town in adjusting assessments to benefits, in action by contractor to enforce assessment lien.
Shank *v.* Smith (Ind.), 926.
Constitutionality of statute giving lien to person doing street improvement work at the request of any abutting owner.
Young *v.* Borzone (Wash.), 924.
Constitutionality of statute providing for front-foot rule of assessment.
San Francisco Paving Co. *v.* Bates (Cal.), 915.

IMPROVEMENTS—*Continued.*

Continuous tract of land lying on both sides of street may be treated as one tract in estimating damages and benefits.
Peck *v.* Borough of Bristol (Conn.), 763.

Contract for street litter boxes could be made only upon recommendation of public improvement board, construction of St. Louis charter.
State *ex rel.* Belt *v.* City of St. Louis (Mo.), 402.

Contract for street litter boxes invalid for giving contractor privilege of posting advertisements.
State *ex rel.* Belt *v.* City of St. Louis (Mo.), 402.

Contract for street litter boxes must comply with charter requirements.
State *ex rel.* Belt *v.* City of St. Louis (Mo.), 402.

Counterclaim of property owner in action by assignee to establish improvement lien.
Young *v.* Borzone (Wash.), 924.

Courts will not interfere with discretion of trustees of town with respect to the necessity of public improvements, at instance of abutter.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

Defences in action to enforce contractor's lien.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

Definiteness of paving ordinance.
Houston *v.* City of Chicago (Ill.), 921.

Delegation of city council's authority to draw up improvement specifications.
Grant *v.* Barber (Cal.), 913.

Effect of alien labor clause in improvement contract on validity of assessment.
Givens *v.* People *ex rel.* Raymond (Ill.), 929.
Hamilton *v.* People *ex rel.* Raymond (Ill.), 929.

Effect of improvement ordinances requiring license fee of contractor.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.
City of Louisville *v.* Mehler (Ky.), 927.

Effect on validity of assessments of fact that successful bidder for contract had monopoly of material.
Givens *v.* People *ex rel.* Raymond (Ill.), 929.

Estoppel of abutting owner to set up refusal of town trustees to hear objection to enforcement of assessments.
Shank *v.* Smith (Ind.), 926.

Failure of city officials to act under statute authorizing.
Pickton *v.* City of Fargo (N. Dak.), 930.

Failure to perform contract to repair as a defence to action by contractor to enforce assessment lien.
Shank *v.* Smith (Ind.), 926.

Harmless defect in improperly defining tax district in ordinance providing for street improvement.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

Harmless error in diagram of street improvement.
Blanchard *v.* Ladd (Cal.), 912.

Jurisdictional defect not cured by descriptions in improvement specifications.
Grant *v.* Barber (Cal.), 913.

Kentucky statute exempting city from cost of improvement not applicable to reconstruction.
City of Louisville *v.* Tyler (Ky.), 915.

Liability of abutting owner for cost of extending street under railroad.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

Liability of abutting owner for costs of reconstruction.
City of Louisville *v.* Tyler (Ky.), 915.

Mandamus will not lie to compel board of public improvements to enter into a contract for street litter boxes under invalid ordinance.
State *ex rel.* Belt *v.* City of St. Louis (Mo.), 402.

Objection to insufficiency of description of improvement in ordinance authorizing.
City of Chicago *v.* Holden (Ill.), 912.

Plans of engineers as part of contract with private contractors.
Young *v.* Borzone (Wash.), 924.

IMPROVEMENTS—*Continued.*

Power of board of supervisors to assess property where work has been performed by abutter.
De Haven *v.* Berendes (Cal.), 914.

Prima facie evidence of regularity of assessments.
San Francisco Paving Co. *v.* Bates (Cal.), 915.

Proposed street improvement will not be enjoined at suit of abutting owner where remedy at law.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

Reasonableness of ordinance requiring abutter to repair sidewalk.
State *v.* Richards (Conn.), 952.

Recovery for extra work done under oral directions where statute requires that all contracts relating to city affairs shall be in writing.
McManus *v.* City of Philadelphia (Penn.), 727.

Right of abutter to enjoin improvement of sidewalk to be limited to particular lot.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

Right of contractor to interest on street improvement warrants.
Tacoma Bituminous Pav. Co. *v.* Sternberg (Wash.), 925.

Right of defendant to claim benefit of excess paid by third person, in action to establish contractor's lien.
Young *v.* Borzone (Wash.), 924.

Right of landowner to damages where street grade is changed, as affected by delay in completion of work.
Peck *v.* Borough of Bristol (Conn.), 763.

Separate actions on contractor's bond.
City of Philadelphia *v.* Stewart (Pa.), 931.

Sufficiency of advertisement for bids for street improvement work.
Ellis *v.* Witmer (Cal.), 878.

Sufficiency of description of improvement in ordinance authorizing.
Fay *v.* City of Chicago (Ill.), 911.

Sufficiency of description of work in resolution of intention for the construction of sewers.
McDonnell *v.* Gillon (Cal.), 917.

Sufficiency of notice filed by assignee to establish lien for street work.
Young *v.* Borzone (Wash.), 924.

Sufficiency of notice inviting proposals.
Belser *v.* Allman (Cal.), 928.

Sufficiency of ordinance specifying quality of material.
Nichols *v.* City of Chicago (Ill.), 919.

Sufficiency of petition of citizens to call meeting to let contracts for internal improvements.
Hubbell *v.* Town of Custer City (S. Dak.), 884.

Sufficiency of petition of property owners for street improvement.
Houston *v.* City of Chicago (Ill.), 921.

Sufficiency of petition of property owner, under Illinois statute.
Trah *v.* Village of Grant Park (Ill.), 918.

Validity of contractor's lien where resolution of intention was insufficient.
Bay Rock Co. *v.* Bell (Cal.), 932.

Validity of improvement ordinances failing to specify paving material.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.

Validity of improvement ordinances referring to nonexisting plans and specifications.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.

What constitutes reconstruction of sidewalk.
City of Louisville *v.* Tyler (Ky.), 915.

What constitutes such interest as will render invalid a contract on the ground that city councilmen were unlawfully interested therein.
City of Northport *v.* Northport Town Site Co. (Wash.), 736.

IMPROVEMENTS—*Continued.*
What does not cure defect in improvement specifications.
Grant *v.* Barber (Cal.), 913.
When contract will be set aside by a court of its own motion on the ground that the councilmen were unlawfully interested therein.
City of Northport *v.* Northport Town Site Co. (Wash.), 736.
Who liable for extra cost where contractor undertakes to repair.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

IMPUTABLE NEGLIGENCE.
See Children.

INCORPORATION.
See Municipal Corporations.

INDEBTEDNESS.
See Municipal Indebtedness.

INDEPENDENT CONTRACTORS.
See Personal Injuries.

INJUNCTION.
See Improvements.
Local Assessments.
Streets and Highways.
Confession of judgment in injunction suit to restrain mayor and council from entering into contract.
Smith *v.* State (Kan.), 724.
Enjoining payment of warrants subsequently issued until warrants for salaries have been paid.
Hull *v.* Ames, City Treasurer, (Wash.), 884.
Necessary parties in proceedings to injoin sanitary district of Chicago from issuing bonds.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.
Remedy for unlawful diversion of nonnavigable interstate stream.
Pine *v.* Mayor (C. C. A.), 894.
Restraining the letting of illegal municipal contract.
Barto *v.* Board of Sup'rs of City and County of San Francisco (Cal.), 700.

INJURIES TO PROPERTY.
See Streets and Highways.
Interest on damages, in action for injury to traction engine caused by defective bridge.
Coan *v.* Brownstown Tp. (Mich.), 796.
Liability for injury to property caused by defective bridge.
Coan *v.* Brownstown Tp. (Mich.), 796.
Measure of damages for injury to buggy caused by defect in highway.
Overpeck *v.* City of Rapid City (S. Dak.), 946.
Sufficiency of complaint in action for injury to horse by reason of alleged negligent construction of street railway track.
Van Cleave *v.* City of St. Louis (Mo.), 946.
Sufficiency of complaint in action for injury to traction engine caused by defective highway.
Stauffacher *v.* Town of Sylvester (Wis.), 799.

INNOCENT PURCHASERS.
See Local Assessments.

INSPECTOR.
See Officers.

INSTRUCTIONS.
Incorrect enumeration of instructions not reversible error under statute of Iowa.
Johnson *v.* City of Sioux City (Iowa), 772.
Proximate cause.
Decker *v.* McSorley (Wis.), 284.

INTEREST.
See Bonds.
Damages.
Improvements.
Warrants.
Water Supply.

INTOXICATING LIQUORS.
Effect of annexation to city on village ordinance regulating sale.
Krause *v.* Harrison (Ill.), 187.
Indiana statute authorizing city to regulate place of sale does not authorize ordinance requiring licensee to sell on premises not owned by nor accessible to him.
Rowland *v.* City of Greencastle (Ind.), 647.

INTOXICATING LIQUORS—*Continued.*
Local law regulating sale modified by subsequent Kentucky act.
Mullins *v.* City of Lancaster (Ky.), 188.
Mandamus the proper remedy to test effect of annexation of one municipality to another on ordinance regulating sales.
Krause *v.* Harrison (Ill.), 187.
Not necessary to allege publication of ordinance prescribing limits of district within which intoxicating liquors may be sold, Indiana statute.
Rowland *v.* City of Greencastle (Ind.), 647.
Not necessary to allege publication of ordinance unless same be denied under oath, in proceedings to collect penalty for its violation.
Rowland *v.* City of Greencastle (Ind.), 647.
Ordinance prescribing limits of business portion not conclusive that place of sale was without such limits.
Rowland *v.* City of Greencastle (Ind.), 647.
Pleading ordinance by number of section and date of adoption in complaint for its violation.
Rowland *v.* City of Greencastle (Ind.), 647.
Power of city council to fix boundaries of business portion of city and prohibit sales elsewhere, Indiana statute.
Rowland *v.* City of Greencastle (Ind.), 647.
Power of council to prohibit sale in suburban portion of city when portion of suburbs is also used for business purposes, under Indiana statute authorizing city to prohibit sale of liquor outside of certain district.
Rowland *v.* City of Greencastle (Ind.), 647.
Proof of publication of ordinance prescribing limits within which intoxicating liquors may be sold.
Rowland *v.* City of Greencastle (Ind.), 647.
Provision of local law imposing penalties for violation of local option law repealed by general law.
Bailey *v.* Com. (Ky.), 187.
Special act regulating sale not repealed by subsequent Kentucky statute incorporating town.
Bailey *v.* Com. (Ky.), 187.
Validity of ordinance prohibiting sale without license
Mullins *v.* City of Lancaster (Ky.), 188.
Validity of ordinance regulating amount that may be sold in single package.
Krause *v.* Harrison (Ill.), 187.

INTOXICATION.
See Ordinances.

JOURNAL.
See City Council.

JUDGMENTS.
Payable out of what fund.
Townsend Gas & Electric Co. *v.* Hill (Wash.), 197.

JUDICIAL NOTICE.
See Ordinances.

JURISDICTION.
See Municipal Corporations.
Officers.
Ordinances.
Police Courts.
Public Improvements.
Telegraphs and Telephones.
Water and Watercourses.
Equity jurisdiction to enforce legal liability.
City of Eau Claire *v.* Payson (C. C. A.), 210.
City of Eau Claire *v.* Payson (C. C. A.), 217.
Equity jurisdiction to require partial payment on unadjudicated claim.
City of Eau Claire *v.* Payson (C. C. A.), 210.
Federal courts as dependent on citizenship, in suit by assignee.
City of Eau Claire *v.* Payson (C. C. A.), 210.
Jurisdiction of federal courts as dependent on citizenship of parties in action by assignee.
City of Eau Claire *v.* Payson (C. C. A.), 217.
Of supreme court of Illinois to test validity of proceedings for incorporation of municipality.
People *ex rel.* Bondurant *v.* Marquiss (Ill.), 835.

JURY TRIAL.
See Ordinances.

KNOWLEDGE OF DEFECTS.
See Personal Injuries.

LAND.
See Real Estate.
Streets and Highways.

LAWS.
See Statutes.

LICENSES.
See Ordinances.
Taxation.
Application of ordinance imposing license tax on peddlers.
West *v.* City of Mt. Sterling (Ky.), 687.
Brokers, who are not.
Gast *v.* Buckley (Ky.), 905.
Constitutionality of city ordinance imposing license tax.
West *v.* City of Mt. Sterling (Ky.), 687.
Constitutionality of ordinance imposing license tax upon merchants and dividing them into classes.
Clark *v.* City of Titusville (U. S.), 690.
Constitutionality of Virginia statute imposing license on persons engaged in certain occupations.
Thomas *v.* Snead (Va.), 906.
Effect of amendment of ordinance including certain occupations where ordinance was broad enough to include them.
Johnson *v.* Mayor, etc., of City of Macon (Ga.), 905.
Implied authority of city to exempt from license tax.
Thomas *v.* Snead (Va.), 906.
Licenses not imposing double taxation.
Bishoff *v.* State (Fla.), 815.
Of whom license tax may be required under Virginia statute.
Thomas *v.* Snead (Va.), 906.
One who sells only to dealers as agents of wholesalers, is not a peddler.
City of St. Paul *v.* Briggs (Minn.), 501.
Ordinance declaring person to be peddler who is not such invalid.
City of St. Paul *v.* Briggs (Minn.), 501.
Ordinance imposing license tax does not create any contract right.
Bishoff *v.* State (Fla.), 815.
Peddlers, who are.
City of St. Paul *v.* Briggs (Minn.), 501.
Power of city to impose license on person not enumerated in statute conferring authority.
City of Independence *v.* Cleveland (Mo.), 694.
Power to impose license tax on owner of vehicles.
Johnson *v.* Mayor, etc., of City of Macon (Ga.), 905.
Review by the courts of municipal discretion in fixing amount.
Woodall *v.* City of Lynchburg (Va.), 697.
Validity of ordinance requiring license to buy claims.
Gast *v.* Buckley (Ky.), 905.

LIENS.
See Improvements.
Local Assessments.
Taxation.

LIGHT COMPANIES.
See Street Lighting.

LIGHTS.
See Municipal Indebtedness.
Street Lighting.

LIMITATION OF ACTIONS.
See Taxation.
Presentation of claims against city.
Davis *v.* City of Appleton (Wis.), 937.
Retroactive operation of statute.
Thoeni *v.* City of Dubuque (Iowa), 656.
Statute not to be construed as destroying existing right of action.
Thoeni *v.* City of Dubuque (Iowa), 656.
Statute not to be construed retrospectively in absence of express words or necessary implication.
Thoeni *v.* City of Dubuque (Iowa), 656.
Statute of limitation in action on claims against city.
Davis *v.* City of Appleton (Wis.), 937.

LIVE STOCK.
See Animals.

LOCAL ASSESSMENTS.
See Bonds.
Eminent Domain.
Abutter having work done by private contractor, defence in action to enforce assessment under California statute.
De Haven *v.* Berendes (Cal.), 914.
Action of board of supervisors in assessing property where improvement has been made by abutter not validated by failure of owner to file remonstrance.
De Haven *v.* Berendes (Cal.), 914.
Action of board of supervisors in assessing property where improvement has been made by abutter not validated by his failure to appeal.
De Haven *v.* Berendes (Cal.), 914.
Admissibility of ordinance in evidence in action for commissions for collecting assessments.
Mayor, etc., of Hagerstown *v.* Startzman (Md.), 908.
Allowing credit for work performed by abutter under California statute.
De Haven *v.* Berendes (Cal.), 914.
Assessing entire cost on abutting property where contractor guarantees material.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.
Assessment not invalid as in part one for repairs where provision of contract as to repairs was merely a guaranty of the proper execution of the work.
Shank *v.* Smith (Ind.), 926.
Authority of council to determine validity of assessment under Burns' Rev. St. 1894, sec. 4294.
Leeds *v.* DeFrees (Ind.), 917.
Burden of proving irregularities in assessment proceedings, in action to enforce liens.
Belser *v.* Allman (Cal.), 928.
Collateral attack on validity of assessment.
Leeds *v.* DeFrees (Ind.), 917.
Collector's right to commissions on assessments.
Mayor, etc., of Hagerstown *v.* Startzman (Md.), 908.

LOCAL ASSESSMENTS—*Continued.*
Conflict of evidence with respect to damages and benefits.
Houston *v.* City of Chicago. (Ill.), 921.
Conformity to Michigan statute providing that common council shall assess benefits to real estate.
Goodrich *v.* City of Detroit (U. S.), 748.
Constitutionality of statute authorizing city council to determine validity of assessment.
Leeds *v.* DeFrees (Ind.), 917.
Constitutionality of statute providing for front-foot rule.
San Francisco Paving Co. *v.* Bates (Cal.), 915.
Constitutionality of Washington statute giving lien on property to any person who at the request of a property owner improves street or road.
Young *v.* Borzone (Wash.), 924.
Construction of North Dakota statute.
Pickton *v.* City of Fargo (N. Dak.), 930.
Continuous tract of land lying on both sides of street may be treated as one tract in estimating damages and benefits.
Peck *v.* Borough of Bristol (Conn.), 763.
Contractor did not lose lien for failing to return warrant within 30 days where it was returned 30 days after recordation, construction of California statute.
Cotton *v.* Watson (Cal.), 917.
Counterclaim of property owner in action by assignee to establish contractor's lien.
Young *v.* Borzone (Wash.), 924.
Delegation of city council's authority to make improvement specifications.
Grant *v.* Barber (Cal.), 913.
Dismissal of suit to enjoin collection on the ground of invalidity of assessments.
Thomas *v.* City of Portland (Ore.), 923.
Due process, failure to give notice of proceedings to make improvements.
Goodrich *v.* City of Detroit (U. S.), 748.

LOCAL ASSESSMENTS—*Continued.*

Effect of alien labor clause on validity of assessment.
Hamilton *v.* People *ex rel.* Raymond (Ill.), 929.

Effect of failure to appeal where description of improvement given by assessment and diagram was insufficient.
Blanchard *v.* Ladd (Cal.), 912.

Effect of irregularities in apportionment warrants.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.

Effect of variance between copy of and original diagram of improvement.
Blanchard *v.* Ladd (Cal.), 912.

Effect on assessments of void ordinances requiring license fee of contractor.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.

Effect on validity of assessment of fact that successful bidder had monopoly of material.
Givens *v.* People *ex rel.* Raymond (Ill.), 929.

Essentials to validity of assessment lien on abutting property.
Joyce *v.* Falls City Artificial Stone Co. (Ky.), 910.

Estoppel of abutting owner to set up a refusal of town trustees to hear objection, in action by contractor to enforce assessment lien.
Shank *v.* Smith (Ind.), 926.

Estoppel of property owners failing to attend hearing after notice to object to illegality of proceedings.
Gorman *v.* State (Ind.), 907.

Estoppel of property owners to deny validity of reassessment on the ground that original assessment was valid.
City of Port Angeles *v.* Lauridsen (Wash.), 923.

Exemptions.

Application of statute chartering Boston Asylum and Farm School.
Boston Asylum & Farm School for Indigent Boys *v.* Charles (Mass.), 746.

LOCAL ASSESSMENTS—*Continued.*

Failure of city officials to act under statute authorizing.
Pickton *v.* City of Fargo (N. Dak.), 930.

Failure to perform contract to repair as a defence in action by contractor to enforce assessment lien.
Shank *v.* Smith (Ind.), 926.

Harmless error in diagram of improvement.
Blanchard *v.* Ladd (Cal.), 912.

Harmless error in failing to strike out names of fictitious persons from complaint in action on street assessment.
Belser *v.* Allman (Cal.), 928.

Illegally basing assessments on engineer's estimate.
Pickton *v.* City of Fargo (N. Dak.), 930.

Injury to property owner presumed where assessments are irregular and illegal.
Pickton *v.* City of Fargo (N. Dak.), 930.

Issues triable by jury where objection of property owner.
Houston *v.* City of Chicago (Ill.), 921.

Jurisdictional defects not cured by description in improvement specification.
Grant *v.* Barber (Cal.), 913.

Jurisdiction of equity to restrain enforcement of special assessments, to prevent multiplicity of suits.
Dumars *v.* City of Denver (Colo.), 123.

Kentucky statute exempting city from costs of improvement not applicable to reconstruction.
City of Louisville *v.* Tyler (Ky.), 915.

Liability for extra expense where contractor is required to give security to repair.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

Liability of abutter who has had the work done.
De Haven *v.* Berendes (Cal.), 914.

Liability of abutting owner for cost of extending street under railroad.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

Liability of abutting property

LOCAL ASSESSMENTS—*Continued.*
owner for cost of reconstruction.
City of Louisville *v.* Tyler (Ky.), 915.
Liability of land in hands of innocent purchaser where city has failed to file a lis pendens in suit to foreclose street assessment lien.
Dow *v.* City of Ballard (Wash.), 761.
Liability of tax collector's sureties.
Delker *v.* City of Owensboro (Ky.), 909.
Limitations in action to enforce lien for cost of street improvement in city of Louisville.
Kirwin *v.* Nevin (Ky.), 916.
Mandamus to compel board of public works to prepare assessment list, construction of Indiana statute.
Gorman *v.* State (Ind.), 907.
Misdescription of lands taken no defence to person whose land was not taken.
Goodrich *v.* City of Detroit (U. S.), 748.
Misdescription of property assessed.
Gregory *v.* City of Ann Arbor (Mich.), 923.
Notice to nonresident property owners.
McIntosh *v.* City of Pittsburg (Penn.), 911.
Objection on merits as waiver of irregularities in notice to property owner.
Gregory *v.* City of Ann Arbor (Mich.), 923.
Objections to foreclosure alleging noncompliance with specifications for street improvements, where application for judgment of sale of property assessed.
People *v.* Whidden (Ill.), 909.
Objections to insufficiency of description of improvement in ordinance authorizing.
City of Chicago *v.* Holden (Ill.), 912.
Parol evidence of intention of council in voting for written resolutions fixing tax collector's commission, in action by collector to recover commissions.
Mayor, etc., of Hagerstown *v.* Startzman (Md.), 908.

LOCAL ASSESSMENTS—*Continued.*
Passage of ordinance.
Pickton *v.* City of Fargo (N. Dak.), 930.
Personal judgment in action to foreclose assessment lien.
Leeds *v.* De Frees (Ind.), 917.
Power of board of supervisors to assess where property owner has performed work himself.
De Haven *v.* Berendes (Cal.), 914.
Power of city to levy under Ballinger's Ann. Codes and statutes of Washington.
Smith *v.* City of Seattle (Wash.), 910.
Power to bond assessment district under Ballinger's Ann. Codes and statutes of Washington.
Smith *v.* City of Seattle (Wash.), 910.
Prima facie evidence of compliance with the statutory prerequisites not overcome.
Berry *v.* City of Chicago (Ill.), 920.
Prima facie evidence of regularity and correctness.
San Francisco Paving Co. *v.* Bates (Cal.), 915.
Remedy of warrant holder where misdescription of property.
Kirwin *v.* Nevin (Ky.), 916.
Retrospective legislation.
City of Grand Rapids *v.* Lake Shore, etc., Ry. Co. (Mich.), 741.
Right of contractor to interest on street improvement warrant.
Tacoma Bituminous Pav. Co. *v.* Sternberg (Wash.), 925.
Rights of parties not appealing from local assessment proceedings.
Berry *v.* City of Des Moines (Iowa), 922.
Right of street railway company not appealing from local assessment proceedings to defend against contention of appellant that he cannot be legally assessed for portion of paving of street car track.
Berry *v.* City of Des Moines (Iowa), 922.
Scope of curative act where assessments invalid.
Oregon Real Estate Co. *v.* City of Portland (Ore.), 921.
Thomas *v.* City of Portland (Ore.), 923.

LOCAL ASSESSMENTS—*Continued.*

Sufficiency of complaint in action to enforce assessment lien.
Leeds *v.* De Frees (Ind.), 917.

Sufficiency of description of work contained in ordinance authorizing.
Fay *v.* City of Chicago (Ill.), 911.

Sufficiency of description of work in resolution of intention to construct sewers.
McDonnell *v.* Gillon (Cal.), 917.

Sufficiency of evidence of compliance with statutory prerequisite in proceedings for confirmation of assessment.
Yaggy *v.* City of Chicago (Ill.), 919.

Sufficiency of notice and opportunity for hearing.
Voigt *v.* City of Detroit (U. S.), 755.

Sufficiency of notice filed by assignee to establish lien for street work.
Young *v.* Borzone (Wash.), 924.

Sufficiency of notice inviting proposals for improvement work.
Belser *v.* Allman (Cal.), 928.

Sufficiency of ordinance specifying quality of material.
Nichols *v.* City of Chicago (Ill.), 919.

Sufficiency of petition of property owners for street improvement.
Houston *v.* City of Chicago (Ill.), 921.

Sufficiency of petition of property owner under Illinois statute.
Leeds *v.* De Frees (Ind.), 917.

Sufficiency of publication authorizing construction of improvement.
Dumars *v.* City of Denver (Colo.), 123.

Sufficiency of rule of assessment to satisfy constitutional guaranty of due process of law.
Voigt *v.* City of Detroit (U. S.), 755.

Tender of amount of assessment not a condition precedent to right of taxpayer to enjoin.
Dumars *v.* City of Denver (Colo.), 123.

LOCAL ASSESSMENTS—*Continued.*

Vacation of assessment pending appeal.
Berry *v.* City of Des Moines (Iowa), 922.

Vacation of judgment confirming under Illinois statute.
City of Chicago *v.* Nicholes (Ill.), 920.

Validity of assessments as affected by failure to publish ordinance authorizing improvement.
Dumars *v.* City of Denver (Colo.), 123.

Validity of bond given by tax collector.
Delker *v.* City of Owensboro (Ky.), 909.

Validity of contractor's lien where resolution of intention to perform work was insufficient.
Bay Rock Co. *v.* Bell (Cal.), 932.

Validity of improvement ordinances referring to nonexisting plans and specifications.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.

Validity of judgment against nonresident property owners who might have become parties.
McIntosh *v.* City of Pittsburg (Penn.), 911.

What constitutes reconstruction of sidewalks.
City of Louisville *v.* Tyler (Ky.), 915.

What does not cure defects in improvement specifications.
Grant *v.* Barber (Cal.), 913.

When invalid assessment a cloud upon title.
Dumars *v.* City of Denver (Colo.), 123.

LOCAL CARRIERS.

See Ordinances.

LOCAL LABOR.

See Local Assessments.

MAGISTRATES.

See Officers.

MANDAMUS.
See Appeals.
Officers.
Ordinances.
Taxation.
Mandamus to compel removal of news stand encroaching on sidewalk refused where encroachment was very slight.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.
Mandamus to compel removal of news stand under stairway of elevated railway.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.
Right of taxpayer to mandamus to compel removal of news stands encroaching on sidewalk.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.
Scope of issues in mandamus proceedings to prevent interference with boundaries.
Town of Kent *v.* Pratt (Conn.), 936.
Sufficiency of return.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

MAPS.
Power to contract for map of city.
State *v.* Mayor (N. J.), 885.

MARKETS.
See Ordinances.
Power of city to authorize private persons to build markets and collect revenues therefrom.
City of New Orleans *v.* Vidalat (La.), 446.

MARRIED WOMEN.
See Taxation.

MARSHALS.
See Officers.

MASTER AND SERVANT.
See Fire Departments.
Municipal Corporations.
Officers.
Personal Injuries.

MAXIM DE MINIMIS.
See Taxation.

MAYOR.
See Officers.

MERCHANTS.
See Licenses.

MILK.
See Ordinances.

MILL PRIVILEGES.
See Water and Watercourses.

MISAPPROPRIATION.
See Warrants.

MORTALITY TABLES.
See Evidence.

MUNICIPAL BONDS.
See Bonds.

MUNICIPAL CORPORATIONS.
See Boundaries.
Charters.
Constitutional Law.
Contracts.
Eminent Domain.
Fire Department.
Health Department.
Injuries to Property.
Judgments.
Light Companies.
Markets.
Municipal Indebtedness.
Officers.
Parks.
Personal Injuries.
Process.
Real Estate.
Records.
Streets and Highways.
Streets and Sidewalks.
Taxation.
Telegraphs and Telephones
Ultra Vires.
Warrants.
Water Companies.
Water Rates.
Water Supply.
Water and Watercourses.
Acceptance of statute relating to police and fire department in towns, construction of Massachusetts statute.
Ray *v.* De Butts (Mass.), 839.
Admissibility of other evidence to prove acts of city council where no records are kept.
Brown *v.* City of Webster City (Iowa), 559.
Area of territory to be incorporated under Illinois statute.
People *ex rel.* Bondurant *v.* Marquiss (Ill.), 835.
Assumption of risk by employee engaged in construction of public work.
McDougald *v.* Town of Lumberton (N. Car.), 137.

MUNICIPAL CORPORATIONS—*Continued.*

Authority of city organized by special act to surrender special charter and adopt one under general law.
Somo Lumber Co. *v.* Lincoln County (Wis.), 895.

Authority to establish municipal lighting plant under laws of Maryland.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.

Certiorari will not lie to review action of commissioner in removing municipal employee.
People *v.* Brady (N. Y.), 95.

Change of ward lines must be by ordinance.
State *v.* City of Elizabeth (N. J.), 837.

City not entitled to fees of notary also acting as city clerk.
Wood *v.* City of Kansas City (Mo.), 841.

City not estopped to claim additional strip by failure to improve street to entire width.
Davis *v.* City of Appleton (Wis.), 937.

Confession of judgment in injunction suit against mayor and council to restrain them from making contract.
Smith *v.* State (Kan.), 724.

Consolidation of several municipalities not prohibited by constitution of West Virginia.
State *v.* Hoard (Tex.), 834.

Constitutionality of statute incorporating city of Morgantown.
Mayor, etc., of Town of Morgantown *v.* City of Morgantown (W. Va.), 834.

Detachment of Territory.

Application of Nebraska statute relating to detachment of territory.
Village of Osmond *v.* Smathers (Neb.), 835.

Filing of ordinance as the consummation of the act.
People *ex rel.* Glenn *v.* Binns (Ill.), 836.

Right of nonresident to maintain suit for detachment.
Village of Osmond *v.* Smathers (Neb.), 835.

Right of nonresident to maintain suit for detachment of agricultural land.
Village of Osmond *v.* Matterson (Neb.), 836.

MUNICIPAL CORPORATIONS—*Continued.*

To whom Nebraska statute is available.
Village of Osmond *v.* Matterson (Neb.), 836.

Whether repeal of statute pending proceedings is an infringement of vested rights.
People *ex rel.* Glenn *v.* Binns (Ill.), 836.

Effect of partial invalidity, in provision for issue of bonds, construction of Miss. Code.
Board of Mayor, etc., of Town of Pontotoc *v.* Fulton (Miss.), 634.

Estoppel of city to deny existence of street at place of accident.
May *v.* City of Anaconda (Mont.), 949.

Incorporation not invalid for failure to include whole town, under Arizona statute.
Territory *ex rel.* Attorney General *v.* Town of Jerome (Ariz.), 833.

Jurisdiction to appoint trustees where town lies in two counties.
Yancy *v.* Town of Fairview (Ky.), 658.

Laws authorizing incorporation not unconstitutional for not providing for notice to taxable inhabitants.
Territory *ex rel.* Attorney General *v.* Town of Jerome (Ariz.), 833.

Legislative policy of New York as to the division of cities into wards.
State *v.* City of Elizabeth (N. J.), 837.

Liability of city for acts of officers in impressing horses.
City of Galveston *v.* Brown (Tex.), 674.

Liability of city for legal service rendered in unauthorized action.
Root *v.* City of Topeka (Kan.), 886.

Liability of city to holders of warrants drawn on special fund where such fund has been misappropriated.
Quaker City Nat. Bank of Philadelphia *v.* City of Tacoma (Wash.), 623.

MUNICIPAL CORPORATIONS—*Continued.*

May bind themselves by implied contracts.
City of Austin *v.* Bartholmew (C. C. A.), 370.
Nalle *v.* City of Austin (C. C. A.), 370.

Meander lines as boundaries of donation.
Pacific Sheet Metal Works *v.* Roeder (Wash.), 901.

Power of Chicago to build new bridge to replace bridges rendered useless by the widening of the river by sanitary district.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.

Power of chief of supply department to appoint inspector under Massachusetts statute.
Muldoon *v.* City of Lowell (Mass.), 839.

Power of city of St. Louis to acquire land outside of city for wharf purposes.
Hafner *v.* City of St. Louis (Mo.), 889.

Power of city to issue commercial paper.
Coquard *v.* Village of Oquawka (Ill.), 880.

Power of supply department to appoint inspector under Massachusetts statute.
Muldoon *v.* City of Lowell (Mass.), 839.

Power to contract for map of city.
State *v.* Mayor (N. J.), 885.

Power to enter into agreement to close passway not included in power to pave streets.
City of Paris *v.* Lilleston (Ky.), 887.

Power to impress horses must be expressly conferred, and exercised only in manner prescribed.
City of Galveston *v.* Brown (Tex.), 674.

Power to lease water terminals of street.
Hirsch *v.* Mayor, etc., of City of Brunswick (Ga.), 793.

Power to remove veterans from services of municipality without trial.
Stutzbach *v.* Coler, City Comptroller, (N. Y.), 72.

Ratification of unauthorized contract for legal services.
Root *v.* City of Topeka (Kan.), 886.

MUNICIPAL CORPORATIONS—*Continued.*

Recovery for extra work done under oral directions where statute requires that all contracts relating to city affairs shall be in writing.
McManus *v.* City of Philadelphia (Penn.), 727.

Repeal of charter of municipal corporations not prohibited by constitution of West Virginia.
State *v.* Hoard (Tex.), 834.

Repeal of statute authorizing change of ward lines by resolution.
State *v.* City of Elizabeth (N. J.), 837.

Restraining illegal municipal contract.
Barto *v.* Board of Sup'rs of City and County of San Francisco (Cal.), 700.

Restriction as to population on right to incorporate, construction of Wisconsin constitution.
State *v.* Lammers (Wis.), 115.

Review by supreme court of Illinois of proceedings to test validity of incorporation.
People *ex rel.* Bondurant *v.* Marquiss *et al.* (Ill.), 835.

Right of taxpayer to restrain proposed bond issue.
Le Tourneau *v.* City of Duluth (Minn.), 627.

State cannot authorize municipality to divert waters of nonnavigable interstate stream to the injury of riparian owners in the other state.
Pine *v.* Mayor (C. C. A.), 894.

Under its power to contract for map of city a municipality may have furnished list of property owners.
State *v.* Mayor (N. J.), 885.

Validity of incorporation as affected by failure to file plat.
State *v.* Hoard (Tex.), 834.

Validity of incorporation as affected by failure to include land not intended for town purposes.
State *v.* Hoard (Tex.), 834.

Validity of ordinance creating fund to replace misappropriated fund.
Quaker City Nat. Bank of Philadelphia *v.* City of Tacoma (Wash.), 623.

Ward lines, declaration of New Jersey legislative policy.
State *v.* City of Elizabeth (N. J.), 837.

MUNICIPAL CORPORATIONS—*Continued.*

What constitutes misappropriation of municipal funds, payment of subsequent warrants in preference to those previously issued.
Quaker City Nat. Bank of Philadelphia *v.* City of Tacoma (Wash.), 623.

When action of city officer in removing municipal employee is not reviewable by courts.
People *ex rel.* Kennedy *v.* Brady, Building Com'r, (N. Y.), 95.

Whether statute authorizing incorporation special or general.
People *ex rel.* Bondurant *v.* Marquiss (Ill.), 835.

Whether territory to be incorporated must be platted under Illinois statute.
People *ex rel.* Bondurant *v.* Marquiss (Ill.), 835.

Who may question power of city of St. Louis to acquire and hold land outside of city for wharf purposes.
Hafner *v.* City of St. Louis (Mo.), 889.

MUNICIPAL INDEBTEDNESS
See Municipal Corporations.

Effect of illegal amendment of charter on municipal indebtedness on account of officers' salaries.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.

Limitation of Indebtedness.

Basis to determine whether statutory limit of sanitary district has been exceeded.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.

Burden of proving that limit has been exceeded, in action to recover for work and labor.
Adams *v.* City of Waterville (Me.), 392.

City not estopped by recital in bonds from showing that they exceed limit of indebtedness.
City of Pierre *v.* Dunscomb (C. C. A.), 874.

Contract for light and water void as creating indebtedness in excess of constitutional limit.
Duncan *v.* City of Charleston (S. Car.), 343.
Peiper *v.* City of Charleston (S. Car.), 343.

MUNICIPAL INDEBTEDNESS—*Continued.*

Expenses of supplying water and lights as ordinary expenses, construction of statute providing for taxation.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

Funding bonds create no debt.
City of Pierre *v.* Dunscomb (C. C. A.), 874.

Power of city already indebted for such purpose to raise money to pay for water mains.
Smith *v.* City of Seattle (Wash.), 910.

Issuance of bonded indebtedness not prevented by South Carolina statute limiting municipal indebtedness.
Bray *v.* City Council of Florence (S. Car.), 879.

Right of contractor to recover on contract creating debt in excess of income where part of contract price is to cover future repairs, construction of Kentucky statute.
City of Louisville *v.* Gosnell (Ky.), 886.

Sufficiency of complaint in action to invalidate contract by city on the ground that it creates an indebtedness in excess of income, in violation of Kentucky constitution.
City of Louisville *v.* Gosnell (Ky.), 886.

Validity of bonds issued in excess of limit.
City of Pierre *v.* Dunscomb (C. C. A.), 874.

Validity of bonds where same exceed debt limit.
Gable *v.* City of Altoona (Pa.), 871.

Warrants issued for salaries not invalid because issued for necessary expenses.
Hull *v.* Ames, City Treasurer, (Wash.), 884.
Gladwin *v.* Ames, City Treasurer, (Wash.), 884.

MUNICIPAL INDEBTEDNESS —*Continued.*
Power of legislature to compel payment of debt contracted during previous illegal existence.
State *ex rel.* Cooper *v.* Springer (N. J.), 389.
Validity of statute of New Jersey entitled an act relating to certain borough governments and requiring the payment of their debts.
State *ex rel.* Cooper *v.* Springer (N. J.), 389.

MUNICIPAL RECORDS.
See Records.

NEGLIGENCE.
See Fire Department.
Health Department.
Injuries to Property.
Personal Injuries.

NEGOTIABLE INSTRUMENTS.
See Warrants.

NEWS STANDS.
See Streets and Highways.

NONUSER.
See Water and Watercourses.

NOTARIES.
See Officers.

NOTICE.
See Personal Injuries.

NOTICE OF CLAIM.
See Streets and Sidewalks.
Torts.

NUISANCES.
See Streets and Highways.
Barbed wire across street undergoing repairs where absence of light or other warning is given.
City of Glasgow *v.* Gillenwaters (Ky.), 786.

OBLIGATIONS OF CONTRACT.
See Constitutional Law.

OBSTRUCTIONS.
See Personal Injuries.
Streets and Highways.

OCCUPATION TAXES.
See Licenses.

OFFENCES.
See Ordinances.

OFFICERS.
See Light Companies.
Ordinances.
Police.
Streets and Highways.
Taxation.
Warrants.
Action on bond given by city treasurer, how brought.
Somerville *v.* Wood (Ala.), 842.
Action to oust person unlawfully acting as school commissioner is properly brought in name of state under Wisconsin statute.
State *ex rel.* Nelson *v.* Mott (Wis.), 849.
Aldermen unlawfully increasing municipal indebtedness not ineligible to re-election.
State *ex rel.* Graves, Dist. Atty., *v.* Cavett (Miss.), 848.
Appointment by legislature as unconstitutional interference with local affairs, construction of Wisconsin statute.
O'Connor *v.* City of Fond du Lac (Wis.), 526.
Appointment of deputies of county officers under consolidated government of city and county of San Francisco.
Crowley *v.* Freud (Cal.), 840.
Appointment of station-house keepers under New York constitution.
People *ex rel.* Dunn *v.* Ham (N. Y.), 846.
Authority of board of education to select school site.
Com. *v.* Davis (Penn.), 843.
Authority of general court to delegate to commissioners its powers with respect to fixing salary of policeman.
Gooch *v.* Town of Exeter (N. H.), 544.
Authority of general court to fix salary, construction of New Hampshire constitution.
Gooch *v.* Town of Exeter (N. H.), 544.
Authority of legislature to divest mayor of Detroit of authority to appoint administrative officers.
Oren *v.* Bolger (Mich.), 538.
Authority of selectmen to determine questions as to boundaries.
Town of Kent *v.* Pratt (Conn.), 936.

OFFICERS—*Continued.*

Authority of superintendent of lamps to appoint and discharge workmen under Baltimore city charter.
American Lighting Co. of Baltimore City *v.* McCuen (Md.), 191.

City engineer, continuance of office by virtue of city ordinances after repeal of statute creating office.
Commonwealth *ex rel.* O'Rourke *v.* Davis *et al.* (Pa.), 843.

City not entitled to fees of notary also acting as city clerk.
Wood *v.* City of Kansas City (Mo.), 841.

Civil service as affecting right to remove.
Thompson *v.* Troup (Conn.), 107.

Clerk in municipal office not estopped from claiming fees for service rendered as notary by having received compensation as clerk.
Wood *v.* City of Kansas City (Mo.), 841.

Colorable abolition of office by change of name does not justify dismissal of municipal officers holding under civil service act.
City of Chicago *v.* Luthardt (Ill.), 110.

Competitive examination, examiners not restricted as to number to be nominated under Acts 1900, c. 16.
Keyser *v.* Upshur (Md.), 845.

Constitutionality of Nebraska statute authorizing removal of police magistrates by district courts.
Gordon *v.* Moores (Neb.), 841.

Constitutional provision as to term of office applicable only to office created by constitution of New York.
People *ex rel.* Ward *v.* Scheu (N. Y.), 844.

Construction of provision of Wisconsin constitution on the subject of appointment of municipal officers.
O'Connor *v.* City of Fond du Lac (Wis.), 526.

Control of discretion of municipal officers by courts.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

OFFICERS—*Continued.*

De facto officers, validity of acts.
Yancy *v.* Town of Fairview (Ky.), 658.

De facto officers will not be enjoined from performing duty of office.
Chambers *v.* Adair (Ky.), 871.

Distinction between general and municipal elections, construction of Buffalo city charter.
People *ex rel.* Ward *v.* Scheu (N. Y.), 844.

Effect of failure to swear mayor and council before entering upon trial of charges against city.
State *v.* City of Noblesville (Ind.), 99.

Effect of illegal amendment of charter on municipal indebtedness on account of officers' salaries.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.

Effect of provision forbidding the incurring of expenses without previous appropriation on right to recover wages during time of suspension.
City of Chicago *v.* Luthardt (Ill.), 110.

Election of aldermen as affected by changing class of cities, construction of Colorado statute.
Harris *v.* Chambers (Colo.), 843.

Extension of term of office as an unconstitutional interference with local self-government.
O'Connor *v.* City of Fond du Lac (Wis.), 526.

Extension of term of office by legislature not unconstitutional interference with municipal powers of city of Detroit.
Common Council of City of Detroit *v.* Schmid (Mich.), 515.
Ruoff *v.* Common Council of City of Detroit (Mich.), 515.

Failure to reappoint police constable did not vacate his appointment, under Central Falls Charter, ch. 4, cl. 2.
Lowrey *v.* Mayor, etc., of Central Falls (R. I.), 103.

Filling vacancy under constitution of New York.
People *ex rel.* Ward *v.* Scheu (N. Y.), 844.

OFFICERS—*Continued.*
Fireman not estopped to claim full salary by signing contract consenting to reduction.
Nelson *v.* City of Superior (Wis.), 848.
Insufficiency of record to show amount of legal salary, in action to recover for reduction.
Nelson *v.* City of Superior (Wis.), 848.
Interference with right of electors to choose municipal officers in violation of constitution of Wisconsin.
O'Connor *v.* City of Fond du Lac (Wis.), 526.
Jurisdiction to appoint trustees where town lies in two counties.
Yancy *v.* Town of Fairview (Ky.), 658.
Liability of city for removal of officers in violation of civil service law.
City of Chicago *v.* Luthardt (Ill.), 110.
Liability of sureties on bond of city marshal where arrest is made without warrant.
Drolesbaugh *v.* Hill (Ohio), 842.
Mandamus proper remedy to compel reinstatement.
Thompson *v.* Troup (Conn.), 107.
Mandamus to compel council to fix reasonable salary for city marshal where it is discretionary with council.
State *v.* City of Noblesville (Ind.), 837.
Method of filling vacancy in office of commissioner of public works, under constitution of New York.
People *ex rel.* Ward *v.* Scheu (N. Y.), 844.
Obligations of sureties on bond given by city treasurer.
Somerville *v.* Wood (Ala.), 842.
Power of city attorney to compromise claim for taxes.
City of Louisville *v.* Louisville Ry. Co. (Ky.), 677.
Power of city council to appoint, construction of charter of Detroit.
Oren *v.* Bolger (Mich.), 538.
Power of common council to abolish position of station-house keeper under New York statute.
People *ex rel.* Dunn *v.* Ham (N. Y.), 846.

OFFICERS—*Continued.*
Power of court to order special election to fill vacancy in common council of city of Detroit.
Common Council of City of Detroit *v.* Schmid (Mich.), 515.
Ruoff *v.* Common Council of City of Detroit (Mich.), 515.
Power of de facto officer to bind city.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.
Power of mayor and council to create office of city marshal and require official bond.
Somerville *v.* Wood (Ala.), 842.
Power of supply department to appoint inspector under Massachusetts statute.
Muldoon *v.* City of Lowell (Mass.), 839.
Recovery of salary during time of suspension.
City of Chicago *v.* Luthardt (Ill.), 110.
Right of chief of police to hold office and receive emoluments under statute of Wisconsin extending term of office.
O'Connor *v.* City of Fond du Lac (Wis.), 526.
Right of notary in city clerk's office to fees where ordidinance declaring that they shall be turned over to city treasury is invalid as contravening statute.
Wood *v.* City of Kansas City (Mo.), 841.
Right of policeman appointed by police commission to recover salary from town, construction of New Hampshire statute.
Gooch *v.* Town of Exeter (N. H.), 544.
Right to hearing before removal.
Thompson *v.* Troup (Conn.), 107.
Scope of charter provision respecting removals.
Thompson *v.* Troup (Conn.), 107.
Special act regulating term of office not repealed by general enactment, construction of Rhode Island statutes.
Lowrey *v.* Mayor, etc., of Central Falls (R. I.), 103.
Statute of Michigan providing for the appointment of municipal officers not invalid as

OFFICERS—*Continued.*
embracing more than one object in its title.
Oren, Attorney General, *ex rel.* Maybury, Mayor, *v.* Bolger (Mich.), 538.
Statute of New Hampshire authorizing governor to appoint police commissioners not unconstitutional.
Gooch *v.* Town of Exeter (N. H.), 544.
Tender of services not necessary after notice of dismissal in order to maintain proceedings for reinstatement.
Lowrey *v.* Mayor, etc., of Central Falls (R. I.), 103.
Time of election of board of education under Kentucky statute.
Chambers *v.* Adair (Ky.), 871.
Validity of Buffalo city charter provision for filling vacancies.
People *ex rel.* Ward *v.* Scheu (N. Y.), 844.
Validity of Ind. Acts 1867, p. 75, sec. 88, authorizing common council to remove municipal officers.
State *v.* City of Noblesville (Ind.), 99.
Validity of nominations for appointment, under Maryland statute.
Keyser *et al. v.* Upshur *et al.*, Police Com'rs, (Md.), 845.
What constitutes such interest as will render improvement contract invalid on the ground that councilmen were unlawfully interested therein.
City of Northport *v.* Northport Town Site Co. (Wash.), 736.
When legislative interference with respect to appointment of municipal officers is not unconstitutional, construction of Detroit statute.
Common Council of City of Detroit *v.* Schmid (Mich.), 515.
Ruoff *v.* Common Council of City of Detroit (Mich.), 515.
When mayor may cast deciding vote in election of school commissioners by mayor and council.
State *ex rel.* Nelson *v.* Mott (Wis.), 849.
Whether concurrent exercise by two departments of power to remove officers is not in violation of Nebraska constitution.
Gordon *v.* Moores (Neb.), 841.
Whether firemen are officers within the meaning of Wisconsin statute prohibiting reduction of salaries.
Nelson *v.* City of Superior (Wis.), 848.
Whether officers of consolidated city and county government are county officers, under California constitution.
Crowley *v.* Freud (Cal.), 840.
Who are city officers under civil service law of Illinois.
City of Chicago *v.* Luthardt (Ill.), 110.

OFFICIAL BONDS.
See Officers.

OMNIBUSES.
See Ordinances.

ORDINANCES.
See Disorderly Houses.
Improvements.
Intoxicating Liquors.
Licenses.
Local Assessments.
Peddlers.
Street Lighting.
Streets and Highways.
Taxation.
Telegraphs and Telephones.
Allegation of unconstitutionality.
City of New Orleans *v.* Chappuis (La.), 181.
Application of constitutional guaranty of right of trial by jury in cases in police courts for violation of ordinance.
In re Kinsel (Kan.), 643.
Authority of city of New Orleans to require that certain articles of food shall be sold only in public markets.
City of New Orleans *v.* Vidalat (La.), 446.
Authority to enact penal ordinance against drunkenness.
Village of Fairmont *v.* Meyer (Minn.), 189.
Construction of criminal ordinances.
City of New Orleans *v.* Chappuis (La.), 181.
Definiteness of paving ordinance.
Houston *v.* City of Chicago (Ill.), 921.

ORDINANCES—*Continued.*

Departure of declaration from original complaint in prosecution of attorney for practising without license.
Ahlrichs *v.* City of Cullman (Ala.), 904.

Effect of annexation to city on village ordinance regulating sale of intoxicating liquors.
People *ex rel.* Krause *v.* Harrison (Ill.), 187.

Evidence of other violation of ordinance prohibiting animals from running at large, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

Failure to prescribe time for abutter to repair sidewalk.
State *v.* Richards (Conn.), 952.

Judicial notice.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.

Jurisdiction to try person for a municipal offence which is also a violation of state law.
Reeves *v.* City of Atlanta (Ga.), 669.

Liability of city for failure to enforce ordinance regulating speed of wheelman.
Mayor, etc., of City of Hagerstown *v.* Klotz (Md.), 303.

Mandamus proper remedy to test effect of annexation of one municipality to another on ordinances regulating sales of intoxicating liquors.
People *ex rel.* Krause *v.* Harrison (Ill.), 187.

North Dakota statute requiring ordinances to be passed by yea and nay vote mandatory.
Pickton *v.* City of Fargo (N. Dak.), 930.

Notice to councilmen of special meeting held to pass ordinance to regulate water rates.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.

Object not expressed in title.
State *ex rel.* Belt *v.* City of St. Louis (Mo.), 402.

Obligation of ordinance granting franchise as affected by statute of frauds.
Graves County Water Co. *v.* Ligon (Ky.), 653.

Ordinance requiring coal to be weighed on city scales not applicable to sale of small quantity.
Wills *v.* City of Ft. Smith (Ark.), 665.

Pleading ordinance prohibiting animals from running at large, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

Power of common council to prohibit the running of traction engines on streets.
Bogue *v.* Bennett (Ind.), 802.

Power to repeal or modify.
Bishoff *v.* State (Fla.), 815.

Presence of members of council at time of passage of ordinances not presumed from roll call.
Pickton *v.* City of Fargo (N. Dak.), 930.

Proof of publication, Indiana statute.
Rowland *v.* City of Greencastle (Ind.), 647.

Publication in Sunday paper.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.

Publication under Burns' Rev. St. Ind., sec. 3535.
State *v.* City of Noblesville (Ind.), 99.

Publication, whether charter provision mandatory or directory.
Reed *v.* City of Louisville (Ky.), 898.

Purpose of North Dakota statute requiring ordinances to be passed by yea and nay vote.
Pickton *v.* City of Fargo (N. Dak.), 930.

Purpose of North Dakota statute requiring ordinances to be passed by yea and nay vote.
Pickton *v.* City of Fargo (N. Dak.), 930.

Reasonableness of ordinance prohibiting burial within city limits.
Wygant *v.* McLauchlan (Ore.), 420.

Reasonableness of ordinance requiring abutter to repair sidewalk.
State *v.* Richards (Conn.), 952.

Reasonableness of ordinance requiring coal to be weighed on city scales.
Wills *v.* City of Ft. Smith (Ark.), 665.

ORDINANCES—*Continued.*

Right of city recorder to take judicial notice of ordinance.
State *v.* Judge of Criminal District Court (La.), 635.

Right of party sentenced to fine or imprisonment to have constitutionality of ordinance tested in supreme court.
City of New Orleans *v.* Chappuis (La.), 181.

Sufficiency of affidavit to support declaration in prosecution for violation of ordinance.
Ahlrichs *v.* City of Cullman (Ala.), 904.

Sufficiency of complaint charging violation of ordinance.
Village of Fairmont *v.* Meyer (Minn.), 189.

Sufficiency of evidence to sustain conviction of omnibus driver for failure to wear number.
City of Atlantic City *v.* Turner (N. J.), 673.

Sufficiency of evidence to warrant affirmative charge in prosecution of attorney for practising without license in violation of ordinance.
Ahlrichs *v.* City of Cullman (Ala.), 904.

Sufficiency of information, in prosecution for violation of ordinance regulating sale of milk.
State *v.* Tyrrell (Conn.), 426.

Town ordinance cannot effect repeal of general law with which it is in conflict.
Bailey *v.* Com. (Ky.), 187.

Validity of contract by health board entered into under invalid ordinance.
Goddard *v.* City of Lowell (Mass.), 888.

Validity of ordinance imposing fee for weighing coal on city scales.
Wills *v.* City of Ft. Smith (Ark.), 665.

Validity of ordinance prohibiting pool selling or horse racing which conflicts with state law.
Ex parte Ogden (Tex.), 670.

Validity of ordinance prohibiting sale of intoxicating liquors without license.
Mullins *v.* City of Lancaster (Ky.), 188.

Validity of ordinance prohibiting sale of intoxicating liquors in single package in quantities less than four gallons.
People *ex rel.* Krause *v.* Harrison (Ill.), 187.

Validity of ordinance prohibiting the scattering of paper.
City of Philadelphia *v.* Brabender (Penn.), 661.

Validity of ordinance prohibiting the scattering of paper, discrimination.
City of Philadelphia *v.* Brabender (Penn.), 661.

Validity of ordinance prohibiting the use of streets for traction engine.
Bogue *v.* Bennett (Ind.), 802.

Validity of ordinance providing for location of public markets.
City of New Orleans *v.* Vidalat (La.), 446.

Validity of ordinance providing that fees of notary in city clerk's office shall be turned in to city treasury.
Wood *v.* City of Kansas City (Mo.), 841.

Validity of ordinance regulating sale of milk where subject-matter is covered by general statute.
State *v.* Tyrrell (Conn.), 426.

Violation of ordinance prohibiting animals from running at large as negligence, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

What constitutes two-thirds vote of common council, when attempting to pass ordinance over veto, where members have died or resigned.
Pollasky *v.* Schmid, City Clerk, (Mich.), 839.

What constitutes violation of ordinances prohibiting animals from running at large.
Decker *v.* McSorley (Wis.), 284.

PARENT AND CHILD.

See Children.
Streets and Highways.

PARKS.

Statute providing for acquisition of land for park purposes superseded by charter of San Francisco.
Fritz *v.* City and County of San Francisco (Cal.), 870.

PARTIES.
See Appeals.
Injunction.
Jurisdiction.

PASSWAY.
See Streets and Highways.

PAYMENT UNDER PROTEST.
See Taxation.

PEDDLERS.
See Licenses.

PENALTIES.
See Disorderly Houses.
Drunkenness.
Ordinances.

PERSONAL INJURIES.
See Animals.
Health Department.
Ordinances.
Streets and Highways.
Streets and Sidewalks.

Admissibility of evidence that horse had been previously driven over road, as tending to show why horse left traveled track, in action for personal injuries caused by failure to maintain guard rail at excavation in highway.
Johnson *v.* City of Sioux City (Iowa), 772.

Barbed wires across street undergoing repairs where no light is maintained or warning given.
City of Glasgow *v.* Gillenwaters (Ky.), 786.

Care required of water company making excavation in street.
Robinson *v.* Mills (Mont.), 948.

Contributory Negligence.

Admissibility of evidence as to whether plaintiff was ordinarily a fast driver.
City of Salem *v.* Webster (Ill.), 951.

As a matter of defence.
Snook *v.* City of Anaconda (Mont.), 950.

Collision with bowlder in unlighted street.
May *v.* City of Anaconda (Mont.), 949.

Crossing street at place other than regular crossing.
City of Glasgow *v.* Gillenwaters (Ky.), 786.

Degree of care required of plaintiff in action for personal injuries caused by defective sidewalk.
Phelps *v.* City of Salisbury (Mo.), 954.

Manner of driving horse where collision between vehicle and hydrant standing near curb.
St. Germain *v.* City of Fall River (Mass.), 947.

Question for jury where horse and buggy were injured by reason of excavation in highway.
Overpeck *v.* City of Rapid City (S. Dak.), 946.

Question for jury where horse is frightened at point where street is undergoing repairs.
Coles *v.* Revere (Mass.), 789.

Trotting along defective sidewalk with hands in overcoat pocket.
Wilton *v.* City of Flint (Mich.), 384.

Damages.

Considering age of plaintiff.
Phelps *v.* City of Salisbury (Mo.), 954.

Evidence of home treatment of accused.
City of Salem *v.* Webster (Ill.), 951.

Excessive verdict.
City of Glasgow *v.* Gillenwaters (Ky.), 786.

Failure of plaintiff to disclose true condition to physician, instruction not warranted by evidence.
City of Rock Island *v.* Starkey (Ill.), 954.

Measure of damages.
City of Salem *v.* Webster (Ill.), 951.

Measure of damages for injury to horse.
Overpeck *v.* City of Rapid City (S. Dak.), 946.

Nervous condition aggravated by subsequent injuries.
City of Rock Island *v.* Starkey (Ill.), 954.

Pleading.
Mauch *v.* City of Hartford (Wis.), 959.

Probable consequences of injury.
Snook *v.* City of Anaconda (Mont.), 950.

PERSONAL INJURIES—*Continued.*

Degree of care required of water company in filling excavation in street.
Robinson *v.* Mills (Mont.), 948.

Duty of water company making excavation in street to restore it to safe condition.
Robinson *v.* Mills (Mont.), 948.

Effect of amendment of charter upon pending causes of action.
Mauch *v.* City of Hartford (Wis.), 959.

Erroneous instruction assuming existence of defect in sidewalk.
Byington *v.* City of Merrill (Wis.), 956.

Estoppel of city to deny existence of street at place of accident.
May *v.* City of Anaconda (Mont.), 949.

Evidence as to existence of buggy tracks at place of accident, observed ten days after, in action for personal injuries caused by failure to maintain guard rail at excavation in highway.
Johnson *v.* City of Sioux City (Iowa), 772.

Excavation in street as nuisance per se.
Robinson *v.* Mills (Mont.), 948.

Expert testimony with respect to nature of injury.
City of Rock Island *v.* Starkey (Ill.), 954.

Failure to properly guard excavation in highways, question for jury.
Overpeck *v.* City of Rapid City (S. Dak.), 946.

Governmental duty of repairing street not changed in its nature by acceptance of charter authorizing city to repair.
Colwell *v.* City of Waterbury (Conn.), 780.

Harmless error in admitting evidence as to city's notice of defect.
Snook *v.* City of Anaconda (Mont.), 950.

Harmless error in admitting evidence in action for personal injuries caused by excavation in street.
City of Salem *v.* Webster (Ill.), 951.

Harmless error in instruction failing to connect injury with city's negligence.
City of Salem *v.* Webster (Ill.), 951.

Hydrant projecting beyond curb, whether a defect in street.
St. Germain *v.* City of Fall River (Mass.), 947.

Implied exemption of city from liability.
May *v.* City of Anaconda (Mont.), 949.

Knowledge of street commissioner of defect in sidewalk as notice to city, sufficiency of evidence.
Mauch *v.* City of Hartford (Wis.), 959.

Liability for personal injuries caused by barbed wire across street undergoing repairs where failure to maintain light.
City of Glasgow *v.* Gillenwaters (Ky.), 786.

Liability of city for act of water commissioner in placing hydrant beyond curb.
St. Germain *v.* City of Fall River (Mass.), 947.

Liability of city for death caused by dangerous sewer.
City of Rome *v.* Cheney (Ga.), 140.

Liability of city for failure of independent contractor to place light where street was undergoing repairs.
City of Glasgow *v.* Gillenwaters (Ky.), 786.

Liability of city for frightening horses by blowing off steam when using stone crusher.
Butman *v.* City of Newton (Mass.), 775.

Liability of city for injury to its employee caused by pole on private land of city, erected by electric light company.
Barker *v.* Boston Electric Light Co. (Mass.), 143.

Liability of city for negligence in using stone crusher in performing governmental duty of repairing street.
Colwell *v.* City of Waterbury (Conn.), 780.

Liability of city for negligence in using stone crusher where horse was frightened.
Butman *v.* City of Newton (Mass.), 775.

PERSONAL INJURIES — *Continued.*

Liability of city for negligence of independent contractor in constructing temporary street crossing.
Beattie *v.* City of Detroit (Mich.), 767.

Liability of city for negligence of workmen under control of its officers in constructing highway.
Butman *v.* City of Newton (Mass.), 775.

Liability of city for personal injuries caused by defect in street.
May *v.* City of Anaconda (Mont.), 949.

Liability of city for personal injuries caused by unsafe condition of street.
Snook *v.* City of Anaconda (Mont.), 950.

Liability of city for personal injury from accident caused by fruit rinds on sidewalk.
Archer *v.* Town of Johnson City (Tenn.), 958.

Liability of city where day following accident is Sunday.
Snook *v.* City of Anaconda (Mont.), 950.

Liability of municipality for injuries resulting from defect in sidewalk.
Byington *v.* City of Merrill (Wis.), 956.

Liability of receiver of water company for personal injuries caused by excavation in street.
Robinson *v.* Mills (Mont.), 948.

Liability of receiver of water company making excavation in street not dependent on notice.
Robinson *v.* Mills (Mont.), 948.

Liability of water company for personal injuries caused by excavation in street.
Robinson *v.* Mills (Mont.), 948.

Measure of damages of personal injuries caused by defective sidewalk.
Wilton *v.* City of Flint (Mich.), 384.

Nature of governmental duty of repairing street not changed by reason of fact that part or whole of expense is borne by abutters.
Colwell *v.* City of Waterbury (Conn.), 780.

PERSONAL INJURIES — *Continued.*

Negligence of city in failing to promulgate proper rules for the performance of work of taking down fire alarm.
Wagner *v.* City of Portland (Ore.), 598.

Negligence, question for jury where horse is frightened where street is undergoing repairs.
Coles *v.* Revere (Mass.), 789.

New trial because of special verdict contrary to evidence, in action for personal injuries caused by defect in sidewalk.
Byington *v.* City of Merrill (Wis.), 956.

New trial because of subsequent knowledge of physician as to character of injuries.
Ellis *v.* City of Hammond (Ind.), 960.

Notice to city of defect in sidewalk from length of time.
Mauch *v.* City of Hartford (Wis.), 959.

Pleading ordinance prohibiting animals from running at large, in action for wrongful death.
Decker *v.* McSorley (Wis.), 284.

Pleading specific injury.
Mauch *v.* City of Hartford (Wis.), 959.

Presumption of notice from length of time that area way was insufficiently guarded.
Donnelly *v.* City of Rochester (N. Y.), 955.

Proximate cause where person riding horse was injured by reason of defect in street, pleading.
Snook *v.* City of Anaconda (Mont.), 950.

Question for jury whether sidewalk was rendered unsafe by ridge of snow and ice.
Byington *v.* City of Merrill (Wis.), 956.

Spontaneous utterances of injured person as evidence.
City of Salem *v.* Webster (Ill.), 951.

Statute requiring city to be notified of claim for personal injuries to be strictly construed.
Tattan *v.* City of Detroit (Mich.), 382.

Statutory provision with respect

PERSONAL INJURIES—*Continued.*
to presumption of injury from duration of defect.
Byington *v.* City of Merrill (Wis.), 956.
Sufficiency of allegations as to city's knowledge of accumulation of fruit rinds on sidewalk.
Archer *v.* Town of Johnson City (Tenn.), 958.
Sufficiency of railing question for jury.
Donnelly *v.* City of Rochester (N. Y.), 955.
Sufficiency of complaint alleging specific injuries.
Mauch *v.* City of Hartford (Wis.), 959.
Sufficiency of complaint in action for personal injuries caused by defect in sidewalk.
Byington *v.* City of Merrill (Wis.), 956.
Sufficiency of declaration in action for personal injuries caused by defective sidewalk.
Wilton *v.* City of Flint (Mich.), 384.
Sufficiency of evidence that drain was a contrivance attractive to children, in action for wrongful death.
City of Rome *v.* Cheney (Ga.), 140.
Sufficiency of evidence to show that bowlder in street was a dangerous obstruction.
May *v.* City of Anaconda (Mont.), 949.
Sufficiency of notice of claim for personal injuries under Flint city charter.
Wilton *v.* City of Flint (Mich.), 384.
Sufficiency of notice of claim under Michigan statute.
Tattan *v.* City of Detroit (Mich.), 382.
Suing receiver of water company appointed by federal court for personal injuries caused by excavation in street.
Robinson *v.* Mills (Mont.), 948.
Testimony of physician as to statements made by injured person.
City of Salem *v.* Webster (Ill.), 951.
What constitutes notice of defect to receiver of water company making excavation in street.
Robinson *v.* Mills (Mont.), 948.
PERSONAL INJURIES—*Continued.*
Whether landlord or tenant liable for injuries caused by leaving doors of vault under sidewalk open.
Rider *v.* Clark (Cal.), 956.
X-ray photographs as evidence.
Mauch *v.* City of Hartford (Wis.), 959.

PETITIONS.
See Improvements.
Local Assessments.

PHOTOGRAPHS.
See Personal Injuries.

PHYSICAL SUFFERING.
See Personal Injuries.

PLATS.
See Municipal Corporations.

PLEADING.
See Injuries to Property.
Light Companies.
Ordinances.
Personal Injuries.
Streets and Highways.
Demurrer will not be sustained merely because complaint contained irrelevant matter.
Dumars *v.* City of Denver (Colo.), 123.

POLICE.
See Officers.
Appointment of station-house keepers under New York statute.
People *ex rel.* Dunn *v.* Ham (N. Y.), 846.
Liability of sureties on bond of city marshal where arrest is made without warrant.
Drolesbaugh *v.* Hill (Ohio), 842.
Power of common council to abolish office of station-house keeper under New York statute.
People *ex rel.* Dunn *v.* Ham (N. Y.), 846.
Promotion of police officers for acts of heroism.
People *ex rel.* Leary *v.* Knox (N. Y.), 847.
Right of policeman to promotion for acts of heroism, under Greater New York charter.
People *ex rel.* Leary *v.* Knox (N. Y.), 847.

POLICE COURTS.
Agreement of parties cannot give jurisdiction.
Bailey *v.* Com. (Ky.), 187.
Provisions of local law with respect to jurisdiction repealed by general law.
Bailey *v.* Com. (Ky.), 187.

POLICE DEPARTMENT.
Acceptance of statute relating to police and fire departments in towns, construction of Massachusetts statute.
Ray *v.* De Butts (Mass.), 839.
Constitutionality of statute authorizing removal of police magistrates by district courts.
Gordon *v.* Moores (Neb.), 841.

POLICE MAGISTRATES.
See Officers.

POLICE POWER.
See Disorderly Houses.
Intoxicating Liquors.
Ordinances.
Telegraphs and Telephones.
Authority to enact penal ordinance to prevent drunkenness.
Village of Fairmont *v.* Meyer (Minn.), 189.
Regulation of water rates.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.

PONDS.
See Water and Watercourses.

POOL SELLING.
See Ordinances.

POWERS.
See Municipal Corporations.
Officers.
Street Lighting.
Water Supply.

PRACTICE.
See Actions.
Mandamus.
Trial.

PRESCRIPTION.
See Adverse Possession.

PRESUMPTION.
See Bonds.
Local Assessments.

PRIVATE USES.
See Streets and Highways.

PROBATE COURT.
See Constitutional Law.

PROCESS.
Impairment of obligation of contract by change made in mode of service of process on city.
Oshkosh Waterworks Co. *v.* City of Oshkosh (Wis.), 263.

PROSTITUTES.
See Disorderly Houses.

PROXIMATE CAUSE.
See Instructions.

PUBLICATION.
See Ordinances.

PUBLIC IMPROVEMENTS.
See Improvements.

PUBLIC LANDS.
See Real Estate.

QUORUM.
See City Council.

RACES.
See Ordinances.

RAILROADS.
See Dedication.

REAL ESTATE.
See Eminent Domain.
Streets and Highways.
Admissibility of evidence that city had levied taxes on land to show adverse possession, where assessors were independent state officers.
Consolidated Ice Co. *v.* Mayor (N. Y.), 890.
Inurement of legal title of trustee to benefit of city.
Hafner *v.* City of St. Louis (Mo.), 889.
Power of city of St. Louis to acquire land outside of city for wharf purposes.
Hafner *v.* City of St. Louis (Mo.), 889.
Tide lands lying across bay in front of city as second class lands under Laws of 1897 of Wash., p. 229, sec. 39.
State *v.* Bridges (Wash.), 891.
Who may question power of city of St. Louis to acquire and hold land outside of city for wharf purposes.
Hafner *v.* City of St. Louis (Mo.), 889.

RECEIVERS.
See Personal Injuries.

RECITALS.
See Bonds.

RECONSTRUCTION.
See Local Assessments.

RECORDS.
See Municipal Corporations.
Degree of care required in keeping municipal records.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

REDEMPTION PROCEEDINGS.
See Taxation.

RE-ELECTION.
See Officers.

REFUNDING.
See Bonds.

RELEASES.
See Streets and Highways.

RESERVOIRS.
See Taxation.
Water Supply.

RETROACTIVE LEGISLATION.
See Taxation.

RETROSPECTIVE LAWS.
See Constitutional Law.
Taxation.

REVERSION.
See Streets and Highways.

RINDS.
See Personal Injuries.

RIPARIAN RIGHTS.
See Water and Watercourses.

RIVERS.
See Water and Watercourses.

SALARIES.
See Officers.
Warrants.

SALES.
See Local Assessments.
Ordinances.

SANITARY DISTRICTS.
See Bonds.
Health Department.
Basis to determine whether statutory limit of indebtedness has been exceeded by sanitary district of Chicago.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.
Necessary parties to enjoin sanitary district of Chicago from issuing bonds.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.
Power of sanitary district of Chicago to widen and deepen Chicago river.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.

SCALES.
See Ordinances.

SCATTERING PAPER.
See Ordinances.

SCHOOL BONDS.
See Bonds.

SCHOOL COMMISSIONERS.
See Officers.

SCHOOLS.
See Officers.

SCHOOL SITE.
See Officers.

SCHOOL TAX.
See Taxation.

SERVICE OF PROCESS.
See Constitutional Law.

SIDEWALKS.
See Improvements.
Personal Injuries.
Streets and Highways.
Streets and Sidewalks.

SNOW.
See Personal Injuries.

SPECIAL ASSESSMENTS.
See Local Assessments.

STATION HOUSES.
See Officers.

STATUTE OF FRAUDS.
See Ordinances.
Water Supply.

STATUTE OF LIMITATIONS.
See Limitations.
Taxation.

STATUTES.
See Bonds.
Personal Injuries.
Enacting clause to be construed in subordination to title.
State *ex rel.* Cooper *v.* Springer (N. J.), 389.
General provisions to be construed together and according to intent.
People *ex rel.* Krause *v.* Harrison (Ill.), 187.

STOCK.
See Animals.

STOCK AND STOCKHOLDERS.
See Contracts.

STOCK, INJURIES TO.
See Torts.

STREET LIGHTING.
See Light Companies.
Municipal Indebtedness.
Authority of superintendent of lamps to appoint and discharge contractor's workmen.
American Lighting Co. of Baltimore City *v.* McCuen (Md.), 191.
Authority to establish lighting plant, under constitution and laws of Maryland.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.
City not estopped to plead invalidity of ultra vires street lighting contract.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.
Completion of contract for street lighting, advertising for bids.
American Lighting Co. of Baltimore City *v.* McCuen (Md.), 191.
Consent of electors to construction of plants, under Michigan statute.
Belding Land & Imp. Co. *v.* City of Belding (Mich.), 232.
Contract by city for electric lighting need not be authorized by ordinance.
Town of Gosport *v.* Pritchard (Ind.), 149.

STREET LIGHTING—*Cont'd.*
Contract made by city officers binding on city.
Town of Gosport *v.* Pritchard (Ind.), 149.
Form of action against city to recover contract price of lights.
Town of Gosport *v.* Pritchard (Ind.), 149.
Impairment of obligation of contract for street lighting plant which gave option to renew.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.
Insufficiency of defence in action against city to recover contract price of lights.
Town of Gosport *v.* Pritchard (Ind.), 149.
Michigan statute authorizing, applicable to what cities.
Belding Land & Imp. Co. *v.* City of Belding (Mich.), 232.
Michigan statute authorizing contracts of street lighting not repealed by subsequent local acts.
Belding Land & Imp. Co. *v.* City of Belding (Mich.), 232.
Michigan statute authorizing not affected by act taking effect at later day.
Belding Land & Imp. Co. *v.* City of Belding (Mich.), 232.
Obligation of contract giving company use of streets not impaired by ordinance requiring removal of lamp post.
St. Paul Gaslight Co. *v.* City of St. Paul (U. S.), 154.
Payable out of what fund, construction of Washington statute.
Townsend Gas & Electric Co. *v.* Hill (Wash.), 197.
Statutory requirements as affecting validity of election to determine whether light plant shall be procured.
Hamilton *v.* Village of Detroit (Minn.), 311.
Sufficiency of complaint in action against city to recover price of lights.
Town of Gosport *v.* Pritchard (Ind.), 149.
Ultra vires as defence to action on contracts for street lighting.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.

STREET LIGHTING—*Cont'd.*
Ultra vires as defence to action on contract with light companies.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.
Validity of election to determine whether electric plant shall be purchased.
Hamilton *v.* Village of Detroit (Minn.), 311.
What cities included in Michigan statute authorizing.
Belding Land & Imp. Co. *v.* City of Belding (Mich.), 232.
When federal question not presented by passage of ordinance denying liability of city under contract with gaslight company.
St. Paul Gaslight Co. *v.* City of St. Paul (U. S.), 154.
Whether impairment of obligation of contract in requiring company to seek payment out of another fund.
Townsend Gas & Electric Co. *v.* Hill (Wash.), 197.
Whether ordinance forbidding comptroller to audit claims arising under gas light contract impaired obligation of contract.
St. Paul Gaslight Co. *v.* City of St. Paul (U. S.), 154.

STREET RAILWAYS.
See Local Assessments.
Personal Injuries.

STREETS AND HIGHWAYS.
See Animals.
Improvements.
Injuries to Property.
Light Companies.
Municipal Corporations.
Ordinances.
Personal Injuries.
Telegraphs and Telephones.

Abandonment, discretion of town council.
Attorney General *ex rel.* Trustees of Mathewson St. M. E. Church *v.* Shepard (R. I.), 932.
Abandonment, effect of change in maps.
City and County of San Francisco *v.* Center (Cal.), 939.
Abandonment extinguishes servitude.
Blain *v.* Staab (N. Mex.), 938.

STREETS AND HIGHWAYS—*Continued.*
Abandonment proceedings under statute of Rhode Island.
Attorney General *ex rel.* Trustees of Mathewson St. M. E. Church *v.* Shepard (R. I.), 932.
Admissibility of evidence of other accidents tending to show municipality's knowledge of defect in sidewalk.
Yeager *v.* Incorporated Town of Spirit Lake (Iowa), 563.
Adverse occupancy, what is not.
W. N. Eisendrath & Co. *v.* City of Chicago (Ill.), 939.
Adverse possession against city.
Crawford *v.* Ross (Mich.), 935.
Adverse possession by turnpike company.
South Covington, etc., Ry. Co. *v.* Newport, L. & A. Turnpike Co. (Ky.), 935.
Authority of selectmen to determine questions as to boundaries.
Town of Kent *v.* Pratt (Conn.), 936.
Bona fide effort to agree on terms as a condition precedent to right to condemn land for street.
Core *v.* City of Norfolk (Va.), 394.

Change of Grade.
Abutting owners not estopped from claiming damages by fact that they stood by and saw work done without objection.
Jorgenson *v.* City of Superior (Wis.), 944.
Compensation where property is both within and without location of highway.
Como *v.* City of Worcester (Mass.), 933.
Damages for loss of trees.
Millard *v.* City of Webster City (Iowa), 934.
Damages for second change of grade.
Buser *v.* City of Cedar Rapids (Iowa), 940.
Estoppel of city to disclaim acts of its agents injuring abutting property.
Millard *v.* City of Webster City (Iowa), 934.
Liability for injury to abutting property where there

STREETS AND HIGHWAYS—*Continued.*
has been no trespass nor direct encroachment.
Millard *v.* City of Webster City (Iowa), 934.
Liability of city for torts of servants in changing street grade.
Roughton *v.* City of Atlanta (Ga.), 945.
Liability to abutting owner under Wisconsin statute.
Jorgenson *v.* City of Superior (Wis.), 944.
Measure of damages for injury to property.
Roughton *v.* City of Atlanta (Ga.), 945.
Proof of value of property from comparison with other property.
Millard *v.* City of Webster City (Iowa), 934.
Remedy of property owner under Wisconsin statute where failure to assess benefits.
Jorgenson *v.* City of Superior (Wis.), 944.
Res judicata in action to recover damages for second change of grade.
Buser *v.* City of Cedar Rapids (Iowa), 940.
Right of abutter to compensation as affected by failure to grade to full width.
Como *v.* City of Worcester (Mass.), 933.
Right of purchaser at foreclosure sale to recover damages.
Bruhn *v.* Norris (Wash.), 938.
In re City of Seattle (Wash.), 938.
Special damages because of age of abutter.
Millard *v.* City of Webster City (Iowa), 934.
Statute of limitation in action to recover damages for second change of grade.
Buser *v.* City of Cedar Rapids (Iowa), 940.
City liable to bicycle rider injured by defect in sidewalk.
Gagnier *v.* City of Fargo (N. Dak.), 567.
City not estopped to claim additional strips by failure to improve street to entire width.
Davis *v.* City of Appleton (Wis.), 937.
STREETS AND HIGHWAYS—*Continued.*
City not liable to injured wheelman where sidewalk was reasonably safe for pedestrians.
Gagnier *v.* City of Fargo (N. Dak.), 567.
City's negligence a question for jury in action for injury to child caused by coal chute.
Fink *v.* City of Des Moines (Iowa), 596.
Conditions precedent to right to sue city for breach of agreement to close passway, where the consideration of the contract was a grant of land for street purposes.
City of Paris *v.* Lilleston (Ky.), 887.
Constitutionality of charter provision preventing acquirement of title against city by adverse possession.
Crawford *v.* Ross (Mich.), 935.
Construction of ordinance fixing course of street.
Grace *v.* Walker (Tex.), 942.
Contract for street litter boxes giving contractor privilege of posting advertisements invalid as subjecting street to private use.
State *ex rel.* Belt *v.* City of St. Louis (Mo.), 402.
Contributory negligence as matter of law in choosing part of walk which is obviously dangerous in preference to part which is obviously safe.
Devine *v.* City of Fond du Lac (Wis.), 577.
Contributory negligence of child injured by coal chute.
Fink *v.* City of Des Moines (Iowa), 596.
Courts at instance of abutter will not interfere with discretion of officers as to the necessity of public improvements.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.
Cross petition of city against property owners in action for personal injuries caused by defect in street.
City of Covington *v.* Huber (Ky.), 587.
Damages for physical suffering in action for injuries caused by defect in street.
City of Covington *v.* Huber (Ky.), 587.

STREETS AND HIGHWAYS—*Continued.*

Dedication.

Acceptance.
City of Port Angeles *v.* Lauridsen (Mich.), 923.
Grace *v.* Walker (Tex.), 942.
Gregory *v.* City of Ann Arbor (Mich.), 923.
South Covington, etc., R. Co. *v.* Newport L. & A. Turnpike Co. (Ky.), 935.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

Acceptance by user.
W. N. Eisendrath & Co. *v.* City of Chicago (Ill.), 939.

Acceptance shown by long-continued user.
City of Rock Island *v.* Starkey (Ill.), 954.

Acceptance, sufficiency of evidence.
Coe College *v.* City of Cedar Rapids (Iowa), 941.

Cul-de-sac.
Coe College *v.* City of Cedar Rapids (Iowa), 941.

Effect of failure of mortgagee to join in dedication deed.
Gregory *v.* City of Ann Arbor (Mich.), 923.

Effect of failure to perform conditions.
Gregory *v.* City of Ann Arbor (Mich.), 923.

Effect of withdrawal of plat before acceptance.
Gregory *v.* City of Ann Arbor (Mich.), 923.

Estoppel of city to claim entire width of street after accepting and improving less than entire width.
City of Indianapolis *v.* Board of Church Extension of United Presbyterian Church (Ind.), 553.

Extent of city's title acquired by dedication.
State *ex rel.* Beckham *v.* Taylor (Tenn.), 396.

Intention to dedicate.
Coe College *v.* City of Cedar Rapids (Iowa), 941.

Repairs as evidence of acceptance.
City of Rock Island *v.* Starkey (Ill.), 954.

Sufficiency of evidence of.
Town of Kent *v.* Pratt (Conn.), 936.

Sufficiency of evidence to show that petitioner consented to use of his land for road.
Grace *v.* Walker (Tex.), 942.

Degree of care required of owner in maintaining vault under sidewalk.
West Chicago Masonic Ass'n *v.* Cohn (Ill.), 808.

Direction of verdict for defendant in action for injury claimed to have been caused by defect in highway.
Southworth *v.* Shea (Ala.), 611.

Duty of city to repair dedicated highway under special law prohibiting the opening of public ways by private persons.
Makepeace *v.* City of Waterbury (Conn.), 589.

Duty of city to use reasonable care in maintaining sidewalk constructed by property owner, instruction.
City of Rock Island *v.* Starkey (Ill.), 954.

Duty to repair, Arkansas statute adopted in Indian Territory.
Blaylock *v.* Incorporated Town of Muskogee (Ind. Ter.), 941.

Effect of failure to prescribe time for abutter to repair sidewalk.
State *v.* Richards (Conn.), 952.

Estoppel of city to claim insufficiency of notice of claim for personal injuries caused by defective sidewalk.
Brown *v.* City of Owosso (Mich.), 379.

Estoppel of property owner to claim damages where he petitioned for abandonment.
Attorney General *ex rel.* Trustees of Mathewson St. M. E. Church *v.* Shepard (R. I.), 932.

Evidence of condition of sidewalk prior to accident, in action for personal injuries.
Yeager *v.* Incorporated Town of Spirit Lake (Iowa), 563.

Evidence of condition of walk prior to time of accident as tending to show city's knowledge of defect.
Yeager *v.* Incorporated Town of Spirit Lake (Iowa), 563.

Excavation in street as nuisance per se.
Robinson *v.* Mills (Mont.), 948.

Failure to restore street where excavation has been made.
Robinson *v.* Mills (Mont.), 948.

STREETS AND HIGHWAYS—*Continued.*

Injuries to trees, grass and shrubbery as elements of damage to property caused by street grading.
Brown *v.* City of Webster City (Iowa), 559.

Instruction as to duty to repair.
City of Rock Island *v.* Starkey (Ill.), 954.

Instruction not objectionable as requiring city to keep streets in repair to their whole width, in action for personal injuries caused by failure to maintain guard rail at excavation in highway.
Johnson *v.* City of Sioux City (Iowa), 772.

Insufficiency of evidence to show contributory negligence, in action for injuries caused by defect in sidewalk.
Yeager *v.* Incorporated Town of Spirit Lake (Iowa), 563.

Judgment against city not conclusive as to liability of abutting owner for personal injuries caused by defect in sidewalk.
City of Lansing *v.* Detroit, etc., R. Co. (Mich.), 584.

Lack of consent of abutters to change in width of street did not prevent ordinance operating against those who did consent.
Grace *v.* Walker (Tex.), 942.

Liability of abutting owner for cost of extending street under railroad.
City of Louisville *v.* Gosnell (Ky.), 906.
Louisville Steam Forge Co. *v.* Mehler (Ky.), 906.

Liability of city for acts done by street commissioner in excess of his authority after ratification of same.
Brown *v.* City of Webster City (Iowa), 559.

Liability of city for failure to enforce ordinance regulating speed of wheelmen.
Mayor, etc., of City of Hagerstown *v.* Klotz (Md.), 303.

Liability of city for injury sustained by wheelman on defective sidewalk.
Lee *v.* City of Port Huron (Mich.), 301.

Mandamus to compel removal of news stand encroaching on sidewalk refused where encroachment was very slight.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.

Mandamus to compel removal of news stand under stairway of elevated railway where encroachment was very slight.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.

Mistake in entering into agreement with land owner to release city from claim on account of land acquired for street purposes no ground for equitable relief against city.
Anthony *v.* Granger (R. I.), 893.

Negligence of parents not imputable to injured child.
Fink *v.* City of Des Moines (Iowa), 596.

Notice of defect in bridge to municipal officer not charged with care of bridge not notice to city.
City of San Antonio *v.* Ball (Tex.), 594.

Opinion of plaintiff as to condition of sidewalk in action for personal injuries caused by defect therein.
Yeager *v.* Incorporated Town of Spirit Lake (Iowa), 563.

Ordinance requiring abutter to construct walk within five days void for unreasonableness.
Auditor General *v.* Hoffman (Mich.), 672.

Parol evidence to show consideration for agreement by city to close passway.
City of Paris *v.* Lilleston (Ky.), 887.

Person claiming title to property under a petition for road bound by his own acts.
Grace *v.* Walker (Tex.), 942.

Power of city council to regulate erection and maintenance of news stands.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.

Power of city to authorize use of bicycles on sidewalks.
Lee *v.* City of Port Huron (Mich.), 301.

Power of city to lease water terminals.
Hirsch *v.* Mayor, etc., of City of Brunswick (Ga.), 793.

STREETS AND HIGHWAYS—*Continued.*

Power of mayor and council to abandon under Tennessee statute.
State *ex rel.* Beckham *v.* Taylor (Tenn.), 396.

Power of mayor and council to convey fee-simple title.
State *ex rel.* Beckham *v.* Taylor (Tenn.), 396.

Power to make agreement to close passway not included in power to pave streets.
City of Paris *v.* Lilleston (Ky.), 887.

Presumption as to authority to construct vault under sidewalk.
Rider *v.* Clark (Cal.), 956.

Presumption of notice of existence of defect in action for injuries caused by defect in street.
City of Covington *v.* Huber (Ky.), 587.

Primary liability of abutter for injury caused by defect in sidewalk, construction of Fond du Lac city charter.
Devine *v.* City of Fond du Lac (Wis.), 577.

Proposed street improvement will not be enjoined at suit of abutting owner where remedy at law.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

Public barred by lapse of time where change of lines by act of abutter.
Town of Kent *v.* Pratt (Conn.), 936.

Public travel on sidewalk includes person riding bicycle.
Gagnier *v.* City of Fargo (N. Dak.), 567.

Reasonableness of ordinance requiring abutter to repair sidewalk.
State *v.* Richards (Conn.), 952.

Resolution of city council authorizing construction of railway as acceptance of land dedicated for street purposes.
Michigan Cent. R. Co. *v.* City of Bay City (Mich.), 549.

Reversion of ultimate fee where street is abandoned.
State *ex rel.* Beckham *v.* Taylor (Tenn.), 396.

Right of abutter to enjoin construction of improvement to be limited to a particular lot.
Trustees of Hazelgreen *v.* McNabb (Ky.), 953.

Right of city to erect water tank in street.
Davis *v.* City of Appleton (Wis.), 937.

Right of mere citizen to maintain injunction to prevent trespass upon abandoned street.
State *ex rel.* Beckham *v.* Taylor (Tenn.), 396.

Right of owner of fee where street is abandoned.
Blain *v.* Staab (N. Mex.), 938.

Right of taxpayer to mandamus to compel removal of news stand from city street.
People *ex rel.* Pumpyansky *v.* Keating (N. Y.), 945.

Rights of city in alley lost by adverse possession.
Hegan *v.* Pendennis Club (Ky.), 943.

Right to make city and abutter joint defendants in action for injuries caused by defect in sidewalk, construction of Fond du Lac city charter and Wisconsin statute.
Devine *v.* City of Fond du Lac (Wis.), 577.

Scope of issue in mandamus proceedings to prevent interference with boundaries.
Town of Kent *v.* Pratt (Conn.), 936.

Services of nurse as element of damages in action for injury caused by defective sidewalk.
Yeager *v.* Incorporated Town of Spirit Lake (Iowa), 563.

Sidewalk need be only reasonably safe for use in ordinary manner.
Kohlhof *v.* City of Chicago (Ill.), 960.

Special law as affecting city's liability for personal injuries caused by failure to repair highway.
Makepeace *v.* City of Waterbury (Conn.), 589.

Statute forbidding conveyance of land held adversely by another not applicable to easement.
Hegan *v.* Pendennis Club (Ky.), 943.

STREETS AND HIGHWAYS— *Continued.*

Subsequent deed of right of way to railway crossing highway not operating as withdrawal of dedication.
Michigan Cent. R. Co. *v.* City of Bay City (Mich.), 549.

Sufficiency of complaint in action for personal injuries caused by defective sidewalk.
Brown *v.* City of Owosso (Mich.), 379.

Sufficiency of description of defect in sidewalk and injury caused thereby in notice of claim of damages for personal injuries.
Wood *v.* Borough of Stafford Springs (Conn.), 573.

Sufficiency of description of locus in quo in notice of claim for injury caused by defect in sidewalk.
Wood *v.* Borough of Stafford Springs (Conn.), 573.

Sufficiency of description of street in ordinance providing for.
Grace *v.* Walker (Tex.), 942.

Sufficiency of evidence to show ratification by city of employees' wrongful act while grading streets.
Brown *v.* City of Webster City (Iowa), 559.

Sufficiency of finding of adverse possession.
Davis *v.* City of Appleton (Wis.), 937.

Sufficiency of notice of claim for personal injuries caused by defective sidewalk, under Michigan statute.
Brown *v.* City of Owosso (Mich.), 379.

Time of taking effect of ordinance fixing course and boundaries of certain road.
Grace *v.* Walker (Tex.), 942.

Validity of agreement by city to close passway, sufficiency of evidence.
City of Paris *v.* Lilleston (Ky.), 887.

Whether landlord or tenant liable for personal injuries caused by failure to cover coal hole.
West Chicago Masonic Ass'n *v.* Cohn (Ill.), 808.

Whether land under water covered by reservation for street purposes, construction of grant by New York statute.
Consolidated Ice Co. *v.* Mayor (N. Y.), 890.

Whether misjoinder of causes of action, in action for breach of agreement by city to close passway.
City of Paris *v.* Lilleston (Ky.), 887.

Whether uninclosed spaces were parts of streets of San Francisco.
City and County of San Francisco *v.* Center (Cal.), 939.

Who may plead want of consent of owners, in action for obstructing highway.
Grace *v.* Walker (Tex.), 942.

SUMMARY CONVICTION.
See Ordinances.

SUNDAY.
See Personal Injuries.

SUNDAY PAPERS.
See Ordinances.

SUPPLIES.
See Contracts.

SUPPLY DEPARTMENT.
See Municipal Corporations.

TAXATION.
See Bonds.
Licenses.
Local Assessments.
Real Estate.

Apportionment of taxes between city and county not enforcible by action under Mills' Ann. St., sec. 3953.
Town of Fairplay *v.* Board of Com'rs of Park County (Colo.), 898.

Assessment of special tax.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.

Authentication of tax bill under Kentucky statute.
Reed *v.* City of Louisville (Ky.), 898.

Authority to impose tax for privilege of keeping dogs.
Hill *v.* City Council of Abbeville (S. Car.), 475.

Colorado road tax law not unconstitutional for attempting

TAXATION—*Continued.*

to exempt towns from payment of taxes levied by county commissioners.
Town of Fairplay *v.* Board of Com'rs of Park Co. (Colo.), 898.

Constitutionality of Mississippi statute prohibiting cities authorized under general charter law from levying taxes in excess of three per cent. of the assessed valuation.
Somo Lumber Co. *v.* Lincoln County (Wis.), 895.

Effect on pending suit to recover taxes of subsequent statute legalizing appraisal.
Fuller *v.* City of Montpelier (Wash.), 899.

Error in rendering personal judgment for taxes against married women.
Reed *v.* City of Louisville (Ky.), 898.

Exemptions.

Lot sold upon ground-rent plan not exempt in absence of express contract.
Wells *v.* Mayor and Aldermen of the City of Savannah (U. S.), 462.

Rural landed property in annexed territory.
Sindall *v.* Mayor, etc., of Baltimore (Md.), 453.

To be strictly construed.
City of New Orleans *v.* Vidalat (La.), 446.

Expenses of supplying water and lights as ordinary expenses, construction of statute conferring power of taxation.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

Failure to make full levy in past years gives no authority to make excessive levy for subsequent years.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

Harmless mistake in appropriation ordinance cured by Rev. St. of Ill., ch. 120, sec. 191.
People *v.* Chicago, B. & Q. R. Co. (Ill.), 897.

Invalid levy exceeding three per cent. of assessed valuation, construction of Wisconsin statute.
Somo Lumber Co. *v.* Lincoln County (Wis.), 895.

TAXATION—*Continued.*

Mandamus to compel payment of judgment where charter limitation has been exceeded.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

Power of city attorney to compromise claim for taxes.
City of Louisville *v.* Louisville Ry. Co. (Ky.), 677.

Power of city to compromise claims for taxes.
City of Louisville *v.* Louisville Ry. Co. (Ky.), 677.

Power to impose license and privilege taxes under constitution and laws of South Carolina.
Hill *v.* City Council of Abbeville (S. Car.), 475.

Power to impose license fees limited by general law, where charter has been surrendered.
Harris *v.* City of Water Valley (Miss.), 425.

Property outside of corporate limits, effect of property owner's subjecting property to certain uses with consent of city.
Pacific Sheet Metal Works *v.* Roeder (Wash.), 901.

Right to object that town tax was illegal because of failure to properly certify claims under Illinois statute.
Chicago & A. Ry. Co. *v.* People (Ill.), 896.

Scope of charter provision conferring general power of taxation.
Woodall *v.* City of Lynchburg (Va.), 697.

Statute of limitation where action to recover taxes paid under protest.
Millsaps *v.* City of Jackson (Miss.), 900.

Sufficiency of description of property in assessment list.
Miller *v.* Williams (Cal.), 903.

Sufficiency of objection to raise question of validity of appropriation ordinance under Illinois statute.
People *v.* Chicago, B. & Q. R. Co. (Ill.), 897.

Sufficiency of petition to enjoin levy of school tax under Kentucky statute.
Chambers *v.* Adair (Ky.), 871.

TAXATION—*Continued.*

Taxation of property annexed to Baltimore city.
Sindall *v.* Mayor, etc., of Baltimore (Md.), 453.

Taxation on account of municipal ownership of water rights and reservoir in another town.
Miller *v.* City of Fitchburg (Mass.), 307.

Taxes based on certificates of claims audited on days other than those specified are illegal under Illinois statute.
Chicago & A. Ry. Co. *v.* People (Ill.), 896.

Tax Sales.

Applicability of maxim de minimis where land is sold for more than is due.
Miller *v.* Williams (Cal.), 903.

Enforcement of tax liens.
State *v.* City of Camden (N. J.), 903.

Failure to surrender certificate assigned as collateral on right to redemption money.
Bidwell *v.* City of Tacoma (Wash.), 901.

Illegal certificates of purchase under ordinance of Tacoma.
Gove *v.* City of Tacoma (Wash.), 902.

Limitation of action by assignee of certificate of purchase to recover redemption money under charter of Tacoma.
Bidwell *v.* City of Tacoma (Wash.), 901.

Limitation of action to recover purchase money where it is claimed that property was assessed beyond its true value.
Gove *v.* City of Tacoma (Wash), 902.

Rights of holder of certificate of purchase where redemption money is paid to purchaser who has assigned certificate.
Bidwell *v.* City of Tacoma (Wash.), 901.

Sufficiency of description of property in tax deeds.
Miller *v.* Williams (Cal.), 903.

Sufficiency of notice of redemption proceeding.
Miller *v.* Williams (Cal.) 903.

Sufficiency of petition in action to recover purchase money where it is claimed that property is assessed beyond its true value.
Gove *v.* City of Tacoma (Wash.), 902.

When power to sell lands must be exercised.
State *v.* City of Camden (N. J.), 903.

Treasurer's extent against collector for unpaid taxes, which is not preceded by an express demand for taxes, is invalid.
Ayres *v.* Goss (N. H.), 899.

Uniformity in imposing license and privilege taxes on business occupations and professions under South Carolina constitution.
Hill *v.* City Council of Abbeville (S. Car.), 475.

Validity of levy of special road tax under Hurd's Rev. St., ch. 121, sec. 119.
Chicago & A. R. Co. *v.* People (Ill.), 896.

Validity of treasurer's extent against collector.
Ayres *v.* Goss (N. H.), 899.

Whether city reservoir subject to taxation.
Miller *v.* City of Fitchburg (Mass.), 307.

Whether municipal officers can be compelled by mandamus to levy taxes.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

Whether power to create debt implies power of taxation.
City of Cleveland, Tenn., *v.* United States (C. C. A.), 222.

Wisconsin statute prohibiting cities authorized under general charter law from levying taxes in excess of three per cent. of assessed value not void for uncertainty.
Somo Lumber Co. *v.* Lincoln County (Wis.), 895.

TAXPAYERS.

See Local Assessments.
Mandamus.
Municipal Corporations.

TAX SALES.

See Bonds.
Local Assessments.
Taxation.

TELEGRAPHS AND TELEPHONES.

Act Cong. July 24, 1866, does not authorize district telegraph companies to use city streets.
City of Toledo *v.* Western Union Tel. Co. (C. C. A.), 1.

Company asking intervention of court of equity to enable it to enjoy franchises granted by city ordinance must show that it has performed obligation imposed thereby.
Mayor, etc., of City of Baltimore *v.* Chesapeake & P. Tel. Co. (Md.), 7.

Compelling use of underground conduits.
Mayor, etc., of Baltimore *v.* Chesapeake & P. Tel. Co. (Md.), 7.

Constitutionality of sec. 3461, Ohio Rev. St. requiring court to regulate use of street by telephone company.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 26.

Control by city over interstate telegraph company.
City of Toledo *v.* Western Union Tel. Co. (C. C. A.), 1.

Grant of use of street could not be revoked except by exercise of police power.
City of Duluth *v.* Duluth Tel. Co. (Minn.), 67.

Jurisdiction of supreme court of appeals from order granting writ of mandamus to assignee of telephone company to acquire permission to lay conduits.
Board of Public Works of City of Denver *v.* Denver Tel. Co. (Colo.), 15.

Jurisdiction of supreme court to decide question of constitutionality of resolution of city council granting to telephone company right to use streets.
Board of Public Works of City of Denver *v.* Denver Tel. Co. (Colo.), 15.

Obligation to construct underground conduits in street, construction of city ordinance of 1889, No. 41.
Mayor, etc., of Baltimore *v.* Chesapeake & P. Tel. Co. (Md.), 7.

TELEGRAPHS AND TELEPHONES—*Continued.*

Ordinance granting exceptional privileges with respect to use of streets to be strictly construed.
Mayor, etc., of City of Baltimore *v.* Chesapeake & P. Tel. Co. (Md.), 7.

Party must have personal interest in order to be entitled to maintain bill to set aside ordinance granting exclusive franchise.
Patten *v.* Mayor, etc., of City of Chattanooga (Tenn.), 50.

Power of city to compel removal of wires and poles upon termination of franchise.
City of Duluth *v.* Duluth Tel. Co. (Minn.), 67.

Power of city to designate location of line.
Louisville Home Tel. Co. *v.* Cumberland Telephone & Telegraph Co. (C. C. A.), 43.

Power of city to refuse use of streets to second company where franchise of first company is not, in terms, exclusive.
State *ex rel.* Spokane & B. C. Telephone and Telegraph Co. *v.* City of Spokane (Wash.), 20.

Right of board of public works to attack validity of ordinance authorizing use of streets.
Board of Public Works of City of Denver *v.* Denver Tel. Co. (Colo.), 15.

Right of city holding title to streets to recover for additional burden.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 30.

Right of city to deny use of streets where statute authorizes telephone company to use streets and highways.
State *ex rel.* Spokane & B. C. Telephone & Telegraph Co. *v.* City of Spokane (Wash.), 20.

Right of company operating under general statute to construct lines in city streets.
City of Zanesville *v.* Zanesville Telephone & Telegraph Co. (Ohio), 30.

Rights of rival company in

TELEGRAPHS AND TELEPHONES—*Continued.*
streets as affected by priority of occupation.
Louisville Home Tel. Co. *v.* Cumberland Telephone & Telegraph Co. (C. C. A.), 43.
Sufficiency of evidence to show substantial interference with rights of rival company first occupying street.
Louisville Home Tel. Co. *v.* Cumberland Telephone & Telegraph Co. (C. C. A.), 43.
Validity of exclusive franchise not affected by fact that it imposes additional burden on street.
Patten *v.* Mayor, etc., of City of Chattanooga (Tenn.), 50.
Wash. Const. art. 12, sec. 19, conferring right to use of streets to telephone company is not self-operative.
State *ex rel.* Spokane & B. C. Telephone & Telegraph Co. *v.* City of Spokane (Wash.), 20.
Who may question validity of exclusive grant of use of street.
Patten *v.* Mayor, etc., of City of Chattanooga (Tenn.), 50.

TIDE LANDS.
See Real Estate.

TORTS.
See Fire Department.
Municipal Corporations.
Personal Injuries.
Streets and Highways.
Day from which reckoning is made excluded in determining time in which notice of claim against city for salary must be made.
O'Connor *v.* City of Fond du Lac (Wis.), 526.
Statute requiring notice of claim against city for killing of stock had same effect as statute of limitations.
O'Connor *v.* City of Fond du Lac (Wis.), 526.

TRACTION ENGINES.
See Ordinances.

TREASURER.
See Officers.

TRIAL.
Remarks of counsel.
Coan *v.* Brownstown Tp. (Mich.), 796.

TURNPIKE COMPANIES.
See Streets and Highways.

ULTRA VIRES.
See Water Supply.
As defence to action on contract for street lighting.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.
As defence to action on contract with water company.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.
City not estopped to plead invalidity of ultra vires street lighting contract.
Mealey *v.* Mayor, etc., of City of Hagerstown (Md.), 200.
Liability of city for ultra vires acts of officers in impressing horses.
City of Galveston *v.* Brown (Tex.), 674.
That contract is partly ultra vires was no defence to action for hydrant rentals due thereunder.
Monroe Waterworks Co. *v.* City of Monroe (Wis.), 360.

VAULTS.
See Personal Injuries.
Streets and Highways.

VEHICLES.
See Licenses.

VETERANS.
See Municipal Corporations.

VETO.
See Ordinances.

WAIVER.
See Water Supply.

WARD LINES.
See Municipal Corporations.

WARRANTS.
See Local Assessments.
Municipal Corporations.
Amendments of original act not operating so as to impair rights of contractors.
Pickton *v.* City of Fargo (N. Dak.), 930.

WARRANTS—*Continued.*
Bona fide holder.
Blackman *v.* City of Hot Springs (S. Dak.), 883.
City not estopped by recitals from showing that statutory requirements have not been complied with.
Hubbell *v.* Town of Custer City (S. Dak.), 884.
Effect of irregularities in apportionment warrants.
City of Louisville *v.* Mehler (Ky.), 927.
Horne *et al. v.* Mehler (Ky.), 927.
Mehler *v.* Horne (Ky.), 927.
Enjoining payment of warrants subsequently issued until warrants for salaries are paid.
Hull *v.* Ames, City Treasurer, (Wash.), 884.
Gladwin *v.* Ames, City Treasurer, (Wash.), 884.
Failure to pay in order of presentation as misappropriation of funds.
Blackman *v.* City of Hot Springs (S. Dak.), 883.
Insufficiency of evidence to show lack of power in town to contract debt, in action on warrant.
Hubbell *v.* Town of Custer City (S. Dak.), 884.
Negotiability.
Hubbell *v.* Town of Custer City (S. Dak.), 884.
Question of insufficiency of special fund cannot be raised for first time on appeal.
Porter *v.* City of New Whatcom (Wash.), 883.
Right of contractor to interest on street improvement warrants.
Tacoma Bituminous Pav. Co. *v.* Sternberg, City Treasurer, (Wash.), 925.
Whether recourse may be had to general fund after special fund has been exhausted.
Porter *v.* City of New Whatcom (Wash.), 883.

WATER COMMISSIONERS.
See Personal Injuries.

WATER COMPANIES.
See Contracts.
Personal Injuries.
Taxation.
Water Supply.
Assignment by water company of contract with city, right to question.
City of Austin *v.* Bartholomew (C. C. A.), 370.
Nalle *v.* City of Austin (C. C. A.), 370.
Estimating value of property of water company purchased by city.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.
Franchises an element of value in estimating value of water plant purchased by town.
Town of Bristol *v.* Bristol & W. Waterworks (R. I.), 336.
Obligations of succeeding company under contract with city.
City of Austin *v.* Bartholomew (C. C. A.), 370.
Nalle *v.* City of Austin (C. C. A.), 370.
Power conferred by purchase of mill privilege to draw water out of pond.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.
Power to purchase and hold mill privilege in pond.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.
What amounts to a taking of land by water-supply company under right of eminent domain.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.
What amounts to exemption of water company from taxation.
Monroe Waterworks Co. *v.* City of Monroe (Wis.), 360.
What land may be taken by water-supply company under right of eminent domain.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.

WATER AND WATER-COURSES.
City cannot authorize municipality to divert water of nonnavigable interstate stream to the injury of riparian owners in the other state.
Pine *v.* Mayor (C. C. A.), 894.
Easement in pond, constituting mill privilege, is not lost by

WATER AND WATER-COURSES—*Continued.*
nonuser, when it was created by grant.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.
Extent of title conveyed by grant of mill privilege by town.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.
Power of Chicago sanitary district to widen and deepen Chicago river.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.
Remedy for unlawful diversion of waters of nonnavigable interstate stream.
Pine *v.* Mayor (C. C. A.), 894.
Sanitary district's jurisdiction over Chicago river does not conflict with that of the city.
Lussem *v.* Sanitary Dist. of Chicago (Ill.), 881.

WATER SUPPLY.
See Municipal Indebtedness.
Taxation.
Water Companies.
Completeness of system purchased by town as affected by fact that it also supplies another town.
Town of Bristol *v.* Bristol & W. Waterworks (R. I.), 336.
Contract fixing rate does not preclude further regulation by ordinance.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.
Contract partly ultra vires, in action for hydrant rentals due thereunder.
Monroe Waterworks Co. *v.* City of Monroe (Wis.), 360.
Counterclaim on account of failure of company to maintain adequate pressure in action to recover against city for hydrant rentals.
Monroe Waterworks Co. *v.* City of Monroe (Wis.), 360.
Deductions on account of taxes not collected, but which defendant company had agreed to receive in part payment of claim on account of water supply.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.

WATER SUPPLY—*Continued.*
Determination of question of public necessity of reservoir.
Miller *v.* City of Fitchburg (Mass.), 307.
Effect on validity of contract with water company of failure to designate city by its legal name.
City of Harrodsburg *v.* Harrodsburg Water Co. (Ky.), 236.
Impairment of obligation of contract with water company by subsequent reduction of water rates.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.
Obligation of contract not impaired by statute giving water company option of selling its property to city.
Newburyport Water Co. *v.* City of Newburyport (Mass.), 734.
Obligation of ordinance granting franchise as affected by statute of frauds.
Graves County Water Co. *v.* Ligon (Ky.), 653.
Operating water system for profit does not place city on footing of private owner.
Smith *v.* City of Seattle (Wash.), 910.
Petition in action by water company on contract to show compliance with charter requirements.
City of Harrodsburg *v.* Harrodsburg Water Co. (Ky.), 236.
Police power to regulate water rates.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.
Power of city of Austin to rent hydrants of water company.
City of Austin *v.* Bartholomew (C. C. A.), 370.
Nalle *v.* City of Austin (C. C. A.), 370.
Power of city to regulate rates when it is itself a consumer.
Mayor, etc., of City of Knoxville *v.* Knoxville Water Co. (Tenn.), 238.
Power to raise money for water mains by bonding assessment district, under constitution of Washington.
Smith *v.* City of Seattle (Wash.), 910.

WATER SUPPLY—*Continued.*
Right of property owner to maintain action for loss of property by fire by reason of water company's failure to furnish water supply.
Graves County Water Co. *v.* Ligon (Ky.), 653.
Ultra vires as a defence to action on contract with water company.
Lake Charles Ice, Light & Waterworks Co. *v.* City of Lake Charles (La.), 277.
Unlawful assumption of bonded debt incurred in purchase of waterworks.
Painter *v.* City of Norfolk (Neb.), 238.
Use of reservoir as public use.
Miller *v.* City of Fitchburg (Mass.), 307.
Validity of contract with water company by which city guarantied interest on bonds of water company.
Painter *v.* City of Norfolk (Neb.), 238.
Validity of election held to ratify contract with water company.
City of Harrodsburg *v.* Harrodsburg Water Co. (Ky.), 236.
Waiver of counterclaim in action against city to recover hydrant rentals.
Monroe Waterworks Co. *v.* City of Monroe (Wis.), 360.
When counterclaim is permissible in action against city to recover hydrant rentals.
Monroe Waterworks Co. *v.* City of Monroe (Wis.), 360.
Whether mill privilege in pond was included in property of water company purchased by city.
Gloucester Water-Supply Co. *v.* City of Gloucester (Mass.), 325.

WATER TANKS.
See Streets and Highways.

WATER TERMINALS.
See Streets and Highways.

WEIGHTS AND MEASURES.
See Ordinances.

WHARFS.
See Real Estate.

WHEELMEN.
See Streets and Sidewalks.

X-RAY PHOTOGRAPHS.
See Personal Injuries.

NOV 8 - 1929